8 VAC 20-81-10. Definitions.

Autism
Recommendation: Amend the definition of autism as follows:
"Autism" means a developmental spectrum disability significantly affecting verbal and nonverbal communication, and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. Difficulties in abstract thinking, flexible thinking, social awareness and judgment may be present as well as perseverative thinking. Delays in fine and gross motor skills may also be present. The order of skill acquisition frequently does not follow normal developmental patterns. Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. ~~A child who manifests the characteristics of autism after age three could be diagnosed as having autism if the criteria in this definition are satisfied.~~
Justification: Federal regulations use "identified" in lieu of "diagnosed". The inserted changes would help key the Individualized Education Program (IEP) team in on additional considerations when developing the IEP. Changes are framed such that they are not to be used as criteria, but characteristics exhibited on the autism spectrum.

Change of placement
Recommendation: Insert the following into the proposed definition:
Any change in setting for a student receiving special education that does not replicate all elements of the educational program of the student's previous setting;
Justification: Including the new language suggested in subsection 4 of the definition of "change in placement" brings the Virginia special education regulations into line with case law from the Fourth Circuit Court of Appeals on what constitutes a change of placement. Specifically, that case law is *A.W. v. Fairfax County School Board*, 372 F.3d 674 (4th Cir. 2004).

Child study committee
Recommendation: Retain the child study committee definition in current regulations.
Justification: Child study committees serve a vital role in the identification, evaluation, determination of eligibility and development and monitoring of special education programs and placements.

Cognitive disability
Recommendation: Change the reference to "see Intellectual disability."
"Cognitive disability" – see "~~Mental retardation~~." "Intellectual disability"
Justification:
See justification provided under "Intellectual disability"

Developmental delay
Recommendation: Follow federal law allowing children through age nine to be included in this category.
"Developmental delay" (DD) means a disability affecting a child ages two by September 30 through ~~five~~ nine inclusive: …

Justification: Federal regulations, §300.8(b), allow developmental delay to include children through the age of nine years old. The Coalition applauds the Virginia Department Of Education's (VDOE) choice to retain the lower bound of 2 years old. Children who demonstrate developmental delay may not meet eligibility requirements for other disability categories at age five and should be allowed to utilize the developmental delay label through age nine to avoid the potential for inaccurate disability category assignments. Arguments that claim allowing the developmental delay identification up to age 9 promotes disproportionality are misapplied. The Individuals with Disabilities Education Act (IDEA) Federal Regulations are clear that States have the option to include children through age 9 in the definition of developmental delay. If disproportionality or over representation was tied to developmental delay for ages five through nine, federal regulations would have had amplifying language and would not use age three to nine as a benchmark. Provisions for early intervening services have been incorporated into the federal regulations to address over representation and disproportionality.
Section 613(f)(1) of IDEA provides early intervening services to children in the local education agency (LEA), particularly to children in those groups that were significantly over-identified. The federal regulations state that early intervening services are for children in kindergarten through grade 12, with a particular emphasis on children in kindergarten through grade 3; which more than aptly covers disproportionality through age 9.

Emotional disturbance
Recommendation: Change definition to Emotional disability
Justification: Emotional disturbance is a term that lends itself to adding stigma to students with this categorical label. Emotional disability is still accurate for the categorical label but more sensitive to students receiving services in this disability category.

Functional behavioral assessment
Recommendation: Amend the definition of functional behavioral assessment (FBA) as follows:
"Functional behavioral assessment" means ~~an(n) process~~ evaluation with parent participation, 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 peers. A functional behavioral assessment may ~~be~~ include a review of existing data.
Justification: Functional behavioral assessment (FBA) is an evaluation, not an 'assessment.' The United States Department of Education, Office of Special Education Programs (OSEP) Letter to Scheinz was written to address the 1997 IDEA, OSEP has issued another Letter on this same issue since IDEA 2004 was passed, consistent with its earlier finding in Letter to Scheinz that parents are entitled to an independent educational evaluation (IEE) FBA. The new OSEP Letter, Letter to Christiansen, dated February 9, 2007, states:

"If an FBA is used to evaluate an individual child in accordance with 34 CFR §§ 300.304 through 300.311 to assist in determining whether the child is a child with a disability and the nature and extent of special education and related services that the child needs, it is considered an evaluation under Part B and the regulation at 34 CFR § 300.15. If the FBA is conducted for individual evaluative purposes to develop or modify a behavioral intervention plan for a particular child, under 34 CFR § 300.502, a parent who disagrees with the child's FBA would have the right to request an IEE at public expense. These regulatory provisions are consistent with the policy clarification provided in the Scheinz letter."

Parent participation in the FBA provides additional insight and experience into the evaluation being conducted, and will improve the considerations incorporated into the evaluation. Parent participation will also reduce the likelihood of a parent disagreeing with the FBA evaluation.

Implementation plan
Recommendation: Retain current definition for implementation plan.
Justification: The requirement for an implementation plan places responsibility on the LEA to develop a plan for carrying out the decision of a hearing officer, as well as identifying the parties responsible for implementing the plan.

Intellectual disability
Recommendation: Insert the official American Association on Intellectual and Developmental Disabilities (AAIDD) definition for intellectual disability.
"Intellectual disability" ~~– see "Mental retardation."~~ means a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before the age of 18.
Justification: An international committee of scholars, educators, psychologists, physicians, researchers, and service providers developed the 2002 definition provided above. This definition can be found in *Mental Retardation: Definition, Classification and Systems of Support (Luckasson et al., 2002)*, and from the AAIDD website:
http://www.aaidd.org/Policies/faq_intellectual_disability.shtml
According to federal law, States are free to use a different term to refer to a child with mental retardation, as long as all children who would be eligible for special education and related services under the federal definition of mental retardation receive a free and appropriate public education (FAPE). Additionally, per the legislative process from the Virginia General Assembly session in 2008, the term Mental Retardation, will be legislatively changed to "Intellectual Disability." The Virginia Department of Education (VDOE) should proactively change definitions to adhere to anticipated legislative language.

Interpreting services
Recommendation: Amend the definition of interpreting services as follows:
"Interpreting services" ~~as used with respect to children who are deaf or hard of hearing~~, means services provided by personnel who meet the qualifications set forth under 8 VAC 20-81-40 and includes translating from one language to another (e.g., sign language to spoken English), oral interpreting and transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time transcription (CART), C-Print, and TypeWell."
Justification: There are children who are not deaf or hard of hearing (i.e., oral motor apraxia, Down syndrome) that utilize interpreting services as their main source of communication. To leave out these children would unnecessarily narrow what kinds of interpreting services can be provided.

Level I services
Recommendation: Retain current definition which includes "and related services" for students receiving Level I services.

"Level I services" means the provision of special education and related services to children with disabilities for less than 50% of their instructional school day (excluding intermission for meals). The time that a child receives special education services is calculated on the basis of special education services described in the individualized education program (IEP), rather than the location of services.
Justification: Children receiving Level I services may also be receiving related services.

Mental Retardation
Recommendation: Replace the definition in the proposed regulations with the following reference:
Mental retardation – "see Intellectual disability"
Justification: According to federal law, states are free to use a different term to refer to a child with mental retardation, as long as all children who would be eligible for special education and related services under the federal definition of Mental Retardation receive FAPE. Based on the legislative process from the Virginia General Assembly session in 2008, the term "Mental Retardation" will be legislatively changed to "Intellectual Disability."

Other Health Impaired
Recommendation: Retain arthritis and tuberculosis on the list of examples of health impairments that are cover by this category.
Justification: The Coalition is unaware of any problems that currently exist due to the inclusion of these two conditions in current Virginia regulations. Virginia has a longstanding policy of including these two examples in this definition.

Parent
Recommendation: Amend the definition of foster parent as indicated.

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;~~
      i. 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
      ii. 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.~~ of social services, even if the child is in the custody of such an agency.

Justification: The Coalition suggests 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. Moreover, the proposed Virginia regulation regarding when a foster parent can be a parent is confusing. School staff,

foster parents, and social workers have reported they do not understand when foster parents can act as parents.

Recommendation: Amend the definition of biological or adoptive parents as indicated.

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.

Justification: The new federal definition protects biological and adoptive parents' rights by ensuring that they will be the parent when they act as parents. In addition the Coalition also supports adding the italicized language to subsection 4 of this definition so that it clearly comports with subsection 2.

Private school children with disabilities

Recommendation: Expand the definition to include children ages three through five who are placed by their parents in private school that do not qualify as elementary schools.

Justification: IDEA 2004 provides that LEAs have the responsibility to spend a proportionate amount to provide services to children with disabilities who have been parentally-placed in private elementary schools and secondary schools. If the district determines that a private school student with a disability should receive some services, a service plan is formulated for that child. The IDEA regulations state that children ages three through five are not considered to be parentally-placed private school children for these purposes unless they are enrolled in a private school that meets the definition of elementary school. Since most private preschools are not in elementary schools, without this change their students may not qualify for any services that may be provided under the IDEA provisions for "parentally-placed private school children." (CFR 300.132)

Special education hearing officer

Recommendation: Retain current definition of and use of the term impartial hearing officer.

Justification: The VDOE should use the same terminology as the federal regulations to avoid confusion.

Specific learning disability

Recommendation: Remove the first sentence regarding dyslexia.

"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 conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disability does not include

learning problems that are primarily the result of visual, hearing, or motor disabilities; of mental retardation; of environmental, cultural, or economic disadvantage.
~~1. Dyslexia is distinguished from other learning disabilities due to its weakness occurring at the phonological level. Dyslexia is a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge.~~
Justification: The paragraph regarding dyslexia improperly narrows the requirements of IDEA 2004 and the federal regulations. It is absent from federal law. It may result in the denial of eligibility to Virginia students who have a right to IDEA eligibility under federal requirements.

Supplementary aids and services
Recommendation: Insert the following underlined statement into definition:
"Supplementary aids and services" means aids, services, and other supports that are provided in general education classes or other education-related settings to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate in accordance with this chapter.
Supplementary aids and services includes, but is not limited to: providing preferential seating; frequent breaks; extended or additional testing time; allowing tests to be dictated; a functional behavioral assessment and behavioral intervention plan; one-to-one aides; and, interpreting services to students with disabilities.
Justification: The provision of supplementary aids and services is crucial to ensuring that the IDEA's least restrictive environment (LRE) mandate is carried out. Including a non-exhaustive list of examples of supplementary aids and services gives guidance to schools and parents regarding the types of supplementary aids and services that may be provided to students with disabilities to ensure they receive a FAPE in the least restrictive environment (LRE). It also brings the definition of supplementary aids and services in line with the definition of related services, which has long included a non-exhaustive list of examples of related services.

Timely manner
Recommendation: Revise the definition of "Timely manner" as follows:
"Timely manner" if used with reference to ~~the requirement for National Instructional Materials Accessibility Standard~~ 8 VAC 20-81-230.K means that the local educational agency shall take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials before, or at least at the same time as other children receive instructional materials.
Justification: Timely manner should not be limited to use of National Instructional Materials Accessibility Standard (NIMAS), but tied to the provision of proper instructional materials at the same time as other children, regardless of what agency is contracted or method LEAs adopt. School staff need to ensure that all materials students with disabilities need to keep up with the class are available at or before the time their peers are learning the same information. Old textbooks and supplemental materials the teacher uses, or supplemental material that a child may use (such as a dictionary), may not be available through NIMAS.

8 VAC 20-81-20. Functions of the Virginia Department of Education.

Recommendation: Change language from children "in special education and related services" to children who receive or "need special education and related services" in 8 VAC 20-81-20.1.e.

1. Ensure that all children with disabilities, aged two to 21, inclusive, residing in Virginia have a right to a free appropriate public education, including, but not limited to, children with disabilities who:
   e. ~~Are in~~ Need special education and related services, even though they have not failed or been retained in a course or grade, and are advancing from grade to grade;

Justification: Language is consistent with §300.101(c)(1), and identifies that special education is a service to children with disabilities, not a placement.

Recommendation: Add "modifications" to assessment provisions in 8 VAC 20-81-20.4.

4. Ensure that each local educational agency includes all children with disabilities in all general Virginia Department of Education (VDOE) and division-wide assessment programs, including assessments described in section 1111 of ESEA, with appropriate accommodations, modifications, and alternate assessments where necessary and as indicated in their respective IEPs and in accordance with the provisions of the Act at section 1412.

Justification: Modifications to assessments is another IEP consideration to help enable students to participate in taking assessments and progress toward goals.

Recommendation: Amend proposed regulation 8 VAC 20-81-20.15.b.(6) as follows:
Review the Annual Plan, including new or amendments to policies and procedures for the provision of special education and related services, submitted in accordance with 8 VAC 20-81-230. B.2. submitted by state-operated programs, the Virginia School for the Deaf and the Blind at Staunton and the Virginia School for the Deaf, Blind and Multi- Disabled at Hampton.
Justification: To align with recommendation and justification given in 8 VAC 20-81-240. Checks and balances are needed to ensure procedural changes to the provision of FAPE are appropriately crafted.

Recommendation: Retain current language corresponding to 8 VAC 20-81-20.22:
Disburse the appropriated funds for the education of children with disabilities in Virginia to local school divisions and state-operated programs which are in compliance with state and federal laws and regulations pertaining to the education of children with disabilities including submission of revised policies and procedures for provision of special education and related services.
Justification: To align with recommendation given in 8 VAC 20-81-240.

8 VAC 20-81-30. Responsibility of local school divisions and state-operated programs.

Recommendation: Implement the proposed regulations for this section in their entirety.
Justification: Specificity of language removes ambiguity and ensures fewer children in particular situations are inadvertently overlooked.

8 VAC 20-81-40. Special education staffing requirements.

Recommendation: Implement the proposed regulation in Section (A) (1) (a) that students with disabilities shall be instructed with students without disabilities…
Justification: Adds clarity on instruction in the general education classroom setting

Recommendation: Implement the proposed regulation in Section (A) (2) (b) for highly qualified teachers in one or more federal core subjects.
Justification: Aligns with the federal regulations and supports commensurate teaching standards for children with disabilities.

Recommendation: Implement the proposed regulations in Section E.
Justification: The improved interpreter standards will help to ensure that students have access to effective communication.

Recommendation: Change Appendix A Figure 1 and 2 to include developmental delay caseloads for children through the age of nine.
Justification: Federal regulations, §300.8(b), allow the developmental delay category to include children through the age of nine.

8 VAC 20-81-50. Child Find.

Recommendation: Retain 60 day timeline in current regulations
Screening (C) - "Screening.

