

Commenter: Virginia Office for Protection and Advocacy * May 20, 2008

VOPA's Comments

EXECUTIVE SUMMARY

VOPA has submitted more detailed comments about the Proposed Virginia Special Education Regulations. This Executive Summary identifies the proposals that pose the greatest threats to children with disabilities and their parents.

In general, VOPA supports and shares the concerns raised by Governor Kaine, in his March 21, 2008 statement, and the Comments submitted by the Coalition for Students with Disabilities in Virginia.

In particular, we are alarmed by the way the proposed Regulations restrict parental and child rights; indeed, in some areas, the Regulations completely remove rights. VOPA urges that VDOE to review these comments and revise their Regulations to foster and protect the rights children and parents are given in federal law and the current state regulations.

As written, the proposed Regulations will hurt children and their parents by:

- **Denying Parents the Right to Serve on Child Study Committees Determining Special Education Eligibility.**

The proposed regulations delete the current requirements for Child Study Committees and leave it to each LEA to designate procedures to review referrals of children suspected of having a disability. If Child Study Committees are deleted, parents will be effectively removed from the screening process because there will be no guarantee that they be participants. Additionally, if mandatory Child Study provisions are deleted, 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.

- **Denying Parents the Right to Receive Timely Evaluations.**

The proposed Regulations give schools 65 business days to complete Special Education evaluations instead of the 60 calendar days set out in federal law. If the 65 business day timeline, as proposed by Virginia, is allowed to remain, it will improperly and unlawfully delay evaluations for special education services and delay the receipt of services by children who desperately need them. The federal 60 calendar day deadline provides ample time to conduct and complete an evaluation.

- **Denying Parents the Right to Receive Timely Findings of Eligibility.**

The proposed Regulations allow the proposed 65 business day eligibility timeline to be extended even further if there is a “need” to collect additional “data.” This Regulation will unnecessarily and unlawfully delay services to children who need them. As stated, VOPA supports the 60 calendar day timeframe for evaluations set out in federal law.

- **Adding New and Arbitrary Criteria for Eligibility.**

The proposed Regulations set out new eligibility criteria that are not required under federal law and place additional hurdles for families and students seeking Special Education services. The proposed Regulations place eligibility teams in the position of medical professionals—diagnosticians—a role for which they are not qualified. The proposed eligibility criteria set forth arbitrary standards children must meet in order to be found to have a disability. For example, under the new regulations, a child must meet a minimum of 6 separate and seemingly arbitrary criteria for autism. If these new provisions are adopted, they will lead to increased litigation and delays in eligibility determinations.

- **Removing Schools’ Obligation to Implement IEPs Within a Certain Timeframe.**

The proposed Regulations remove the current requirement that an IEP be implemented as soon as possible following the child’s IEP meeting. Without this requirement, schools will be free to develop IEPs, but not actually have to implement them in a reasonable time. Additionally, IEP’s are already formatted to prescribe specific dates when services begin and end. This existing format allows parents to consent to the time when services are to begin and end. Removing it will deny parents this ability and their right to know that their children are actually receiving the services they consented to.

- **Removing Schools’ Obligation to Include Benchmarks or Short-Term Objectives in IEPs.**

The proposed Regulations remove the current requirement that schools include benchmarks or short-term objectives in IEPs. Benchmarks and short-term objectives show a child’s progress towards his or her IEP goals and help parents follow and measure their child’s achievements. Without these important indicators, parents will not be well-informed about their children’s progress and will not be able to take the quick action needed when children fail to meet the goals set out in their IEPs.

- **Unnecessarily Delaying Parents their Right to Receive a Copy of their Child’s IEP.**

The proposed regulations improperly allow schools to delay providing parents with a copy of their child’s IEP until 10 days after an IEP meeting. This arbitrary time period is unnecessary and will delay the implementation of IEPs and the services they mandate. In Virginia, many school districts craft IEPs in electronic format during IEP meetings. This process facilitates speedy updates

to IEPs and allows schools to give parents a copy of the IEP during or right after the meeting.

- **Denying Parents the Right to Independent Functional Behavioral Assessments.**

The proposed Regulations do not identify a 'Functional Behavioral Assessment' as a type of educational evaluation. As a result, parents may be denied the right to receive independent Functional Behavioral Assessments if they disagree with the school's findings. Virginia schools have claimed that Functional Behavioral Assessments ("FBA") are not evaluations and have denied parents independent FBAs. However, the schools' position is contrary to that of the federal Office of Special Education Programs (OSEP), which has ruled that an FBA is an evaluation and that parents are entitled to independent FBAs. See Letter to Christiansen, dated February 9, 2007. Also, a Functional Behavioral Assessment, whether done by a school or independently, should not be simply a 'review of existing data' as is proposed. Rather, it should evaluate the child in all settings throughout the school day.

- **Denying Interpreting Services to Children.**

The proposed Regulation only requires that schools provide interpreting services to children who are deaf or hard of hearing. Interpreting services are utilized by many children who are not deaf or hard of hearing but who have other disabilities affecting their ability to communicate, such as Down's Syndrome and Oral Motor Apraxia. The current Virginia regulations do not unnecessarily limit who can receive interpreting services and should be maintained.

- **Denying Parents the Right to a Fair Due Process Hearing by Shifting Control of Hearing Officers to VDOE.**

The proposed Regulations shift control of Special Education Hearing Officers from the independent Supreme Court of Virginia to VDOE, which is sometimes the defendant in Due Process actions. The proposed Regulation is inappropriate because it allows for the possibility of 'tainted' Hearing Officers - who may be forced to sit in judgment against their employer - rather than truly impartial Hearing Officers under control of the Virginia Supreme Court.

Because the actions of 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 so great that, by its very nature, it causes an appearance of impropriety. For example, the proposed Regulations allow VDOE to override a Hearing Officer's decision. Hearing Officers cannot be truly independent and impartial if a nonjudiciary body like VDOE can overrule them.

Finally, even if VDOE is permitted to take control over Hearing Officers - which VOPA strongly opposes - the proposed Regulation should be revised to make it clear that Hearing Officers and parties, including VDOE, may not engage in improper 'ex parte' communications. The Regulations should also require that Hearing Officers follow the Code of Ethics that all attorneys are required to follow.

- **Denying Parents Equal Rights in Due Process Hearings.**

The proposed Regulations improperly allow schools to raise any issue at a Due Process Hearing, whether or not that issue was raised in the parent's initial request for Due Process. This "right" is not contained anywhere in federal law and will allow schools to ambush parents with new issues at trial. Even worse, the proposed Regulations deny parents the same right.

- **Denying Parents the Right to Timely Implementation of Due Process and Court Orders.**

The proposed Regulations give schools one year to implement Orders made by Hearing Officers and Courts, instead of the 45 calendar days set out in the current regulations. Under the current Virginia regulations, schools must submit implementation plans within 45 calendar days of a Hearing Officer or Judge's decision. This new regulation would delay services to children and deny parents the right to receive the relief ordered by Hearing Officer and Judges. Additionally, the proposed Regulation is out of compliance with federal and state law. No law permits a school, upon being found out of compliance with IDEA, to then take one year to correct the problem. Once a Hearing Officer has ruled, schools should be required to take immediate steps to implement the decision.

Please see our website for the complete comments:

www.vopa.virginia.gov