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February 4, 2000

Dr. Rhonda Weiss, Policy Analyst
U. S. Department of Education
330 C. Street, SW
Switzer Bldg, Room 3626
Washington, DC 20202

Re: Glenn White v. Commonwealth of Virginia

Dear Dr. Weiss:

The Virginia Department of Education (VADOE) has a long-standing policy and practice of failing to enforce certain provisions of 34 C.F.R. Part 300. The U. S. Department of Education has cited VADOE for "problems in the effectiveness of VADOE's monitoring and complaint management procedures" and required VADOE to develop a "corrective action plan" to remedy these identified problems.[1] Despite these actions, and assurances from VADOE that it had implemented appropriate policies and procedures about dealing with complaints against LEAs, VADOE has continued their pre-existing policy and practice, as witnessed by the following events.

On January 17, 2000, at a special education due process hearing against the Virginia Board and Virginia Department of Education, counsel for VADOE claimed that VADOE does not have to comply with regulations issued by the U. S. Department of Education, arguing that:

> . . . (T)he new federal regulation (34 C.F.R. § 300.514) exceeds the statutory authority granted to the United States Department of Education under the IDEA.
> . . .
> (The) U. S. Department of Education's promulgation of Section 300.514(c) exceeded the statutory authority by providing an alternative process by which to establish a stay-put placement that is not found in the IDEA and contradicts the governing statute. (Transcript of January 17, 2000 Oral Argument, pages 50-52)

At issue in this due process hearing is VADOE's responsibility for ensuring that:

[1] OSEP Monitoring Report for Virginia, September 1995, "General Supervision, page 1-2

> "[A] free appropriate public education is available to all children with disabilities residing in the state between ages three and 21, inclusive . . ." 20 U.S.C. § 1412(a)(1)(A)

VADOE will not change their long-standing policy and position unless the U. S. Department of Education and the U. S. Department of Justice force them to change. VADOE continues to take this position because they believe your agency will not require them to comply with the law and because there have been no consequences for non-compliance.

On behalf of Glenn White and other Virginia children with disabilities, I respectfully request that the U. S. Department of Education require the Virginia Department of Education to comply with the law.

Decision by State Level Review Officer
July 10, 1998

Before requesting this second due process hearing, Glenn White and his parents prevailed in an earlier special education due process hearing.[2] On July 10, 1998, the parents were awarded retroactive and prospective tuition reimbursement from Henrico County Public Schools for their son's education at a special education school that teaches children with dyslexia how to read. The Review Officer found that:

> The Henrico County Public Schools has failed to provide for a Free Appropriate Public Education of Michael Glenn White for the school year 1996-1997. The education offered for Michael Glenn White for 1996-1997 was inappropriate. The IEP for Michael Glenn White for the 1996-1997 school year was invalid and did not provide for a free appropriate public education. The IEP for Michael Glenn White for the 1997-1998 school year was invalid and did not provide for a free appropriate public education. Therefore, Michael Glenn White is entitled to reimbursement for tuition and costs attendant to his enrollment at New Community School for the year 1996-97 as a result of the inappropriateness of the education by Henrico County Public Schools that year and for the year l997-98 and in the future for the invalidity of the 1997-98 IEP and the failure of the Henrico County Public Schools to provide for Free Appropriate Public Education for Michael Glenn White then as well as its inability to do so in the future. (Review Officer Decision, page 10-11)

On August 10, 1998, the local school district appealed to state court. As a part of this appeal, and to prevent the case being removed to federal court, the local school district omitted any mention of federal statutes and regulations, and relied exclusively on state statutes and regulations.