1. Each local school division shall have procedures that ensure that all children are screened within 60 business days of enrollment, including transfers from out of state as follows:
   a. Children shall be screened in the areas of hearing and vision in accordance with the requirements of 8 VAC 20-250-10.
   b. Children shall be screened for scoliosis in accordance with the requirements of 8 VAC 20-690-20.
   c. Children shall be screened in the areas of speech, voice, language, and fine and gross motor functions to determine if a referral for an evaluation for special education and related services is indicated.
   d. Children who fail any of the above screenings may be rescreened after 60 days if the original results are not considered valid.
   e. The screening may take place up to 60 business days prior to the start of school. The local educational agency may recognize screenings reported as part of the child's pre-school physical examination required under the Code of Virginia if completed within the above prescribed time line.
   f. Children shall be referred to the special education administrator or designee no more than 5 business days after screening or rescreening if results suggest that a referral for evaluation for special education and related services is indicated. The referral shall include the screening results.

Justification: The proposed regulation deleted the specific 60 business day timeline as in the current Virginia regulation. The proposal leaves it open to each LEA to designate their own timelines. By inserting the above underlined phrases, which is in keeping with the current

Virginia regulation, having a specific timeline in the regulation sets a measure of accountability. If child study committees are deleted, it will have a negative impact on students and will further alienate parents from the screening process by removing the guarantee that they will be participants. By deleting child study provisions, there will be no uniformity among school divisions with regard to screening for children with disabilities. Families across Virginia should be able to rely on and expect the same process to exist for determining eligibility for special education services, including screening.

Recommendation: Keep current Virginia regulations regarding child study committee and delete the sections on Screening D(1-2) and (E).
Justification: Child study committee has been deleted from the proposed regulations. The proposed regulations leave it up to each LEA to designate procedures to handle referrals of children suspected of having a disability.

If child study committees are deleted, it will have a negative impact on students and will further alienate parents from the screening process by removing the guarantee that they will be participants. By deleting child study provisions, there will be no uniformity among school divisions with regard to screening for children with disabilities. Families across Virginia should be able to rely on and expect the same process to exist for determining eligibility for special education services, including screening.

8 VAC 20-81-60. Referral for initial evaluation.

Recommendation: Ensure that evaluations are completed within a timely manner, i.e., within 60 calendar days from date of referral (versus date of consent). Reinsert language with respect to referral initiated by child study committees, including timelines associated with these. Modify language as follows:

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 school staff, a parent(s), the Virginia Department of Education, any other state agency, or other individuals.
   2. If the referral is from a child study committee, it shall be made within five business days following the determination by the child study committee that the child should be referred for evaluation for special education and related services.
   3. ~~2.~~ The referring party shall inform the special education administrator or designee of why an evaluation is requested and efforts that have been made to address the concerns. The referral may be made in oral or written form.
B. Procedures for referral for initial evaluation.
   1. Upon receipt of the referral for initial evaluation for the provision of special education and related services to a child with a disability, regardless of the source, the special education administrator, or designee, shall:
      a. Record the date the referral was received, reason for referral, and names of the person or agency making the referral;

b. Implement procedures for maintaining the confidentiality of all data; and

c. Provide written notice and procedural safeguards to inform the parent(s) in the parents' native language or primary mode of communication, unless it is clearly not feasible to do so, about:

(1) The referral for evaluation,

(2) The purpose of the evaluation, and

(3) Parental rights with respect to evaluation and other procedural safeguards.

d. Inform the parent(s) of the procedures for the determination of needed evaluation data ~~and request any evaluation information the parent(s) may have on the child~~.

e. Secure informed consent from the parent(s) for the evaluation.

2. The special education director or designee may request a review by a child study committee to determine if an evaluation will be completed if the referral comes from a source other than the child study committee. This request for review shall occur within five business days of the receipt of the referral for evaluation. The decision about whether to evaluate shall be made within 10 business days of the request for review.

3. If a child study committee is meeting following the request for review to determine if an evaluation will be completed, the committee shall include all members of the team that meets to determined needed evaluation data including the parent or parents, the IEP team and other qualified professionals as appropriate.

a. The meeting of the child study committee shall not:

(1) Deny or delay the parent(s) right to a due process hearing to contest the decision not to evaluate;

(2) Deny or delay the parent(s) right to make another referral in the future; or

(3) Delay the evaluation of a child who is suspected of having a disability.

b. The child study team may attempt classroom interventions during the evaluation process but such interventions cannot delay the evaluation.

4. ~~f.~~ The local school division shall ensure that all evaluations consist of procedures that:

a. ~~(1)~~ gather relevant functional, developmental and academic information about the child to determine if the child is a child with a disability, and

b. ~~(2)~~ are sufficiently comprehensive to identify all of the child's special education and related services needs, and educational needs.

5. The special education administrator, or designee, shall:

a.~~g.~~ Ensure that all evaluations are completed and that decisions about eligibility are made within ~~65 business days~~ 60 calendar days after the initial referral for evaluation is received by the special education administrator or designee. ~~after the parent has provided written consent to the evaluation process.~~ The time frame shall not apply to the local school division if:

Justification: The references to procedures relating to referral for evaluation relevant to the child study committee are reintroduced for consistency with the changes recommended in 8 VAC 20-80-50 above. Retaining the 10 day time frame for a child study committee decision to evaluate is also critical to ensuring that a delay does not take place. The timeline for completing evaluations and determining eligibility should be changed to 60 calendar days after referral. The Virginia Department of Education (VDOE) proposed change to 65 business days is inconsistent with federal guidelines which, although allowing each state to set its own timeframe, clearly indicate that 60 calendar days is a reasonable timeframe. The proposed regulations as written will cause an unnecessary delay in the evaluations. A parent can make a referral and spend days

or weeks waiting for the school to provide the documentation for consent or explain that consent is needed. Parents new to the process may not understand that no action will take place until consent is obtained. Screening and referral are the gateways to eligibility and the process should be specifically defined. Without clear procedures there will be confusion, a lack of uniformity between school divisions, delay in evaluations and eligibility determinations and needless litigation.

Regarding section B.1.d., VDOE inserted language that is not in current regulations. This may be construed by parents and educators as a demand instead of an option and should be removed.

Recommendation: Delete proposed regulation B.1.h.
~~h. The parent and eligibility group may agree in writing to extend the 65 day timeline to obtain additional data that cannot be obtained within the 65 business days.~~
Justification: The Coalition does not support a policy that would further delay an eligibility decision. Parents may feel pressured to agree to extensions in order to avoid being portrayed as uncooperative.

8 VAC 20-81-70. Evaluation and Reevaluation.

Recommendation: Amend the proposed regulations in 8 VAC 20-81-70. F.1.c. as indicated.
c. At least once every three years, ~~unless the parent and local educational agency agree that a reevaluation is unnecessary.~~
Justification: The purpose of a triennial evaluation is to assist parents, educators and other IEP team members make appropriate decisions about the educational needs an individual student. Reevaluations should continue to be conducted every three years to make sure comprehensive evaluations are performed which yield important data for teams to utilize in planning for each student's academic success.

Recommendation: Insert the language of the federal regulations as Part J of the proposed regulations.
"(3) For a child whose eligibility terminates under circumstances described in paragraph (e)(2) of this section, a public agency must provide a child whose eligibility terminates because of graduation from secondary school with a regular diploma or exceeding the age of eligibility for FAPE, with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals."
Justification: The proposed regulation (I) fails to include the federal requirement (20 U. S.C. 1414 (c).

Recommendation: Amend proposed regulation H.2. as indicated.
H. Timeline for reevaluations
2. If a reevaluation is conducted for purposes other than the child's triennial, the reevaluation process, including eligibility determination, shall be completed in ~~65 business~~ 60 calendar days from the date of the parent's consent to the evaluation.
Justification: The timeline for completing evaluations and determining eligibility should be changed to 60 calendar days after referral. The Virginia Department of Education (VDOE)

proposed change to 65 business days is inconsistent with federal guidelines which, although allowing each state to set its own timeframe, clearly indicate that 60 calendar days is a reasonable timeframe. The proposed regulations as written will cause an unnecessary delay in the evaluations. A parent can make a referral and spend days or weeks waiting for the school to provide the documentation for consent or explain that consent is needed. Parents new to the process may not understand that no action will take place until consent is obtained. Screening and referral are the gateways to eligibility and the process should be specifically defined. Without clear procedures there will be confusion, a lack of uniformity between school divisions, delay in evaluations and eligibility determinations and needless litigation.

Recommendation: Delete proposed regulation H.3.
~~h. The parent and eligibility group may agree in writing to extend the 65-day timeline to obtain additional data that cannot be obtained within the 65 business days.~~
Justification: The Coalition does not support a policy that would further delay an eligibility decision. Parents may feel pressured to agree to extensions in order to avoid being portrayed as uncooperative.

8 VAC 20-81-80. Eligibility.

Recommendation: Retain current parental consent requirements for a determination of ineligibility for special education services. Modify language as stated below:

D. Procedures for determining eligibility and educational leave.
   8. The local educational agency shall obtain written parental consent for the initial eligibility determination. Thereafter, written parental consent shall be secured for any change in categorical identification in the child's disability and for any determination that a child is no longer eligible for special education services.

Justification: The Coalition has recommended that written parental consent continues to be required for partial or full termination of services. A determination of ineligibility is the first step in full termination of services and consent should be required to make this change. (See section on Procedural Safeguards.)

Recommendation: For 8 VAC 20-81-80, eliminate provisions setting forth specific eligibility criteria for each disability. Delete sections H, L, M, O, P, Q, R, and S. Amend proposed regulation sections I and N as follows:
[Deleted sections H, L, M, O, P, Q, R, and S are not shown in order to save space]

I. The Virginia Department of Education adopts criteria for determining whether a child has a disability by using the applicable federal definitions of disability category in conjunction with appropriate evaluations and assessments as required under 8 VAC 80-70 ~~determination of eligibility criteria~~ for all children suspected of having a disability and does not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a disability. 34 CFR § 300.307

N. Eligibility as a child with developmental delay.
   1. The local educational agency may include developmental delay as one of the disability categories when determining whether a preschool child, aged two by September 30 through ~~to~~ five, inclusive, is eligible under this chapter.

2. Other disability categories may be used for any child with a disability aged two through nine ~~to five~~, inclusive.
3. Developmental delay may include a child who has an established physical or mental condition which has a high probability of resulting in a developmental delay. 34 CFR § 300.111(b)

Justification: While the efforts to help clarify disability characteristics are appreciated, the effects will likely result in under representation than over representation of the disability population. The new provisions set forth standards can be interpreted as highly restrictive (such as meeting 6 characteristics of the list presented for autism). The criteria improperly narrows the requirements of IDEA 2004 and the federal regulations. It is absent from federal law and is likely to deny eligibility to Virginia students who have a right to IDEA eligibility under federal law.

With respect to section N for developmental delay, federal regulations, §300.8(b), allow developmental delay to cover children through nine years old. The Coalition applauds VDOE's choice to retain the lower bound of two years old. Children who demonstrate developmental delay may not meet eligibility requirements for other disability categories at age five and should be allowed to utilize the developmental delay label through age nine to avoid the potential for inaccurate disability category assignments.

Recommendation: Retitle subsection T as indicated.
8 VAC 20-81-80 T Children found not eligible for special education at initial eligibility.
Justification: This provides clarity that these provisions apply only at initial eligibility.

Recommendation: Retain current regulation as new subsection U of the proposed regulations.
8 VAC 20-81-80 U Parental consent for changes to eligibility.

1. Written parental consent shall be secured for any change in categorical identification in the child's disability.
2. No changes shall be made to a child's eligibility for special education and related services without parental consent.

Justification: These provisions are in current Virginia regulations. Existing parental rights should not be eliminated. Parents should not be forced to initiate due process to protect their child's eligibility. Virginia currently goes beyond the federal requirements regarding parental consent which has reduced the need for due process requests in Virginia. The VDOE proposes to allow LEAs to unilaterally change eligibility without parental consent. There have been multiple arguments made regarding this provision and the actual impact it will make on students with disabilities. Students and parents are not in the same position to pursue due process, given the formality of the proceedings involved, if they chose to represent themselves and the expense if they are forced to obtain legal counsel. Placing the burden on the LEAs to pursue due process if they believe a student is receiving unnecessary services means that LEAs will only seek to terminate services that are truly unnecessary or overly invasive.

8 VAC 20-81-90. Termination of special education and related services.

Recommendation: Retain parental consent provisions within 8 VAC 20-81-90B.1 and 90B.2.

1. Termination of special education services occurs if the team determines that the child is no longer a child with a disability who needs special education and related services and if parental consent is secured.

2. A related service may be terminated during an IEP meeting without determining that the child is no longer a child with a disability who is eligible for special education and related services. The IEP team making the determination shall include local educational agency personnel representing the specific related services discipline being terminated. Parental consent shall be secured prior to the termination of related services

3. Prior to any partial or complete termination of special education and related services, the local educational agency shall comply with the prior written notice requirements of 8 VAC 20-81-170 C., ~~but parental consent is not required.~~ and obtain parental consent.

Justification: See Justification in 8 VAC 20-81-170 Procedural safeguards

Recommendation: Revise 8 VAC 20-81-90D.2, Summary of Academic Achievement and Functional Performance, to offer the summary if the child exits school prematurely.
If a child exits school without graduating with a standard or advanced studies high school diploma or reaching the age of 22, including if the child receives a general educational development (GED) credential or an alternative diploma option, the local educational agency shall offer to ~~may~~ provide the child, or parent(s) of the child, with a summary of academic achievement and functional performance when the child exits school. However, if the child resumes receipt of educational services prior to exceeding the age of eligibility, the local educational agency shall provide the child with an updated summary when the child exits, or when the child's eligibility terminates due to graduation with a standard or advanced studies high school diploma or reaching the age of 22.

Justification: The child or parent may not otherwise be aware that receipt of the summary is an option. This is a simple solution to make the child or parent aware of the summary and be given an opportunity to elect receipt of the summary.

8 VAC 20-81-100. Free appropriate public education.

Recommendation: Remove language from proposed regulations regarding that restricts services to students based on their age. Retain language in current regulations under section A.1, identifying LEA responsibility for setting goals, with modification on goal date to match new goal date.

1. A free appropriate public education shall be available to all children with disabilities who need special education and related services, aged two to 21, inclusive, ~~who meet the age of eligibility requirements in 8 VAC 20-81-10~~ and who reside within the jurisdiction of each local educational agency. This includes children with disabilities who are in need of special education and related services even though they are advancing from grade to grade or who have been suspended or expelled from school in accordance with the provisions of 8 VAC 20-80-68. The Virginia Department of Education has a goal of providing full educational opportunity to all children with disabilities aged birth through 21, inclusive, by 2010. Each local educational agency shall establish a goal of providing a full educational opportunity for

all children with disabilities from birth to 21, inclusive, residing within its jurisdiction by ~~2010~~ 2015.COV §22.1-213; 34 CFR §§300.300; 300.304

Justification: The age restriction added into proposed regulations is intended to prevent students over the age of five in the developmentally delayed category from receiving services and should be removed. Students with developmental delays should be served through age nine as the federal law allows. Retaining current language requires LEAs to remain engaged, responsible and accountable for setting goals that demonstrate their partnership with students and parents for providing full educational opportunities for students with disabilities.

8 VAC 20-81-110. Individualized education program.

Recommendation: Keep "that" in lieu of "than" in 8 VAC 20-81-110 A.

A. Responsibility. The local educational agency shall ensure that ~~than~~ an IEP is developed and implemented for each child with a disability served by that local educational agency, including a child placed in a private special education school by:

Justification: Grammar

Recommendation: Amend proposed regulation 8 VAC 20-81-110 B.2.d to better align with least restrictive environment (LRE) requirements.

2. Each local educational agency shall ensure that an IEP:
   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.~~

Justification: Allowing an additional month to begin services is inconsistent with the requirements to enable children with disabilities to be educated with children to the maximum extent appropriate. Delaying those services would start the school year at a disadvantage for children with disabilities, especially when IEP meetings for the school year are typically held one or two months after the school starts in the fall. Additionally, IEPs are already formatted to prescribe specific dates when services begin and end. This existing format provides parent awareness and consent when services begin and end. Proper IEP team construction provides the members who can commit resources and those who are implementing the IEP. There should be little surprise or need to provide for unexpected delays. Ten calendar days is a fair compromise.

Recommendation: Amend proposed regulation 8 VAC 20-81-110 B.7 as indicated, to better address lack of progress.

7. This chapter ~~does not~~ requires that ~~any~~ the 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. ~~However,~~ LEAs have an obligation to provide the child with FAPE. If the child is not meeting his or her expected progress by the middle marking period, the IEP team shall be given IEP meeting notice in accordance with the requirements of 8 VAC 20-81-170 A.1.b to address the lack of progress. ~~t~~The Virginia Department of Education (VDOE) and local educational agencies are not prohibited from establishing their own accountability systems regarding teacher, school, or agency performance.

Justification: Encourages a collaborative approach to address the child's lack of progress.

Recommendation: Amend proposed regulation 8 VAC 20-81-110 B.8.a as indicated.

8. Nothing in this section limits a parent's right to ask for revisions of the child's IEP if the parent feels that 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.~~

Justification: Parents should not be refused IEP meetings regarding their concerns for their child. Allowing schools to refuse to meet and discuss the issues raised by a parent defeats the purpose of a team approach. This would also lend itself to subjective opinions on the value of the parents' concerns by the school personnel. If VDOE is adamant on allowing schools to refuse to meet with parents, then notice provisions under section 8 VAC 20-81-170 C.2. should be added to the proposed regulation. This recommended change provides an existing structure to respond to parents when a disagreement arises. Such standardization helps ensure parents are being provided adequate responses to meeting refusals.

Recommendation: Amend proposed regulation 8 VAC 20-81-110 B.10 to ensure parent(s) receive a copy of the amended IEP.

10. In making changes to a child's IEP after the annual IEP team meeting for the school year, the parent(s) and the local educational agency may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.
    a. If changes are made to the child's IEP, the local educational agency shall ensure that the child's IEP team is informed of those changes;
    b. ~~Upon request, a~~ The parent(s) shall be provided with a revised copy of the IEP with the amendments incorporated. Implementation requirements of subdivision B.2 and timeline requirements subdivision E.8 also apply;

Justification: Parents need to be made aware that their child's IEP changed, what those changes are, and when they are being implemented. Without the recommended changes above, parents may be of a different understanding of what services are being provided to the child. Parents should have a current record of the IEP since it is core document laying their child's educational program. The cost to the LEA to ensure the IEP is to the terms agreed upon is minimal, and parents would otherwise likely not know of the option/right to request a copy.

Recommendation: Retain proposed changes to 8 VAC 20-81-110 C.1.g for child participation in the IEP meeting.

Justification: The change from "if" in the current regulations to "whenever" is appropriate for the child in the proposed regulations provides more impetus for IEP teams to seek opportunities for the student to participate in their IEP meetings.

Recommendation: Delete proposed 8 VAC 20-81-110 C.2 that gives determination of school personnel required for IEP meetings to the LEA.

Justification: The guidance from the United States Department of Education applies to excusals and determining the specific personnel, not the representation of IEP team members, to attend the meeting. http://idea.ed.gov/explore/view/p/,root,dynamic,QaCorner,3, states:

"Although the public agency, not the parent, determines the specific personnel to fill the roles of the public agency's required participants at the IEP team meeting, the public agency remains responsible for conducting IEP meetings that are consistent with the IEP requirements of the Act and the regulations. Accordingly, it may not be reasonable for a public agency to agree or consent to the excusal of the public agency representative if that individual is needed to ensure that decisions can be made at the meeting about commitment of agency resources that are necessary to implement the child's IEP that would be developed, reviewed, or revised at the IEP team meeting."

Application of the proposed 8 VAC 20-81-110 C.2 would significantly impede upon collaboration to decide upon IEP team representation and ultimately, upon IEP content. For example, parents can opt to include representation of related service personnel (per C.1.f) if the parent wants to discuss specific related services issues. Restricting what is allowable education discussion at IEP meetings, by limiting participation of personnel, would be detrimental to the education of the child.

Recommendation: Retain proposed changes to 8 VAC 20-81-110 C.3, E.2.b, G.9, and G.10 regarding secondary transition.
Justification: It is wonderful to see changes that will facilitate smoother and more effective transition efforts for both Part C and secondary transition services. Thank you.

Recommendation: Revise proposed 8 VAC 20-81-110 D.2.b as follows:

2. A required member of the IEP team may be excused from attending the IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of curriculum or related services, if:
   a. the parent and the local educational agency consent in writing to the excusal, and
   b. ~~the member submits, in writing , to the parent and the IEP team input into the development of the IEP prior to the meeting.~~ the excused member submits in writing to all IEP team members, sufficient information to aid in the development of the IEP prior to the day of the meeting. The information shall be forwarded to the parent(s) at the same time as the other IEP team members.

Justification: Requiring IEP team members to be given the sufficient details at the same time facilitates informed parent/team participation. It is important that parents receive the input far enough in advance of the IEP meeting to adequately consider it, and possibly ask resultant questions from the excused member in advance.

Recommendation: Revise proposed 8 VAC 20-81-110 E.2.b(2)(c) and add subdivision (d) to clarify who will perform the inviting of specific other agencies.

(2) For secondary transition, the notice shall also:
   (a) Indicate that a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child;
   (b) Indicate that the local educational agency will invite the student; and
   (c) Identify any other agency whom the local educational agency ~~that~~ will ~~be~~ invite~~d~~ to send a representative.
   (d) Identify any other agency whom the parent(s) will invite to send a representative.

Justification: Often there is confusion as to who will invite which outside agency, the parent or the school. This can lead to no representation by an outside agency because each thought the other was responsible for the invitation. Documenting who will invite each outside agency on the notice will avoid this potential confusion and missed opportunities during transition meetings.

Recommendation: Retain the proposed changes to 8 VAC 20-81-110 E.6. which specify the use of policies that regulate the use of recording meetings.
Justification: Use of policies helps facilitate consistent or uniform application of parent rights, and provides a clear understanding to parents of what those rights are.

Recommendation: Amend the proposed regulation 8 VAC 20-81-110 E.6. as indicated to permit eligibility meetings to be recorded in the same manner as IEP meetings.

6. Audio and video recording of IEP meetings.
   a. The local educational agency shall permit the use of audio recording devices at eligibility and IEP meetings. The parent(s) shall inform the local educational agency before the meeting in writing...

Justification: An eligibility meeting, just as an IEP meeting, is a formal meeting that has a significant impact on a child's future and provision of FAPE. It is imperative that parents are afforded the opportunity to have a clear understanding of both the eligibility and IEP meeting and have the ability to review specific details. It is especially important as this meeting can be overwhelming and unfamiliar information and terminology is likely to be used. This provision will help reduce confusion.

Recommendation: Amend the proposed change to 8 VAC 20-81-110 E.8. as indicated.
8. The local educational agency shall give the parent(s) a copy of the child's IEP at no cost to the parent(s) at the IEP meeting~~, but no later than 10 calendar days from the date of the IEP meeting~~. If the local educational agency is working from a draft, a copy of the draft shall be provided to the parent at the same time the information is made available to school personnel so the parent can follow along and mark up the copy during the IEP meeting if desired.
Justification: There should not be a delay in providing a copy of the IEP to the parent. The parent draft copy will also facilitate participation during the IEP meeting and provides an opportunity for the parent to keep track of intended changes until receipt of the final copy.

Recommendation: Retain the proposed change to 8 VAC 20-81-110 F.2.a, which has deleted terminology "if appropriate" from current regulations for considerations when a child's behavior impedes learning.

2. The IEP team also shall:
   a. In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions, strategies, and supports to address the behavior;

Justification: When children's learning is impeded due to behavior, consideration of positive interventions should be standard practice. It is a positive approach that will help abate potential escalation of problems not only for the child, and but possibly for others.

Recommendation: Keep "relate" in lieu of "related" in 8 VAC 20-81-110 F.2.b.

b. In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate~~d~~ to the child's IEP;

Justification: Grammar

Recommendation: Amend the proposed regulation 8 VAC 20-81-110 F.5 to be flexible instead of restrictive.

5. Nothing in this section shall be construed to ~~require~~ prohibit:
   a. the IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP; or
   b. that additional information be included in the child's IEP beyond what is explicitly required in this chapter.

Justification: The Discussion section of the federal regulations for Section 300.320(d) states: "Section 300.320(d), consistent with section 614(d)(1)(A)(ii)(I) of the Act, does not prohibit States or LEAs from requiring IEPs to include information beyond that which is explicitly required in section 614 of the Act." If additional information in the IEP helps make the IEP easier to follow, that would help ensure FAPE for the child. If additional information helps provide FAPE, or assists staff in the provision, then that information should not be prohibited from being included.

Recommendation: Retain the proposed change to 8 VAC 20-81-110 G.1 replacing "should" with "shall" when setting the foundational statements of an IEP.

Justification: Often recommended guidance provided in regulations is overlooked at the cost to the student. Measurable terms and relevant performance information are the cornerstone for effectively building, applying, and monitoring IEPs. Effective application of these foundational statements must be part of an IEP design to ensure successful education of children.

Recommendation: Retain the current regulations to include benchmarks and short-term objectives in 8 VAC 20-81-110 G.2.

G. Content of the individualized education program. The IEP for each child with a disability shall include:
   2. A statement of measurable annual goals, including benchmarks or short-term objectives, and academic and functional goals designed to:

Justification: As with the justification given for using the proposed regulations in 8 VAC 20-81-110 G.1, measurable terms and relevant performance information are the cornerstone for effectively building, applying, and monitoring IEPs. Short term objectives provide a more real-time indictor of progress. As such, any areas of identified lack of progress can be addressed by the IEP team within the child's school year.

Recommendation: Delete the proposed 8 VAC 20-81-110 G.3 regulations for applying benchmarks and short-term objectives only for children taking alternate assessments.

Justification: The recommended change to 8 VAC 20-81-110 G.2 applies to all students with disabilities, including children who take alternate assessments.

Recommendation: Amend the proposed regulation 8 VAC 20-81-110 G.4. as indicated, with federal language inserted.

4. A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided for the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to the child:

Justification: The special education, related services, and supplementary aids and services are to be based on peer-reviewed research, which is intended to provide guidance on best practice. The child's education will be improved by using methods that have been tested and proven to work. The program modifications and supports for school personnel will facilitate the child's advancement toward annual goals. This requirement for utilizing peer-reviewed research comes from federal section 300.320(a)(4)

Recommendation: Amend the proposed regulation 8 VAC 20-81-110 G.8.b., regarding progress reports, as indicated.

8. A statement of:
   a. How the child's progress toward the annual goals will be measured;
   b. When periodic 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, and at least as often as the parent or parents are informed of the progress of their children without disabilities.

Justification: The VDOE proposed language would eliminate the current requirement that parents are informed of the progress of their children with disabilities at least as often as the parents of children without disabilities. All parents benefit from the essential insights progress reports provide, as well as the ability to collaborate with teachers if there is a need to make adjustments to instruction based on the information provided by the progress reports.

Recommendation: Under section G.10.a. (2) include the language from the IDEA regulations Preamble which clarifies that IDEA funds may be used for a student to participate in a transitional program on a college campus, if the student's IEP team includes such services on the IEP.

Justification: Many LEAs and parents are not aware that the IEP team may place a (typically 18 to 21 year old) student who is still eligible for IDEA services in a transition program on a college or university campus and that funding would then be provided for the placement. Virginia has a growing number of high-quality transition and postsecondary programs for students with disabilities. Including this language would clarify that IDEA funds may be used to support these students.

Recommendation: Amend the proposed regulation 8 VAC 20-81-110 G.11 as indicated, to include parents in the notification process regarding age of majority.

11. Beginning at least one year before a student reaches the age of majority, the student's IEP shall include a statement that the student and parent(s) have ~~has~~ been informed of the rights under this chapter, if any, that will transfer to the student on reaching the age of majority.

Justification: While a student should be informed that he will gain rights, the parents should be aware that unless they have documentation to show otherwise (power of attorney, guardianship, letter of incapacitation), that they no longer have the right to make educational (and for that matter, financial, medical, etc.) decisions for their adult son or daughter.

8 VAC 20-81-120. Children who transfer.

Recommendation: Retain rights from current regulations by amending proposed regulation A.2. as indicated.

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~~ by implementing the child's IEP from the previous local educational agency, until the new local educational agency either:

Justification: Current regulations allow for FAPE provision by immediate implementation of the child's current IEP until a new one can be developed. The Coalition believes this practice prevents a gap in service provision for students who transfer.

Recommendation: Retain current regulations that require parental consent for service provision to transfer students.

4. If the parent does not provide written consent to a new IEP or an interim IEP, the local educational agency shall implement ~~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.

Justification: Retaining parental consent for IEP development and implementation for transfer students allows parents full participation in the IEP process.

8 VAC 20-81-130. Least restrictive environment and placement.

Recommendation: Amend the proposed regulation by adding reference to nonacademic and extracurricular services information:

A. General least restrictive environment requirements.

2. In providing or arranging for the provision of nonacademic and extracurricular services and activities (See also 8 VAC 20-81-100.H), including meals, recess periods, and other nonacademic and extracurricular services and activities provided for children without disabilities, each local educational agency shall ensure that each child with a disability participates with children without disabilities in those services and activities to the maximum extent appropriate to the needs of the child with a disability.

Justification: A similar reference is used in 8 VAC 20-81-130 A.3. The reference simplifies navigation to new information regarding extracurricular services required by federal regulations.

Recommendation: Retain current Virginia regulations to make arrangements "where necessary" for children placed outside public schools:

A. General least restrictive environment requirements.

3. For children placed by local school divisions in public or private institutions or other care facilities, the local educational agency shall, ~~if~~ where necessary, make arrangements with public and private institutions to ensure that requirements for least restrictive environment are met. (See also 8 VAC 20-81-150.)

Justification: Stating "where necessary" implies the decision to make arrangements is not simply a LEA "yes or no" determination to make arrangements, but that due diligence should be made to ensure LRE are met.

Recommendation: Clarify "alternative placements" by adding a definition in Section 8 VAC 20-81-10, or maintain examples given in current regulations within this section.

B. Continuum of alternative placements.

2. The continuum shall:

a. Include the alternative placements listed in the term "special education" (instruction in regular classes; special classes; special schools; home-based instruction; and instruction in hospitals and institutions, including Woodrow Wilson Rehabilitation Center and other state facilities) at 8 VAC 20-81-10, and

Justification: The term "alternative placements" is not used in section 8 VAC 20-81-10; as such, a list is not apparent. Not providing a definition, or giving examples of "alternative placements" in this section will likely lead to disputes regarding the provision of alternative placements.

Recommendation: Retain current Virginia regulations regarding the provision of benchmarks and objectives.

B. Continuum of alternative placements.

2. The continuum shall:

b. Make provision for supplementary services (e.g., resource room or services or itinerant instruction) to be provided in conjunction with regular education class placement. The continuum includes integrated service delivery, which occurs when some or all goals, including benchmarks and objectives ~~if required~~, of the student's IEP are met in the general education setting with age-appropriate peers.

Justification: See Justification regarding Short-term objectives and benchmarks in section 8 VAC 20-81-110.F

Recommendation: Amend proposed regulation section A.3., include the language from the Preamble for the IDEA regulations, which clarifies that public agencies that do not have an inclusive public preschool can provide all the appropriate services and supports must explore alternative methods to ensure that the LRE requirements are met. The preamble also states if a public agency determines that placement in a private preschool program is necessary as a means of providing special education and related services to a child with a disability, the program must be at no cost to the parent.

Justification: The statements should be incorporated in the Virginia regulations so that LEAs and parents have a clear understanding of the children's rights. Students with disabilities would likely improve their achievement under the No Child Left Behind Act (NCLB) if more of these students started their education in inclusive settings where there may be more focus on pre-academic skills. In addition, an inclusive preschool setting provides typical peer models for communication and behavior.

8 VAC 20-81-150. Private school placement.

Recommendation: Amend language in proposed regulation C.1.a.(1) to include private preschools that do not qualify as elementary schools.

1. Definitions applicable to this subsection.

a. The term "private school" includes:

(1) Private, denominational, or parochial schools in accordance with § 22.1-254 of the Code of Virginia that meet the definition of elementary school or secondary school in subdivision 1.of this subsection;

(a) Private, denominational, or parochial preschools that do not qualify as elementary schools

Justification: IDEA provides that LEAs have the responsibility to spend a proportionate amount to provide services to children with disabilities who have been parentally-placed in private elementary schools and secondary schools. If the district determines that a private school student with a disability should receive some services, a service plan is formulated for that child. The IDEA regulations state that children ages 3-5 are not considered to be parentally-placed private school children for these purposes unless they are enrolled in a private school that meets the definition of elementary school. Since most private preschools are not in elementary schools, their students would not qualify for any services that may be provided under the IDEA provisions for "parentally-placed private school children."

8 VAC 20-81-160. Discipline procedures.

Recommendation: A. General.
Clarify that case-by-case basis consideration to remove a child must be exercised consistently with the requirements in 8 VAC 20-80-160 and 34 CFR §300.530, and may not be used to circumvent these protections.
Justification: Every week a child stays removed from regular placement can be harmful, particularly for children whose disabilities affect or impede their learning. IDEA was designed to ensure that children with and without disabilities are educated together. Children who are removed lose their access to this important right. It is for this reason that Congress protected the rights of children who are being disciplined, including the manifestation determination and other disability-related requirements. Thus, consideration of unique circumstances must not be used to circumvent the important protections in 34 CFR § 300.530 and 8 VAC 20-80-160. The ability to consider unique circumstances was meant to protect children from zero tolerance rules.

Recommendation: B.2.b. Short-term removals
Amend the proposed regulation B.2.b. as underlined, to require that for additional short-term removals that are not a pattern, that the LEA provide services to the extent determined necessary to provide a free appropriate public education as required by IDEA 2004 § 612(a)(1) to enable the student to continue to ~~participate~~ appropriately progress in the general education curriculum and to progress toward meeting the goals of the student's IEP.
Justification: The federal regulations, 34 CFR § 300.530(d)(1) require a child who is removed to continue to receive educational services as provided in 34 CFR § 300.101(a) and to continue to participate in the general education curriculum and progress toward meeting IEP goals. 300.101(a) requires states to provide FAPE to all children, including those who are removed or suspended. It would be illegal to deprive them of FAPE and thus, the Virginia regulation must make clear that LEAs must provide FAPE. Indeed, IDEA 2004 requires this: § 1415(k)(1)(D) states that children who are removed for more than 10 days from their current placement must "continue to receive educational services, as provided in section 1412(a)(1)." IDEA 2004 does not contemplate the provision of FAPE-light or less-than-FAPE to children who are removed, even for additional short-term periods. Indeed, to the extent that the language" to progress

toward meeting the goals of the student's IEP" implies this, it is important to include the requirement that children receive FAPE.

Recommendation: The Coalition supports the inclusion of the proposed requirement in section B.2.b. that require the LEA to make the determination about services in consultation with the child's special education teacher.
Justification: The special education teacher is knowledgeable about the child's disability, how it affects his/her learning, and what appropriate services the child needs so that he/she will receive FAPE. Teacher involvement is tremendously important. Limiting consultation to a teacher unfamiliar with the child's learning needs will only result in a child receiving a poorer education. Virginia is correct to retain the existing requirement that the special education teacher be consulted.

Recommendation: Amend the proposed regulation B.2.b. to require that a child who has been removed for 10 days and experiences a subsequent removal of less than 10 school days that is not a change in placement begin receiving educational services on the 11th cumulative day of removal.
Justification: This is required by the new federal regulations, 34 CFR § 300.530(d)(4). See 71 Fed. Reg. 46717. It would be fundamentally unfair to deprive a child who has been removed from the classroom of educational services that he/she needs to receive a free and appropriate public education. Discipline studies have shown that removals do not improve educational outcomes, and that the best course of action is to provide educational services. The heart of the IDEA is ensuring that all children receive FAPE, and that LEAs do not use removal procedures to attempt to defeat this.

Recommendation: C. Long-term Removals
Amend the proposed regulation C.2.b. to define "substantially similar" to include behaviors those that were caused by the child's disability or had a direct and substantial relationship to it.
Justification: Inappropriate removal from the regular educational environment can cause great harm to children, both by causing them to fall further and further behind and by removing them from the least-restrictive environment. This is particularly true when a school district removes children for a series of short-term removals, as these removals can add up to a long period of removal. Hence, the regulations seek to protect children by prohibiting LEAs from using a pattern of short-term removals to improperly change a child's placement. But the new federal and state regulations state that a pattern occurs only if the child's behavior is "substantially similar" to other behaviors that caused one of the removals. A child may engage in behaviors that could appear different on the surface but are substantially similar because they are all caused by or related to the disability. For example, a child with impaired understanding or impulse control issues could both take a toy home and repeat curse words because other children told him to. On the surface, these might appear different, but they are substantially similar as they were caused by the child's disability.

Moreover, without this change, LEAs could remove children for repeated nine school day periods and circumvent IDEA's manifestation determination requirement. When children are removed for ten consecutive school days, they are entitled to a manifestation determination review. Their placement cannot be changed if the behavior was a manifestation, even if the behaviors seem to differ on the surface. The same standard should apply here: children should

not be subject to repeated short-term removals for what are manifestations of their disabilities.

Recommendation: Amend the proposed regulation C.3. to provide that if an LEA determines that a series of short-term removals is not a pattern, the LEA shall notify the parent(s) of the decision and provide the parent(s) with the procedural safeguards.
Justification: A series of removals of less than ten school days can quickly add up and result in a child being removed for a cumulatively long period of time. Successive removals of several days only disrupt the child's educational environment and cause the student to fall further behind, particularly if the child's disability impedes the ability to learn. For that reason, particular care should be taken to ensure that parents know their procedural safeguards and can challenge this decision. Providing a copy of the notice is relatively low cost, simple, and does not impose a burden of any significance on LEAs.

Recommendation: Require a functional behavioral assessment (FBA) be performed for children who are given a subsequent short-term removal after being removed for 10 cumulative school days in the year.
Justification: Repeated short-term removals have the potential to harm children with disabilities who are likely to fall further and further behind, and these children lose the right to be educated with their non-disabled peers. It is far better to address and resolve problem behaviors. FBAs, by addressing the actual cause of the behavior, ensure that interventions are appropriate and effective, abating the behavior.

Recommendation: Retain the current Virginia regulation 20-80-68 C.2.(e), requiring that if a child with a behavioral intervention plan (BIP) is removed for ten school days and then subjected to a further short-term removal that is not a change in placement, then the BIP will be reviewed and modified if one or more IEP team members believe it necessary.
Justification: Because removing a child from his/her placement has the potential to harm the child, and prevent the child from being educated in the LRE, it is important to address all problem behaviors. Thus, if an IEP team member believes modification of the BIP is necessary, the team should do so. IEP team members are often most knowledgeable about a child and his/her behavior. Children who are removed for repeated series of periods less than 10 school days can be left without educational services for long cumulative periods of time. It is important to take all steps to prevent this, including having an appropriate BIP in place.

Recommendation: Amend the proposed regulation C.5. "Special Circumstances" as underlined and crossed out, to provide that "school personnel may remove a child with a disability to an appropriate interim alternative educational setting for ~~the same~~ no more than the amount of time that a child without a disability would be subject to discipline. . ."
Justification: School personnel, in exercising their discretion under 8 VAC 20-81-160(A), should be allowed to remove a child for less time than a child without a disability because of unique circumstances. The team should be free to consider extenuating circumstances and reduce the removal period if appropriate. The Coalition applauds the VDOE for proposing to ensure that children with disabilities are not subject to longer periods of removal than children without disabilities. This is in accord with the Americans with Disabilities Act and other nondiscrimination statutes.

Recommendation: Amend the proposed regulation C.6.a.(1) as underlined to provide that a child receiving a long-term removal receives services to enable the student to continue to receive educational services so as to receive a free appropriate public education as required by IDEA 2004 § 612(a)(1) and to enable the student to continue to participate in the general educational curriculum, although in another setting…
Justification: The federal regulations, 34 CFR § 300.530(d)(1) require a child who is removed to continue to receive educational services as provided in 34 CFR § 300.101(a) and to continue to participate in the general education curriculum and progress toward meeting IEP goals. 300.101(a) requires states to provide FAPE to all children, including those who are removed or suspended. It would be illegal to deprive them of FAPE and thus, the Virginia regulation must make clear that LEAs must provide FAPE. Indeed, IDEA 2004 requires this: § 1415(k)(1)(D) states that children who are removed for more than 10 school days from their current placement must "continue to receive educational services, as provided in section 1412(a)(1)." IDEA 2004 does not contemplate the provision of FAPE-light or less-than-FAPE to children who are removed, even for additional short-term periods. Indeed, to the extent that the language " to progress toward meeting the goals of the student's IEP" implies this, it is important to include the requirement that children receive FAPE.

Recommendation: Amend the proposed regulation C.6.a.(2) as underlined and crossed out, so that it provides that children who are long-term removed "continue to receive those services and modifications including those described in the child's current IEP ~~that will~~ to enable the child to progress toward meeting the IEP goals . . ."
Justification: An IEP contains the services and goals that the IEP team has determined are necessary for a child to receive the legally-required FAPE. By definition, an IEP contains services necessary to make progress towards those goals and receive FAPE. The IDEA requires the provision of FAPE to all children, which includes progress in the general curriculum and receipt of services and modifications that enable the child to meet IEP goals. Thus, children who are subject to long-term removals must continue to receive the services in their IEPs. It would be inappropriate to allow LEAs to pick and choose among the services based on what school personnel might believe are necessary to enable a child to make progress.

Recommendation: Amend the proposed regulation C.6.a.3. to require that a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) be developed to address the conduct that resulted in the child's exclusion, and that if there is an existing FBA or BIP that is over one year old, a new one must be developed. If the FBA or BIP is over a year old, the FBA cannot be limited to reviewing existing data in the file.
Justification: Functional behavioral assessments are an important problem-solving process for understanding student problem behavior. Failure to base the intervention or BIP on the actual cause (function) often results in interventions that are ineffective and unnecessarily restrictive. Outdated FBAs and BIPs often fail to effectively address the child's current behavior. A valid FBA must be conducted that identifies the significant, pupil-specific social, affective, cognitive, and/or environmental factors associated with the occurrence (and non-occurrence) of the behaviors. A review of old data will not accomplish this task. Because misbehavior can result in the exclusion of children from the classroom and placement in a more restrictive environment, it is important for FBAs to be effectively conducted and both FBAs and BIPs remain up-to-date. It is important that children have appropriate FBAs and BIPs so as to abate future problematic

behavior. This is important so that the child is not subjected to further discipline. Disciplinary actions on a student's record can severely limit the opportunities students with disabilities have for employment, vocational training, and post-secondary education.

Recommendation: Amend proposed regulation D.7. by adding the following language to require that a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) be developed to address the conduct that resulted in the child's exclusion, and that if there is an existing FBA or BIP that is over one year old, a new one must be developed. If the FBA or BIP is over a year old, the FBA cannot be limited to reviewing existing data in the file.

a. conduct a functional behavior assessment, unless the local educational agency had conducted this assessment before the behavior that resulted in the change in placement occurred, and implement a behavioral intervention plan for the child; or
b. If a behavioral intervention plan already has been developed, review this plan and modify it, as necessary, to address the behavior

Justification: Functional behavioral assessments are an important problem-solving process for understanding student problem behavior. Failure to base the intervention or BIP on the actual cause (function) often results in interventions that are ineffective and unnecessarily restrictive. Outdated FBAs and BIPs often fail to effectively address the child's current behavior. A year is adequate time to determine the appropriateness of a BIP and a FBA.

Recommendation: D. Manifestation Determination
Amend proposed regulation D.2. to specify that in selecting the manifestation determination IEP team members, LEAs must make bona fide efforts to work with parents. Ultimately, as required by 20-81-110 C.1.f. and 34 C.F.R. §300.321(a)(6), the parents or LEA must have the discretion to include all individuals with special knowledge or expertise regarding the child; particularly regarding how a student's disability can impact behavior and understanding consequences of behaviors.
Justification: A manifestation determination review (MDR) is a serious matter that could result in changing the child's placement and removing him/her from the LRE; thus weakening the educational services provided to the child. It is important that all persons with appropriate knowledge and expertise be on the IEP team. In addition, parents' rights to include those IEP team members whom they consider to have appropriate expertise is required by 8 VAC 20-81-110 C.1.f. and 34 C.F.R. §300.321(a)(6). LEAs should not be permitted to prevent parents from designating MDR team members.

Recommendation: The Coalition supports the proposed D.2. requiring that the manifestation determination IEP team convene "immediately, if possible" but not later than 10 school days after the decision to change the placement of the child is made. We recommend, however, strengthening the language to require that the team meet as soon as possible, and if that is not possible, then the school district must document the specific facts that made it impossible.
Justification: Removing a child from their regular placement can cause harm to the child's education and take him/her away from the LRE. If the manifestation team is capable of meeting in fewer than 10 school days, it must do so, rather than waiting the 10 school days. To allow LEAs to wait until the 10th school day is to allow them to exclude children for 20 school days (4 calendar weeks or more). LEAs could suspend a child for 10 school days, and on the 10th school day notify parents of a change in placement and then take another 10 days to convene the

manifestation team. Documentation provides the impetus to show efforts are being made to take immediate action for the child. It can also facilitate identifying unnecessary delays by supervisory personnel.

Recommendation: Amend the proposed regulation D.3 to specify that the review of all relevant information in the child's file includes all of the child's education records, as well as new information that parents or LEAs have.
Justification: Given the potential for the manifestation determination review (MDR) to decide whether a child is excluded from the classroom, it is important for the team to consider all relevant information. This includes new information that would inform the review team. The term "child's file" should be defined to include all education records of the child, so the term is not interpreted so narrowly that relevant information is excluded. The child's file includes all records, including email, electronic documents, recordings, and paper records in the possessions of all LEA employees and agents. Many parents are uninformed about the extent of school records on their children; and therefore, the regulations should make clear that the file includes all relevant information in all education records.

Recommendation: Amend the proposed regulation D.4 to state that behavior has a direct and substantial relationship to the disability if the disability significantly impairs the child's behavioral control.
Justification: The language in the Conference Report 108-779 specifying that behavior is a manifestation if "the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability, and is not an attenuated association, such as low self-esteem" comes from *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986). The case further explained that behavior has a direct and substantial relationship to the disability where the disability significantly impairs the child's behavioral control. This is an appropriate and accurate definition and Virginia should include it.

Recommendation: Amend the proposed regulation D.4. to provide that in determining whether or not a student's behavior was a manifestation of his or her disability, the IEP team should continue to be required to ask if the IEP is appropriate and should continue to be required to look at the current placement.
Justification: These are essential elements of the manifestation determination and should not be eliminated. Without looking at the appropriateness of the IEP or at the student's current placement, the team may miss critical information about the student's disability, his or her behavior, and the services and program he or she is receiving. These all have a substantial bearing on the relationship between the student's behavior and his or her disability and on what ought to happen to the student in the disciplinary process.

Recommendation: Amend the proposed regulation D.6.a and D.6.b to require a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) be developed to address the conduct that resulted in the child's exclusion. If an existing FBA or BIP is over one year old, a new one must be developed and not be limited to reviewing existing data in the file.
Justification: FBAs are an important problem solving process for addressing student problem behavior. Failure to base the intervention on the actual cause (function) often results in interventions that are ineffective and unnecessarily restrictive. Outdated FBAs and BIPs often

will fail to effectively address the child's behavior. Rather, a valid FBA must be conducted that identifies the significant, pupil-specific social, affective, cognitive, and/or environmental factors associated with the occurrence (and non-occurrence) of the behaviors. A review of data in the file will not accomplish this task. Misbehavior can result in the exclusion of children from the classroom and placement in a more restrictive environment For that reason it is important to address the cause of the conduct so that it is abated, which requires appropriate FBAs and BIPs. Otherwise, children may be subject to further unnecessary discipline which not only results in poorer educational outcomes, but also limits the child's opportunities for employment, vocational training, and post-secondary education.

Recommendation: Amend the proposed regulation D.6.a to require that in reviewing and developing a BIP, the LEA consider and implement positive behavioral strategies.
Justification: FBAs and BIPs are designed to abate problem behaviors by determining the causes of the behavior and how to minimize recurrence.

IDEA 2004, 20 U.S.C. §1414(d)(3)(B)(I) requires that positive behavioral interventions be considered in developing the IEPs of all children. Positive behavioral interventions have sustained impact on children's behavior and are effective in correcting it. Positive behavioral supports have been shown to effectively reduce and prevent disruptive behavior. Coercion and negative interventions, by contrast, are rarely effective and can be harmful and dangerous.

Recommendation: Even if the child's conduct is not a manifestation of the child's disability, the IEP team should be required to review positive behavioral strategies and develop an appropriate BIP after a FBA.
Justification: Regardless of whether misconduct is related to a child's disability, FBAs and BIPs are designed to abate problem behaviors. Since good behavior benefits all students, even when misbehavior is not a manifestation of a disability, schools should be diligent about conducting FBAs and writing appropriate BIPs. Moreover, IDEA 2004, 20 U.S.C. § 1414(d)(3)(B)(I) requires that positive behavioral interventions be considered in developing the IEPs of all children.

Recommendation: Amend proposed regulation D.6.c. as indicated.

c. Return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change in placement as part of the modification of the behavioral intervention plan. ~~The exception to this provision is when the child has been removed for not more than 45 school days to an interim alternative educational setting for matters described in subdivision C.5.a.of this section. In that case, school personnel may keep the student in the interim alternative educational setting until the expiration of the 45 day period.~~

Justification: Current state regulation does not allow for placement change to continue once a behavior has been identified as a manifestation of a disability. This proposed change would allow unilateral placement change even when behavior is clearly identified as a manifestation of a disability.

Recommendation: F. Authority of the Special Education Hearing Officer.
Correct the proposed regulation F.1 to add the word "substantially," thus permitting LEAs to

seek due process for 45-day removals only when "the local educational agency believes that the child's behavior is substantially likely to result in injury to self or others."
Justification: The legal standard for permitting a 45-day removal without regard for whether conduct is a manifestation of the disability is that the conduct is "substantially likely" to result in injury to self and others. See 20 U.S.C. §1415(k)(3), 34 C.F.R. §300.532(b), proposed 8 VAC 20-81-160 E.2. Replacing "substantially likely" with merely "likely" is an impermissible lowering of the standard, and a violation of federal law. This may simply be a typographic error, since the previous reference in 20-81-160 E.2. and next reference in 20-81-160 F.2. incorporate the required "substantially likely" language.

Recommendation: Implement the proposed regulation F.3., which provides that an LEA may ask the hearing officer for a 45-school day extension of the interim alternative educational setting "when school personnel believe that the child's return to the regular placement would result in injury to the student or others."
Justification: Removing a child from the regular placement can cause harm, including poorer educational outcomes for the removed child and taking the child out of the LRE. For that reason, further removals must be carefully examined and children should not remain removed unless absolutely essential. We support the new proposed F.3., which requires school personnel, in seeking an extension, to show that returning the child to the regular placement would result in injury to the child or others.

Recommendation: When a child is removed for a 45-day period under F.1. and F.3, the regulations should require that a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) be developed to address the conduct that resulted in the child's exclusion, and that if there is an existing FBA or BIP that is over one year old, a new one must be developed. If the FBA or BIP is over a year old, the FBA cannot be limited to reviewing existing data in the file.
Justification: Functional behavioral assessments are an important problem-solving process for understanding student problem behavior. Failure to base the intervention or BIP on the actual cause (function) often results in interventions that are ineffective and unnecessarily restrictive. Outdated FBAs and BIPs often fail to effectively address the child's current behavior. A valid FBA must be conducted that identifies the significant, pupil-specific social, affective, cognitive, and/or environmental factors associated with the occurrence (and non-occurrence) of the behaviors.

Recommendation: Retain the factors in current regulations, (C)(4)(b), that a hearing officer is to consider in ordering a change in placement to an interim alternative educational setting for not more than 45 school days because current placement is substantially likely to result in injury to student and others, including the appropriateness of the student's current placement. Consider if the LEA made reasonable efforts to minimize the risk of harm in the student's current placement, including the use of supplementary aids and services, and determine whether the interim alternative educational setting to which the child is long-term removed meets the requirements of C.6.a.
Justification: All of these factors remain an important part of the hearing officer's decision, even though 34 C.F.R. § 300.532 no longer contains any requirements about the standards for making the determination. IDEA 2004 did not prohibit hearing officers from considering these

factors or establish that they are not part of the analysis. In fact, the appropriateness of the child's current placement goes to whether the child has been provided FAPE. The LEA is required to make reasonable efforts to keep the child in the least restrictive environment to the maximum extent possible, including the use of supplementary aids and services under IDEA 2004, 20 U.S.C. § 1412(a)(5). This obligation continues to exist, and should be considered in determining whether a 45-day change in placement is appropriate. See *Light v. Parkway C-2 S.D.*, 41 F.2d 1223 (8th Cir. 1994) (interpreting IDEA to apply this consideration to disciplinary hearings even before IDEA 97's specification that these factors should be considered).

Recommendation: H. Protection for children not yet eligible for special education and related services.
The Coalition supports retaining all factors of the current regulation VAC 20-80-68.C.8.b.
Justification: Removal from the classroom poses substantial risk to children with disabilities. The new federal regulations deem a school district knowledgeable about a child's disability for discipline purposes, even if he/she is not yet eligible, if the parent provides notice of his/her concerns that the child needs special education and related services. A child should not forego this protection simply because his/her parent cannot write or has a disability preventing a written statement. Virginia is currently taking the appropriate steps to protect children in such a situation. This recommendation would also retain the current requirement regarding knowledge that "the behavior or performance of the student demonstrates the need for these services."

Recommendation: Clarify the proposed regulation H.3.(b) so that it provides as follows:
A local educational agency would not be deemed to have knowledge that a child is a child with a disability if. . . (b) The child has been evaluated <u>within the last 3 years</u> in accordance with 8 VAC 20-81-70 and 8 VAC 20-81-80 and determined ineligible for special education and related services.
Justification: A school district should not be able to rely on an outdated evaluation, from years ago, to assert that it is not deemed to know that a child had a disability. The reason evaluations are conducted at least triennially is to ensure that the school district relies on up-to-date information about the child. Otherwise, a child who is evaluated and found ineligible at age five is deprived of discipline protections when he/she is 13 and he/she would otherwise be entitled to these protections. But a child who didn't go through the process years ago would receive the protections.

<u>8 VAC 20-81-170. Procedural safeguards.</u>

Recommendation: Delete section indicated.
B. Independent educational evaluation.
2. Parental right to evaluation at public expense.
~~e. A parent is entitled to only one independent educational evaluation at public expense each time the public educational agency conducts an evaluation component with which the parent disagrees.~~
Justification: This section should be deleted. It goes beyond federal regulations and can be interpreted as more restrictive than the federal regulations in that it would limit the right to an independent educational evaluation. In order to eliminate litigation we should look to the federal language in this circumstance.

Recommendation: Amend the proposed regulation as indicated.

C. Prior written notice by the local educational agency; content of notice

1. Prior written notice shall be given to the parent(s) of a child with a disability within a reasonable time, but in no case more than 24 hours before or after the local educational agency: …

Justification: The term reasonable time leads to misunderstandings and litigation between the LEA and the parent. Expectations are made clear when there are specific time lines. For example, if there is a necessity for a parent to file a due process regarding the requests made in the IEP meeting, an open ended time frame for the completion of the required prior written notice can be used to delay access to the due process proceeding as the parent is now required to file a detailed complaint.

Recommendation: Retain the current requirements of notice distribution.

D. Procedural safeguards notice.

1. A copy of the procedural safeguards available to the parent(s) of a child with a disability shall be given to the parent(s) by the local educational agency ~~only one time a school year~~, ~~except that a copy shall be given to the parent(s)~~ upon:

a. Initial referral for or parent request for evaluation

b. Review regarding reevaluation of the child;

~~b~~c. If the parent requests an additional copy;

d. Each notification of an IEP meeting;

~~c~~e. Receipt of the first state complaint during a school year

~~d~~f. Receipt of the first request for a due process hearing during a school year; and

~~e.~~g. On the date on which the decision is made to ~~make~~ take a disciplinary action, including a disciplinary removal that constitutes a change in placement.

Justification: It is important to include parents in all decisions regarding the education of their children and to make sure they are aware of their rights. Providing notice at the identified critical junctions of the education process is essential to ensuring parents are informed. Reevaluation of the child was a trigger event identified in the current Virginia regulations requiring a copy of the procedural safeguards notice. This was deleted in the current proposed Virginia regulations. While acknowledging the need to reduce the resources used to produce these safeguards, it is critical that students and parents are fully aware of all their rights and the process of reevaluation is a significant event which could result in termination or substantial change of services. This event should be retained in the Virginia regulations. The trigger points should be at the review of data and when the team is determining whether or not to reevaluate the child or what components to evaluate.

Recommendation: Retain current parental consent rights from section 8 VAC 20-80-70 of current regulations.

E. Parental Consent

1. Required parental consent. Informed parental consent is required before:

d. Any revision to the child's IEP services~~, except as outlined in division E.2.f. of this subsection~~;

e. Any partial or complete termination of special education and related services, except for graduation with a standard or advanced studies diploma;

Justification: VDOE's proposal would severely impact student and parental rights.

Virginia has always gone beyond the federal requirements regarding parental consent which has reduced the need for due process requests in Virginia. The VDOE proposes to allow LEAs to "change services" through "partial termination" without parental consent. Parents would have to resort to due process to keep their children from loosing needed services. There have been multiple arguments made regarding this provision and the actual impact it will make on students with disabilities. Students and parents are not in the same position to pursue due process, given the formality of the proceedings involved, if they chose to represent themselves and the expense if they are forced to obtain legal counsel. Retaining the provision that permits LEAs to pursue due process if they believe a student is receiving unnecessary services means that LEAs will only seek to terminate services that are truly unnecessary or overly invasive.

Recommendation: Implement the proposed regulations for E.1.f as drafted by VDOE.

E. Parental Consent.
   1. Required parental consent. Informed parental consent is required before:
      f. Inviting to an IEP meeting a representative of any participating agency that is likely to be responsible for providing or paying for secondary transition services.

Justification: This is an important addition to parental consent. Privacy of a student is of utmost importance and whether a student's information is provided to a third party for additional services should be only when consented to by the student or parent.

Recommendation: Retain current regulations requiring parental consent for termination of special education or related services.

E. Parental Consent
   2. Parental consent not required. Parental consent is not required before:
      ~~f. Any partial or complete termination of special education or related services.~~

Justification: Partial or complete termination of special education or related services was removed from section 1. of this section requiring parental consent and added to section 2. specifically not requiring consent. This severely impacts student and parental rights. Virginia has always gone beyond the federal requirements regarding parental consent which has reduced the need for due process requests in Virginia. The VDOE proposes to allow LEAs to "change services" through "partial termination" without parental consent. Parents would have to resort to due process to keep their children from loosing valuable services. There have been multiple arguments made regarding this provision and the actual impact it will make on students with disabilities. Students and parents are not in the same position to pursue due process, given the formality of the proceedings involved, if they chose to represent themselves and the expense if they are forced to obtain legal counsel. Placing the burden on the LEAs to pursue due process if they believe a student is receiving unnecessary services means that LEAs will only seek to terminate services that are truly unnecessary or overly invasive.

Recommendation: Retain current regulations requiring parental consent for service provision to transfer students.

E. Parental Consent.
   2. Parental consent not required. Parental consent is not required before:
      ~~h. The local educational agency provides a free appropriate public education to children with disabilities who transfer public agencies in Virginia or transfer to Virginia from another state in accordance with 8 VAC 20-81-120.~~

Justification: Retaining parental consent for IEP development and implementation for transfer students allow parents full participation in the IEP process.

Recommendation: Amend proposed regulations as indicated. Timeline should be no more than five business days after request has been made for review of educational records.

G. Confidentiality of information.

1. Access rights.

a. The local educational agency shall permit the parent(s) to inspect and review any education records relating to their children that are collected, maintained, or used by the local educational agency under this chapter. The local educational agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing in accordance with 8 VAC 20-81-160 and 8 VAC 20-81-210, or resolution session in accordance with 8 VAC 20-81-210, and in no case more than ~~45 calendar days~~ 5 business days after the request has been made.

Justification: The 45 calendar day timeline is unnecessarily lengthy. Usually when a parent is requesting a review of records there is a time sensitive reason for such and there should be no reason that this could not be accommodated within five business days. The proposed timeline only serves to potentially delay services for a student.

8 VAC 20-81-180. Transfer of rights to students who reach the age of majority.

Recommendation: Retain current requirement for statement of notification to both students and parents at least one year prior to the student's eighteenth birthday that educational rights transfer to the student at the age of majority.

B. Notification

1. The local educational agency shall notify the parent(s) and the student of the following:

a. That educational rights under the Act will transfer from the parent(s) to the student upon the student reaching the age of majority. Such notification must be given at least one year prior to the student's eighteenth birthday;

Justification: While 8 VAC 20-81-180 B.2 goes on to state that the LEA include a statement on the IEP that a student has been informed (at one least one year before the student reaches the age of majority) of the transfer of rights at age 18, it does not state that a parent has been notified nor does it give a timeline for notifying the parent.

Recommendation: Change timeline for C.3.d certification that the adult student is incapable of providing informed consent to be consistent with eligibility timelines in the rest of the document.

d. The certification that the adult student is incapable of providing informed consent may be made as early as 60 calendar days prior to the adult student's eighteenth birthday or ~~65 business days~~ 60 calendar days prior to an eligibility meeting if the adult student is undergoing initial eligibility for special education services.

Justification: All eligibility timelines need to be consistent. A 60 calendar day timeline from referral to eligibility has been recommended by the Coalition.

8 VAC 20-81-190. Mediation.

Recommendation: Amend the proposed regulation as indicated by inserting the underlined text into section C.

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.

Justification: 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.

Recommendation: Amend section F. with the addition of 4, as indicated below:

F. An individual who serves as a mediator:

4. Upon agreement between parents and the LEA, 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.

Justification: 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.

8 VAC 20-81-200. Complaint resolution procedures.

Recommendation: Retain language from current regulations regarding D.4.f timeframe required for initiation of corrective action.

f. Notify the parties in writing of any needed corrective actions and the specific steps that shall be taken by the local educational agency to bring it into compliance with applicable timelines. The local educational agency will be given 15 business days from the date of notice of noncompliance to respond and initiate corrective action.

Justification: The underlined section is in the current Virginia regulations, but deleted from the proposed regulations. This language should be retained to ensure a timely response and corrective action.

8 VAC 20-81-210. Due process hearing.

Recommendation: A. Hearing System.

Amend the provision to comply with the IDEA, 20 U.S.C. §1415(b)(6), permitting parties to file

due process complaints "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" and 1415(f), which requires due process hearings for disciplinary matters under 1415(k). Virginia should use the language in the federal statute.
Justification: The law is clear that parents may have a hearing "with respect to any matter" related to "identification," evaluation, placement or FAPE. The proposed regulation impermissibly narrows the scope of hearings permitted under IDEA. For example, parents could only seek hearings on 3 issues related to identification, even though others exist. Likewise, 1415(f) requires hearings for disciplinary matters under 1415(k) and this must be incorporated.

Recommendation: B. 1. Hearing Officer Appointment.
Implement the proposed regulation B.1.a. (1)-(5), and (7).
Justification: These proposed regulations appropriately define requirements for hearing officers, who serve as the beginning of the justice system within Virginia on IDEA matters. It is appropriate that they have five years of experience in the practice of law, as well as be members of the state bar, have experience with administrative hearings, demonstrated knowledge of special education legal requirements, legal writing ability and the other factors contained therein. Qualified hearing officers are essential to ensure that due process decisions are rendered in accord with the law. (1)-(5) and (7) are an appropriate means of fulfilling the federal requirements under 34 C.F.R. §300.511.

Recommendation: Amend the proposed regulation B.1.a. to require hearing officers to have demonstrated knowledge of, and comply with, the Canons of Judicial Conduct for the Commonwealth of Virginia.
Justification: Hearing officers serve as the first level of judicial decision-making in IDEA cases. It is important that, like Virginia judges, they understand and comply with Virginia's Canons of Judicial Conduct, which safeguard the integrity and ethics of all judges in the Commonwealth. Integrity ensures a fair hearing process.

Recommendation: Amend the proposed regulation B.1.3. to provide that hearing officers may be disqualified and removed when they fail to comply with the Canons of Judicial Conduct for the Commonwealth of Virginia.
Justification: The Canons of Judicial Conduct are the core ethical requirements for judges in Virginia. Judicial integrity is necessary to ensure a fair hearing process. As the first level of the IDEA judicial process, hearing officers should comply with it as judges do. Failure to do so should be grounds for removal and disqualification.

Recommendation: Amend the proposed regulation B.1.3. to provide that hearing officers may be disqualified and removed for failing to perform duties impartially, without bias or prejudice. Alternatively, the regulations should be amended to provide that once a hearing officer has been found to have failed to be impartial two or more times, he/she shall be removed permanently.
Justification: It is essential that hearing officers, like judges in Virginia, act without partiality, bias, or prejudice, so that decisions which are rendered are fair to all parties. When a hearing officer has been found to have failed to perform his/her duties impartially, he/she should be disqualified from serving as a hearing officer in the future. There should be some form of consequence for hearing officers who consistently fail to be impartial.

Recommendation: Implement the proposed regulation B.3.c.(1) specifying that hearing officers may be disqualified from a specific case if they cannot be fair and impartial.
Justification: This requirement is necessary to ensure a fair and impartial hearing system. Fairness is essential to due process.

Recommendation: Strike proposed B.4, permitting the VDOE to require that decisions be reissued if there are concerns about readability or if there are conflicts in "data."
Justification: Proposed regulation B.4. oversteps the VDOE's authority in regulating hearing officers. It permits the VDOE to request that decisions be reissued to improve readability. Permitting staff to review decisions for "readability" is too vague and arbitrary. Suggesting edits to a hearing officer decision may change the facts or result in other substantive changes to the decision, which inappropriately invades judicial decision-making authority. Indeed, a review of the special education regulations in other states in the Mid-Atlantic region does not show that any have given the State Department of Education such review powers. IDEA provides that the decision of the hearing officer is final and this means that State Department of Education staff do not have the authority to alter it.

The proposed regulation further implies that the VDOE has authority to change decisions when staff believe there are errors in fact stating that the VDOE may request changes when there are conflicts in "data." To the extent that the VDOE means that staff could review an opinion for an error in the name of the child's school or his age or address, this needs to be addressed with much narrower and very specific language. Virginia's regulations must make clear that review of both errors in fact and errors in law are reserved for the courts. IDEA reserves such review for either impartial appellate hearing officers (which Virginia has rejected), 20 U.S.C.1415(g), or a court of law, 20 U.S.C.1415(I). Hence, a court, not VDOE staff, should decide whether a hearing officer has committed factual error and if so, how to resolve it. In many situations, whether there is a factual error will depend on the evidence presented and the officer's decisions about witness credibility. Moreover, IDEA provides that "A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final," 20 U.S.C. §1415(I), meaning that State Department of Education staff do not have the authority to review it.

Recommendation: C. Filing the request for a due process hearing.
Implement the provision in proposed regulation C.1., ensuring that there is a two year timeline for filing due process requests.
Justification: The proposed regulation is in accord with Virginia case law, which currently applies a two year statute of limitations in IDEA cases. IDEA 2004 and the federal regulations explicitly state a preference for two year statutes of limitation, 20 U.S.C. § 1415(b)(6)(B), 34 C.F.R. §300.507(a), 300.511(e). Parents unfamiliar with their rights may need two years to bring a case, after carefully weighing the information.

Recommendation: Implement the proposed language in C.1. a. and C.1.b., providing two circumstances under which there is an exception to the two year due process timeline.
Justification: C.1.a. and C.1.b. comply with IDEA and create exceptions to the statute of limitation when an LEA specifically misrepresented that it had resolve the issues or the LEA withheld information it was required to provide under IDEA. LEAs control the information

related to special education and it is important, when an LEA fails to provide information it was required to under IDEA, that an exception to the timeline is made. The same is true when the LEA specifically misrepresents that it had resolved the issues in the request.

Recommendation: In accord with IDEA 2004's legislative history, amend proposed C.1. to permit parents to file actions seeking compensatory education for not just the last two years, but also the failure to provide services before that, when the conduct is ongoing.
Justification: IDEA 2004's legislative history makes clear that parents can seek compensatory education for ongoing denials of FAPE to their children that have extended for longer than two years. "[W]here the issue giving rise to the claim is more than two years old and not ongoing, the claim is barred; where the conduct or services at issue are ongoing to the previous two years, the claim for compensatory education services may be made on the basis of the most recent conduct or services and the conduct or services that were more than two years old at the time of due process or the private placement." Sen. Rep. No. 108-185 at 40. Claims for unilateral placements when the child has not attended public school for more than two years would be time-barred, as would claims for conduct over two years old that is not ongoing. For example, if a child has been denied FAPE for longer than six years, it is insufficient to only provide services to make up for two years.

Recommendation: Amend the proposed regulation C.1. to bring it into conformity with Virginia's statute of limitations for civil actions, Virginia Code § 8.01-229, providing that the statute of limitations is tolled when the person is incapacitated, and when the LEA uses "any other direct or indirect means to obstruct the filing of an action."
Justification: These provisions of the Virginia Code are important to protect parents' and children's rights. If a parent is legally incapacitated, and therefore unable to file a due process complaint, their children should not lose rights to FAPE. When a parent has a disability or is otherwise legally incapacitated, the law provides protection to ensure that the ability to file suit is not lost. It provides similar protection when the defendant obstructs the filing of an action. Virginia should include similar language to protect parents' rights to file due process in similar situations.

Recommendation: Amend the proposed regulation C.1. to provide that if parents file a due process complaint notice, it will toll the timeline in the event that further amendments are required.
Justification: The filing of a due process complaint notice should toll the due process timeline, so that the timeline is applied on the date parents filed their first complaint, not the date of the subsequent amendments. This is the same standard applied in court. Unrepresented parents may be denied the opportunity to litigate a claim due to an inartfully drafted complaint, even when they have a valid claim that was timely (if inelegantly) filed.

Recommendation: D. Procedure for requesting a due process hearing.
Amend the proposed regulation D.1. to provide explicitly that hearing notices may be filed by parents or the LEA.
Amend D.1.(a) to state that if the LEA initiates due process, it must provide the due process hearing complaint itself to parents and the VDOE.
Amend D.1.(b) to provide that parents' due process requests received only by the VDOE, will be

forwarded to the LEA, and make clear that if the LEA fails to send a copy to parents, its due process request will be rejected.

Justification: D.1. is inadvertently worded to appear as if only LEAs may file hearing notices, and as if the provisions in D. only apply to the LEA. Since many parents represent themselves pro se, language should be added making clear that parents can file due process, too. D.1.(a) is worded to provide that LEAs which initial due process must "advise" the parent and VDOE in writing. To comply with federal law, the regulations must require that the LEA send them the actual due process complaint, 34 C.F.R. §300.508(a). D.1.(b) should provide that only when parents fail to serve the LEA with the due process hearing complaint, the State shall forward a copy to the LEA. LEA personnel who make decisions about hearings are very familiar with special education law requirements and receive advanced training that parents do not. LEAs should never be permitted to avoid providing a copy of hearing complaint notices to parents and must provide notice to both the parents and the VDOE.

Recommendation: Amend the proposed regulation D.5. to make clear that the Hearing Officer cannot require pleading with specificity or require any more than the elements set forth in the statute.

Justification: IDEA 2004 requires due process complaints to contain the same elements as IDEA '97, and these are set out in D.2. The regulations should also make clear that a complaint is sufficient if it includes them. IDEA 2004 did not impose a pleading with specificity requirement. Indeed, the legislative history makes clear that due process notices need not reach the level of specificity required for a pleading or complaint filed in court, and need only give the other side "an awareness and understanding of the issues forming the basis of the complaint." Sen. Rep. No. 108-185 at 34. In adopting the Senate bill, the Congress specifically rejected the House's proposed language that parties describe "the specific issues." All courts that have addressed the issue have held that IDEA 2004 imposes minimal pleading requirements and does not require specificity. *Schaffer v. Weast, 126 S.Ct. 528, 532 (2005); Escambia Co. Bd. of Educ. v. Benton, Civ. No. 05-0009 at 12 (M.D. Ala. Dec. 23, 2005); Sammons v Polk County School Bd., Civ. No. 04-2657 at 7 (M.D. Fla. Oct. 28, 2005).*

Recommendation: Amend the proposed regulation D.6. to provide that issues not included in the due process complaint may be raised at a hearing if "the other party agrees otherwise."

Justification: The change is required to make Virginia's regulations consistent with federal requirements, 20 U.S.C. §1415(f)(3)(B); 34 C.F.R. §300.511(d).

Recommendation: Amend the proposed regulation D.6.a. so that parents have the same rights as LEAs when they are recipients of a due process hearing notice. Specifically, D.6.a. should be reworded as follows:

a. ~~If the local educational agency is not the initiating party to the due process hearing proceeding~~, ~~t~~ The Special Education Hearing Officer has the discretionary authority to permit the ~~local educational agency~~ recipient of a due process hearing request to raise issues at the hearing that were not raised in the ~~parent's(s')~~ initiating party's request for due process in light of particular facts and circumstances of the case.

Justification: The proposed regulation is one-sided and extremely inconsistent with federal law. Neither IDEA 2004 or the federal regulations permit such a one-sided state regulation. Parents should have the same and equal rights that LEAs have with regard to hearings. Indeed, IDEA

explicitly states that one of its purposes is to "to ensure that the rights of children with disabilities and parents of such children are protected," 20 U.S.C. §1401(d). IDEA's purposes do not include protecting LEAs' rights or giving them greater rights than parents. Moreover, parents may not be as knowledgeable about these provisions as the LEA personnel and should therefore have the greater leeway. Thus, the regulations should provide that both parents and LEAs, when recipients of a due process hearing notice, may raise additional issues not raised in the original due process hearing notice filed by the other side. Indeed, this has always been understood to be the case. To the extent that the regulation is intended to allow the LEA to raise a counterclaim in the same hearing, it must also allow parents to raise counterclaims. Such even-sided treatment is not only required by IDEA, but it promotes judicial economy by allowing all related claims to be heard in the same proceeding, as is the case in federal and state court. Indeed, the regulation appears to permit LEAs, by artful wording, to prevent parents from putting on an effective defense by limiting them only to the specific terms of the LEA's complaint. By contrast, LEAs would be permitted to raise any issues they chose.

Recommendation: E. Amendment of Due Process Notice.
Amend the proposed regulation E.2. to provide that a new resolution session need not be held if a motion for insufficiency is granted and parents amend their complaint.
Justification: The United States Department of Education, in the federal regulation commentary, states that in such situations, "There is no need to hold more than one resolution meeting, impose additional procedural rules, or otherwise adjust the resolution timeline," 71 Fed. Reg. 46699. It is contrary to IDEA's purposes to put children on a perpetual hamster wheel where complaints are dismissed for insufficiency and their parents must go through the entire process, including another 30 day resolution period, before they can finally have a hearing to adjudicate their claim. In the meantime, the child falls farther and farther behind.

Recommendation: Amend the proposed regulation E.2. to state that parties need to go through the amendment procedure only when seeking to significantly change the subject matter of the complaint, but they may correct minor insufficiencies, such as leaving out the child's address or name of his/her school, without going through the amendment process, particularly if the LEA already has this information in its files.
Justification: Most parents are not knowledgeable about the IDEA's procedural details and will have difficulty effectively using the hearing process. When a complaint is amended, the entire hearing process starts over. The parent must go through a 30-day resolution period, and then wait 45 days after that for a hearing decision. § 615 (c)(2)(E)(ii). It makes no sense to require parents to do this for minor errors, such as leaving out the child's full name, address or school name that the LEA has readily available in its records. If every minor error results in parents being required to amend the complaint or start the hearing process from the beginning, the child's ability to obtain a hearing and relief will be inordinately delayed by adding another 75 days to the process.

Recommendation: Amend the proposed regulation E.2. to require hearing officers to allow due process complaint notices to be amended unless doing so would prejudice the other party.
Justification: IDEA 2004 permits hearing officers to grant leave to amend complaints, but the regulations do not provide guidance to hearing officers about when it is appropriate to do so. Parents will not know and understand the hearing procedural rules in detail. They should be able

to amend complaints when necessary, rather than having to start the entire process from the beginning with a new complaint. The prejudice standard is clear and appropriate. In the alternative, the standard applied to complaints in federal court should be used. Since 1937, Federal Rule of Civil Procedure 15(a) has required that leave to amend be "freely given when justice so requires."

Recommendation: F. Assignment of the Special Education Hearing Officer
Retain current Regulation D.1. and D.2., which requires that hearing officers be appointed by the Supreme Court of Virginia. The Coalition also recommends that throughout section 8 VAC 20-81-210 VDOE retain the current hearing officer system as administered by the Virginia Supreme Court.
Justification: Supreme Court appointment of hearing officers is important to protect the integrity of the process. Because the actions of the VDOE may at times be an issue in a due process proceeding, it is important the hearing officers be completely independent and appointed by the Supreme Court. The danger for conflicts of interest is too great. There should not even be the appearance of impropriety in selecting a hearing officer. Retaining the authority in the Supreme Court is also consistent with its role in administering the judiciary; hearing officers are the first level of the judicial process for IDEA cases.

Recommendation: Amend the proposed regulation F.1 to require that the Hearing Officer be appointed within five business days (three for expedited hearings), rather than the LEA begin the process within those five business days (three for expedited hearings).
Justification: There are often pre-hearing matters that must be decided by hearing officers. For example, if there are complaints that a resolution session was not appropriately commenced, or if there is a motion for insufficiency, a decision is promptly needed. As a result, the hearing officer appointment process needs to be completed within the five business days, not commenced.

Recommendation: Amend the proposed regulation F.1. to require that parents, as well as LEA, be informed of the hearing officer appointment by the State. Alternatively, require the LEA to immediately notify parents upon the appointment of the hearing officer.
Justification: As worded, the proposed regulation would permit the LEA to immediately learn who the hearing officer is, but delay providing that information to parents. Both parties should receive the information at the same time, especially with today's telecommunications technology.

Recommendation: Amend the proposed regulation F.3.b. to provide that in expedited hearing situations, the decision about disqualifying a hearing officer must be made with sufficient time for the hearing to proceed within the requisite 20 school days.
Justification: Expedited hearings are required in discipline situations because of the harm to a child from inappropriately changing his/her placement. IDEA 2004 does not permit exceptions to the 20 school day timeline for expedited hearings, and the regulation should incorporate this into making the determination about disqualifying a hearing officer.

Recommendation: Amend the proposed regulation F.4.b. to provide that no hearing officer may be an employee of any LEA, not simply the LEA involved in educating the child.
Justification: Hearing officers must be impartial and cannot have personal or professional interests that conflict with their objectivity. Often, hearings involve issues that apply beyond the

LEA at issue to other LEAs. Employees of LEAs cannot be truly impartial when hearing due process requests concerning their fellow LEAs.

Recommendation: Amend the proposed regulation F.4.c. to provide that persons who are employees of elementary and secondary school related agencies or organizations cannot serve as hearing officers.
Justification: The present language is one-sided. It prohibits persons who represent schools or parents in special education or disabilities cases from serving as hearing officers and then prohibits employees of parents' rights and disabilities rights organizations from serving. Similarly, employees of school-related organizations should not serve as hearing officers. Impartiality is important. If it is important to protect LEAs against employees of disability rights organizations from serving as hearing officers, it is equally important to protect parents from hearing officers who are employees of school related agencies or organizations.

Recommendation: H. Child's status during administrative or judicial proceedings.
Retain the proposed regulation H.1.-5. as consistent with federal and state law.
Justification: Proposed H 1.-5. are consistent with federal and state provisions regarding tendency, and retains the requirements in the existing Virginia regulation. In particular, H.3. complies with the requirements of federal law, IDEA 2004, 20 U.S.C. § 1415(j) and the case law that has developed there under, as determined by the Supreme Court's determination in *Town of Burlington v. Dept of Educ.*, 471 U.S. 359 (1985) that a hearing officer's decision agreement with the parents that a placement is appropriate is be treated as an agreement between the state education agency (SEA) and the parents for purposes of IDEA § 1415(j), and accordingly 34 C.F.R. § 300.518(a).

Recommendation: Strike the proposed regulation H.6., which provides that a Part C program is not stay put for children transitioning from Part C to Part B.
Justification: IDEA 2004 only permits the adoption of regulations that are necessary to ensure compliance with the specific requirements of IDEA 2004. 20 U.S.C. §607(a). Although H.6. is consistent with 34 C.F.R. §300.518(c), that federal regulation is not required to implement the requirements of IDEA 2004. Indeed, IDEA 2004 made no changes with regard to Part C-Part B transition and stay put.

Recommendation: Retain the proposed regulation I. in full.
Justification: Retain the proposed I, rights of parties in the hearing, in full. It complies with the requirements of federal law and regulation, including 20 U.S.C. §1415(f), and 34 C.F.R.300.512.

Recommendation: J. Responsibilities of the Virginia Department of Education.
Amend the proposed regulation J.4. to require that LEAs maintain lists of hearing officers and qualifications and that this be shared with parents and the public upon request.
Justification: While it is certainly fine for LEAs to maintain lists of hearing officers and qualifications, it is equally important that this information be shared with parents and the public upon request.

Recommendation: Amend J.5.of the proposed regulations to provide that the names of LEA and school personnel shall not be redacted.
Require that Virginia continue to provide such hearing decisions through regular updating of its webpage.
Retain current regulation 8 VAC 20-80-76 G.6. requiring VDOE to notify the Virginia Supreme Court "of either the hearing officer's written decision or other conclusion of the case."
Justification: As a government agency responsible to the people of Virginia, the VDOE has made the appropriate decision to provide due process hearing decisions through its website. This is efficient and cost-effective, and promotes accountability. The regulations should require that the VDOE continue to do so. At present, names of LEA, school personnel, and sometimes counsel are redacted. While parents have the right to have personally identifiable information redacted under FERPA, LEA and personnel have no similar right. Identifying them is important for accountability; their actions and identities should not be hidden from public view. They do not have a valid privacy interest. When actions are appealed to federal court, while the family's name is replaced with initials or pseudonyms, the names of the school district and school personnel are not because they do not have a valid privacy interest.

Recommendation: Amend the proposed regulation J.6. as follows,

6. Ensure that noncompliance findings identified through due process or court action are corrected as soon as possible, but in no case later than 45 days ~~one year from identification~~.

Justification: The proposed regulation is out of compliance with federal and state law. No law permits a school district, upon being found out of compliance with IDEA's provision, to then take 12 months or even 6 months or 4 months to correct the problem. Once a hearing officer has ruled, the school district must take immediate steps to implement the decision. Children develop quickly and time is of the essence in addressing their learning difficulties. Even a few months makes the difference between beginning a year and the middle of that year, and the child who falls behind because of a disability needs that disability addressed very quickly. This is radically different from general civil litigation involving businesses or adults where they are generally not harmed if it takes more time for corrections to be made. Indeed, the additional harm caused by failing to implement a hearing decision for several months would likely be the basis for additional compensatory education. But no parent should be forced to file due process again to seek that remedy. Rather, LEAs should immediately implement hearing officer decisions, and if not immediately, within 45 days.

Recommendation: L. Responsibilities of the local educational agency
Retain current Virginia regulation I.16., providing for implementation plans within 45 calendar days of a hearing decision, and also requiring that hearing decisions be implemented while a case is being appealed.
Justification: It is important the LEAs implement hearing decisions and not delay their implementation. Current Virginia regulation requires the submission of implementation plans within 45 calendar days. It is important to retain this provision, rather than allowing LEAs a year to implement hearing officer decisions, as stated in proposed J.6.

Recommendation: Amend the proposed regulation L.2., to clarify that parents need not use the due process complaint form provided by the LEA.

Justification: In accord with 34 C.F.R. § 300.509, an LEA must develop forms to assist parents who file due process, but cannot require the use of the forms. A parent or agency may use any form or other document they desire to file for due process.

Recommendation: M. Responsibilities of the Special Education Hearing Officer
Retain current Virginia regulation J.3. requiring hearing officers to "Ensure that the rights of all parties are protected and that the laws and regulations regarding the educational placement or services of the child are followed in the conduct of the hearing and in rendering the decision."
Justification: This requirement is essential to protect the rights of parents and children with disabilities. At the core of a hearing officer's obligations lie the duties to ensure that the parties' rights are protected and the laws and regulations are followed.

Recommendation: Amend the proposed regulation M.14. by retaining current Virginia regulation J.16 which requires that copies of the due process decision be provided to both the parties and their attorneys, or at least to the parent, as well as the parent's attorney.
Justification: IDEA requires that parties receive copies of the due process hearing decision, 20 U.S.C.1415(h). It is Virginia's responsibility to ensure that parents receive the decision. This is even more important given the short timelines for appealing a due process decision. Virtually all attorneys comport themselves in accord with Virginia's ethical requirements. But on those rare occasions where an attorney does not provide the parent with the decision (perhaps because of inadvertence or exigent circumstances, or even more rarely inappropriate attorney conduct), the parent should not suffer the consequences.

Recommendation: Implement the proposed regulation M.15, requiring hearing decisions to include the findings of fact determinative of the case, the legal principles on which the decision is based, and an explanation for the basis of decision on each issue, and permitting an explanation of relief granted.
Justification: These requirements are at the core of judicial decision-making and benefit all parties.

Recommendation: Implement the proposed regulation M.17.d., providing that hearing officers may order LEAs to comply with the procedural requirements under 34 C.F.R.§ 300.500 through 300.536.
Justification: Retaining 17.d. is necessary to comply with IDEA 2004, 20 U.S.C. §1415(f)(3)(E) and 34 C.F.R. §300.513. Under the express terms of 1415(f)(3)(E), parents may seek relief from a hearing officer whenever an LEA has violated the procedural requirements in section 1415.

Recommendation: Implement the proposed regulation M.19, specifying the hearing officer's obligations when a manifestation determination is at issue.
Justification: Virginia regulation M.19 correctly describes the hearing officer's obligations regarding manifestation determination decisions under federal and state law. It is appropriate that LEAs demonstrate that a child's behavior was not a manifestation if the school district is to be permitted to remove the child from his/her placement, given the dangers that removal can pose.

Recommendation: N. Authority of the Special Education Hearing Officer.
If the portion of N.5. is retained authorizing hearing officers to require that parties and their representatives "comply with the Special Education Hearing Officer's rules," then the regulations must also provide that all such rules be published on the VDOE's webpage and must comply with IDEA, Virginia's special education requirements, and state and federal civil procedure and evidentiary rules. To the extent they exceed Virginia special education regulations, they must be subject to notice and comment.
Justification: Allowing hearing officers to individually adopt rules may lead to a hodgepodge of conflicting rules, and the rules applicable to an individual case will depend on which hearing officer the parties draw for the hearing. It is essential that any hearing officer rules comply with federal and state requirements. If hearing officers are permitted to adopt individual rules, these must be published on the VDOE's webpage, just as federal court judge's standing orders are published on the district court's webpage or automatically provided to parties upon filing a case and being assigned a judge.

Recommendation: Amend the proposed regulation N.9. to prohibit hearing officers from granting extensions of time for LEAs to respond to parents' due process complaint notices, challenge parents' due process complaints as insufficient, or unilateral LEA requests to extend the 30-day resolution session period.
Justification: The IDEA is clear on its face: parties have 10 days from receipt of a due process hearing notice to respond, 20 U.S.C. 1415 (c)(2)(B)(ii), and 15 days to file notices of insufficiency, 20 U.S.C. §1415(c)(2)(C). LEAs have 15 days to convene resolution sessions and 30 days to resolve the matter, 20 U.S.C. §1415(f)(1)(B). Virginia cannot change these Congressional deadlines or permit its hearing officers to do so. Granting additional extensions only delays further the ability of the child to receive FAPE. In each of these situations, unilateral LEA requests to extend deadlines do not serve a child's best interests.

Recommendation: Amend the proposed regulation N.10. to strike the language permitting dismissal of due process cases if "either party" refuses to comply in good faith with a hearing officer's order.
Alternatively provide that hearing officers have authority to dismiss cases when there is compelling evidence of bad faith by the party that filed for due process, and authority to enter default judgments and strike affirmative defenses when there is compelling evidence of bad faith by the recipient of due process (defendant).
Justification: A dismissal with prejudice is a severe remedy that can harm a child, who is left without FAPE or remedy. IDEA 2004 certainly does not permit a hearing officer to dismiss a parent's case because a defendant school district wrongfully ignores a hearing officer's order. The proposed language, however, would allow that. If defendant LEAs receive the authority to seek dismissal of parents' due process complaints, then plaintiff parents should have an equal ability to seek default judgments and the striking of affirmative defenses when LEAs fail to comply with hearing officer orders or IDEA 2004's procedural requirements. Likewise, because all of these remedies (dismissal, default judgments, and striking of defenses) are so severe, there must be compelling evidence of actual bad faith before they may be ordered.

Recommendation: Amend the proposed regulation N.13.c.(1) to state that the hearing officer is required (not may) to return the child to the placement from which he/she was removed if the

hearing officer determines that the removal violated special education disciplinary procedures or was a manifestation of the disability.
Justification: This change is necessary to conform with IDEA 2004. 20 U.S.C. §1415(k) requires that the child be returned to the placement in these situations. The hearing officer does not have the option, when the conduct is a manifestation, to keep the child in the interim placement.

Recommendation: Timelines for non-expedited due process hearings
Amend the proposed regulation O.1.a. to require that LEAs should make all reasonable efforts to schedule the resolution session at a mutually-agreed upon time and place, and contact the parent within five days of receiving the due process hearing request to schedule the meeting.
Justification: The purpose of resolution meetings is to decrease litigation by allowing the parties to negotiate a resolution to the problem. Parents must be able to attend the meeting if it is to achieve its purpose. The LEA should be required to make all reasonable efforts to ensure that the resolution sessions occur at mutually-agreed upon times and places, including making actual contact with parents within five days of receiving the due process complaint notice. Because the new federal regulations, 34 C.F.R. §300.510(b)(4), permit LEAs to dismiss due process complaints if parents do not participate, LEAs must make every effort to schedule the resolution session at a mutually-agreed upon time and place. Otherwise, LEAs could simply dismiss cases by scheduling sessions when parents cannot attend.

Recommendation: Amend the proposed regulation O.1.a. to specifically recognize the rights of parents to bring advocates and others with special knowledge of the child to the resolution meeting.
Justification: The United States Department of Education has made clear that parents can bring advocates, family friends, and other participants to the resolution session as they have knowledge or special expertise about the child. 71 Fed. Reg. 46701.

Recommendation: Amend the proposed regulation O.1.a. to state that LEAs may not abuse or misuse the resolution session, and may not prevent parents from seeking due process who have attended the session.
Justification: The LEA should not use the resolution session for any purpose other than bona fide attempts to resolve the complaint. LEAs may not impose additional obligations on parents, use the resolution sessions to intimidate or interrogate parents, use the session as a one way discovery session, or use the parent's denial of any offer by the agency as grounds for dismissing the hearing. Under the IDEA, both sides exchange evidence at the same time, five business days, before the hearing. The LEAs may not use the resolution session to subvert this equitable statutory requirement. See IDEA 2004 § 615(f)(2). The statute does not authorize an LEA to prevent a parent from having a due process hearing when the parent has attended the resolution session.

Recommendation: Amend the proposed regulation O.1.d. to require the LEA to consult parents to select relevant team members within five days of the receipt of the due process hearing request.
Justification: Parents are equal partners in the resolution team. To ensure a resolution is achieved, IEP members whom the parent believes need to attend must be included. The LEA

must consult parents sufficiently in advance of the meeting to ensure that parents have meaningful input and that arrangements can be made to ensure that the team members attend.

Recommendation: Amend the proposed regulation O.2.d. to provide that efforts to arrange a resolution meeting must be documented as required in accord with 34 C.F.R.300.322(d) or 8 VAC 20-81 E.4. before the school district may request dismissal.
Justification: The federal regulations, 34 C.F.R. §300.510 make clear that before a school district may request dismissal because parents failed to participate in the resolution meeting, the LEA must make reasonable efforts to obtain parent's participation, including documentation "using the procedures in §300.322(d)." The Virginia regulations must require the use of these procedures, too.

Recommendation: Amend the proposed regulation O.2. to include a new section to provide that if parents are unable to attend a resolution session, the LEA should use alternative means to ensure participation, such as those described in Sec. 300.328, including conference calls or videoconferencing, subject to the parent's agreement.
Justification: Parents must take part in the resolution session so that they can move forward to due process and obtain FAPE for their child. Parents may be unavailable because they are sick, unable to get permission for time off work, or serving in the military. As the United States Department of Education recognized in the Preamble of IDEA, when circumstances beyond a parent's control prevent him/her from attending a resolution session, the LEA should offer to use alternative means to ensure parent participation, such as those described in Sec. 300.328, including videoconferences or conference telephone calls, subject to the parent's agreement. 71 Fed. Reg. 46702.

Recommendation: Amend the proposed regulation O.2.e. to require that if the LEA fails to convene a resolution hearing as required, and parents seek intervention by a hearing officer to start the 45-day due process timeline, the hearing officer must rule within three days of receipt of parents' motion.
Justification: The purpose of the resolution period is to seek an agreed-upon solution, not create a 30-day waiting period. If the LEA fails to convene a resolution session, new federal regulation, 34 C.F.R. §300.510(b)(5) permits parents to seek the intervention of a hearing officer to start the due process timeline. Permitting this to be delayed by a delayed briefing and motions schedule would prevent parents from achieving the solution to which the law entitles them if LEAs ignore their obligations to schedule a hearing. Consequently, the regulations should require hearing officers to rule promptly on such a motion.

Recommendation: Amend the proposed regulation O.4.c. by adding a new section to permit a signed resolution agreement to be enforced through the Complaint Procedures under 8 VAC 20-80-78, as well as in state or federal court.
Justification: The federal regulations permit States to allow parties to enforce a resolution agreement through the complaint procedures if they choose to do so, 34 C.F.R. §300.510(d). Virginia should permit parents to do so, as the complaint process is simpler and less expensive.

Recommendation: Amend the proposed regulation O.9. to provide that if a LEA requests due process, the resolution meeting and process shall apply, including 15 days to convene a meeting

and 30 days to reach a resolution, and the written resolution session agreement enforceable in court.

Justification: The purpose of the resolution process is ostensibly to resolve due process matters between the parties. Prompt resolution of complaints benefits everyone. Consequently, just as parents are subjected to the 30-day resolution period prior to due process, LEAs should be, too.

Recommendation: P. Timelines for expedited due process hearings.
Amend the proposed regulation P.3. to require documentation within 3 business days of changes in hearing dates.

Justification: Because expedited due process hearings are on a fast track, and held within 20 school days of receipt of request, requiring documentation of changed hearing dates within five business days does not appear to always sufficiently inform the parties of changes. This should be changed to 3 business days.

Recommendation: R. Right of appeal.
Retain the current language in Virginia Regulation 8 VAC 20-80-76 O.1. that permits hearing decisions to be appealed within 1 year of the date of issuance rather than 90 days.

Justification: Virginia should keep its current regulations permitting appeals within a year of issuance of the decision. It should not be shortened to 90 days. This has served Virginia and Virginians well for many years, and it serves the interests of justice. Parents unfamiliar with their rights may need adequate time to bring a case, after carefully weighing the decision and information. Indeed, too short of a timeline may result in more cases being appealed as parties rush to protect their rights. The IDEA, 20 U.S.C. §1415(i)(2) specifically permits Virginia to set its own timeline for appeals.

8 VAC 20-81-220. Surrogate parent procedures.

Recommendation: Amend regulation as indicated.

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 biological, 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.~~
      c. ~~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.

Justification: Changing subsection B(1) to reflect changes in the definition of 'parent' in the federal IDEA regulations because we also support the definition of 'parent' in the federal IDEA regulations be substituted for the definition current and proposed Virginia regulations. The change would also save LEAs 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 regulations.

The above change to subsection B(2) would clarify when LEAs are responsible for appointing surrogate parents.

The proposed change to subsection B(4) clarifies that the LEA procedures for appointing surrogates must comply with the provisions of this regulation.

Recommendation: Retain current regulations pertaining to surrogate parent consent rights when termination of services is involved.

B. Appointment of surrogate parents.

7.b. The child is found no longer eligible for special education services and the surrogate parent has consented to the termination of those services;

Justification: Removing this current right would severely impact student and parental rights. Virginia has always gone beyond the federal requirements regarding parental consent which has reduced the need for due process requests in Virginia. The VDOE proposes to allow LEAs to "change services" through "partial termination" without parental consent. Parents would have to resort to due process to keep their children from loosing needed services. There have been multiple arguments made regarding this provision and the actual impact it will make on students with disabilities. Students and parents are not in the same position to pursue due process, given the formality of the proceedings involved, if they chose to represent themselves and the expense if they are forced to obtain legal counsel. Retaining the provision that permits LEAs to pursue due process if they believe a student is receiving unnecessary services means that LEAs will only seek to terminate services that are truly unnecessary or overly invasive.

8 VAC 20-81-230. Local educational agency administration and governance.

Recommendation: Retain current regulation requirement for checks of revisions/amendments to policies and procedures by respective parties (Special Education Advisory Committee (SEAC), local school board, VDOE) in 8 VAC 20-81-230.B.

1.a. Assurances that the local educational agency has in effect policies and procedures for the provision of special education and related services in compliance with the requirements of

the Act, the policies and procedures established by the Virginia Board of Education, and any other relevant federal and state laws and regulations and any revisions to such policies and procedures. Local school divisions shall first submit revisions to the policies and procedures to their local school board for approval.;

2. Prior to submission to the Virginia Department of Education, the annual plan shall be reviewed by the local school division's local advisory committee, and approved by the local school board. State-operated programs, the Virginia School for the Deaf and Blind at Staunton, and the Virginia School for the Deaf, Blind, and Multi-Disabled at Hampton shall first submit any revisions to the policies and procedures with their annual plan to the state special education advisory committee (SEAC) for review prior to submission to the Virginia Department of Education.

Justification: Oversight is imperative to ensure provision of FAPE is upheld. Our system of government is based on a system of checks and balances. By otherwise giving LEAs such autonomy, the VDOE will be less aware if LEAs are correctly crafting procedural changes to the provision of FAPE. Via Virginia's Education statute, Virginia may impose additional requirements in providing state funds to LEAs. Consequently, it is appropriate to continue to require changes to procedures and supporting documentation be submitted to the VDOE.

Recommendation: Retain the requirement to have local advisory committees (LACs) or special education advisory committees (SEACs).

Justification: Local SEACs play an important role in collaboration with school personnel by advising school divisions about the unmet needs of students with disabilities and by making recommendations on how those needs can be met. SEAC representatives come from a broad scope of community representatives. They also provide another opportunity for parent participation in the education process.

Recommendation: Retain current requirement for LEA personnel to serve only as consultants to local Special Education Advisory Committees (SEACS).

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. Local school division personnel shall serve only as consultants to the committee.

Justification: School personnel currently have the right to be members on SEACs, serving as consultants. Their participation allows them to provide specific information, advice and assistance. Allowing school personnel to be voting members could compromise the SEAC's ability to provide an objective advisory role.

Recommendation: Retain current regulation requirements for checks of revisions/amendments to policies and procedures by respective parties (SEAC, local school board, VDOE) in 8 VAC 20-81-230.2.e

e. Review the policies and procedures for the provision of special education and related services prior to submission to the local school board; and the Virginia Department of Education; and

Justification: Oversight is imperative to ensure provision of FAPE is upheld. Our system of government is based on a system of checks and balances. By otherwise giving LEAs such autonomy, the VDOE will be less aware if LEAs are correctly crafting procedural changes to the provision of FAPE. Via Virginia's Education statute, Virginia may impose additional

requirements in providing state funds to LEAs. Consequently, it is appropriate to continue to require changes to procedures and supporting documentation be submitted to the VDOE.

Recommendation: Amend the proposed regulation by adding a subsection for LEAs to adopt a guidance document for the provision of instructional materials. Insert new subsection 4 as follows and renumber proposed subsection "K.4" as "K.5" for Definitions.

4. The local educational agency shall adopt a guidance document outlining the reasonable steps the local education agency will take to facilitate providing instructional materials in accessible formats in a timely manner. The adopted guidance shall also give consideration to availability of supporting assistive technology, supplemental books and materials, advance availability of teacher syllabuses, and availability of trained personnel to proof non-NIMAS documents prior to student receipt.

Justification: The guidance document will facilitate consideration of planning aspects which otherwise would impede students' access and use of instructional materials at the same time as other students.

Recommendation: Amend the proposed regulation in 8 VAC 20-81-230.K.4.a by deleting "shall."

a. The term "timely manner" has the same meaning as the defined in 8 VAC 20- 81-10 ~~shall~~.

Justification: Appears to be a typographical error.

8 VAC 20-81-240. Eligibility for funding.

Recommendation: Retain current regulations regarding submittal of amendments or revision to local policies and procedures.

A. Each local school division and state operated program shall maintain current policies and procedures and supporting documentation to demonstrate compliance with the Act and the Virginia Board of Education regulations governing the provision of special education and related services, licensure and accreditation. Changes to the local policies and procedures and supporting documentation shall be submitted upon amendment or revision ~~made~~ as determined by local need, as a result of changes in state or federal laws or regulations, as a result of required corrective action, or as a result of decisions reached in administrative proceedings, judicial determinations, or other findings of noncompliance.

Justification: Oversight is imperative to ensure provision of FAPE is upheld. Our system of government is based on a system of checks and balances. By otherwise giving LEAs such autonomy, VDOE will be less aware if LEAs are correctly crafting procedural changes to the provision of FAPE. It is appropriate to continue to require changes to procedures and supporting documentation be submitted to the VDOE.

8 VAC 20-81-250. State funds for local school divisions.

Recommendation: Implement the regulations in this section as proposed.

Justification: Additional safeguards have been added for provision of FAPE and LRE to students in state funded placements.

8 VAC 20-81-260. Federal funds.

Recommendation: Implement the regulations in this section as proposed.
Justification: Changes represent clarity on supports and services to be provided to students.

8 VAC 20-81-280. Funding, withholding, and recovery of funds.

Recommendation: Implement the proposed Virginia regulations that allow the Virginia Board of Education to use its discretion to withhold funds when an LEA fails to provide FAPE.

C. Whenever the Virginia Board of Education, in its discretion, determines that a local educational agency fails to establish and maintain programs of free and appropriate public education which comply with the regulations established by the Board, the Board may withhold all state and federal funds for the education of eligible children with disabilities and may use the payments which would have been available to such local educational agency to provide special education, directly or by contract, to eligible children with disabilities in such manner as the Board considers appropriate.

G. Any local educational agency in receipt of a notice, as described in section C., shall provide public notice to the local educational agency's jurisdiction regarding pendency of the action.

Justification: These proposed Virginia regulations allow swift corrective action by the Virginia Board of Education to ensure FAPE is provided to eligible children with disabilities.

8 VAC 20-81-300. Use of public and private insurance.

Recommendation: Implement the regulations in this section as proposed.
Justification: New regulations incorporated in this section add protection to parents with additional consent requirements and provision of information regarding LEA responsibilities.

8 VAC 20-81-330. Compliance with § 504 of the rehabilitation act of 1973, as amended.

Recommendation: Implement the regulations in this section as proposed.
Justification: Additional detail on grievance procedures and reimbursement of costs add clarity and accountability to the process involved.