Henrico Refuses to Implement Review Officer's Decision
August 19, 1998

After a Review Officer issues a final decision, the Virginia Regulations require the LEA to file an Implementation Plan with VADOE about how the LEA will implement the decision of the

[2] See Exhibit 1, July 10, 1998 Review Decision mailed July 13, 1998

Review Officer.[3] On August 19, 1998, the local school district filed the required "Implementation Plan" with VADOE. Their "Implementation Plan" did not implement the Review Officer's decision but simply stated that Henrico was appealing the decision to court.[4]

After receiving this "Refusal to Implement Plan" from Henrico, VADOE was on Notice that Henrico had refused to implement the Review Officer's decision, and that Henrico would not provide Glenn White with a free appropriate education.

As a recipient of federal funds, Henrico must provide assurances that all children residing within its jurisdiction are provided with a free appropriate education. 20 U.S.C. 1413(a)(1).

When an LEA fails to comply with IDEA requirements, the SEA "shall reduce or not provide further payments to the LEA . . . until the SEA is satisfied that the LEA . . . is complying with that requirement." 20 U.S.C. 20 1413(d)(1). VDAOE has not reduced or withheld funding from Henrico until Henrico complies with the law.

VADOE has not required Henrico County to implement the decision of the Review Officer nor has VADOE required Henrico County to provide Glenn White with a free appropriate education. In fact, VADOE has **never** required a local school district to implement a Review Officer's decision if the school district notes their intent to file an appeal.

When the SEA determines that the LEA is "unable to establish and maintain programs of free appropriate public education that meet the requirements of the Act," it must use the funds that would otherwise go to the LEA to provide these services to the child with a disability. 20 U.S.C. § 1413(h). 34 C.F.R. § 300.360-361. VADOE has not used Henrico's funds to provide services to Glenn White so that he receives a free appropriate education.

On March 12, 1999, the U. S. Department of Education issued new regulations. 34 C.F.R. § 300.514 applies to Glenn White:

> **Child's status during proceedings.**
> (c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

The U. S. Department of Education's explanation / commentary about the special education Regulations in Vol. 64, No. 48 of the March 12, 1999 issue of the Federal Register at page 12615 states:

> Paragraph (c) is based on **longstanding judicial interpretation** of the Act's pendency provision that when a State hearing officer's or State review official's decision is in agreement with parents that a change in placement is appropriate, that decision

[3] Virginia Special Education Regulations.
[4] See Exhibit 2, Implementation Plan

> constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement **during subsequent appeals**. See *e.g., Burlington School Committee v. Dept. of Educ*. 471 U.S. 359, 371 (1985) *Susquenita School District v. Raelee S*., 96 F.3d 78, 84 (3rd Cir. 12996); *Clovis Unified v. Office of Administrative Hearing*, 903 F.2d 635, 641 (9th Cur, 1990). Paragraph (c) of this section incorporates this interpretation. However, this provision does not limit either party's right to seek appropriate judicial review under 300.512, it only shifts responsibility for maintaining the parent's proposed placement to the public agency **while an appeal** is pending in those instances in which the State hearing officer or State review official determines that the parent's proposed change of placement is appropriate. (Emphasis added.)

According to 34 C.F.R. § 300.514 and supporting commentary, if the "State review official's decision is in agreement with parents that the change in placement is appropriate, this decision constitutes an agreement by the SEA and the parents for the purpose of determining the child's current placement during subsequent appeals." Section 300.514 does not limit the right of an LEA or SEA to appeal the decision of a Review Officer but shifts "responsibility for maintaining the parent's proposed placement to the public agency **while an appeal** is pending in those instances . . ."

On May 25, 1999, nearly a year after the Review Officer issued the decision in their son's case, Mr. and Mrs. White wrote to VADOE and advised that:

> We are now very concerned and financially burdened because Henrico County appealed the decision of the State Level Review Officer, less than one week before Glenn started the 1998-99 school year. This meant that we again had to pay tuition and additional attorney fees . . . We make an average income and find that we are unable to continue to pay these expenses . . .
>
> . . .
>
> We have been so financially burdened that we have even sold the piano that my great-grandmother and great-grandfather gave me when I was eight. We are in such financial trouble now that we are worried we will never get financially sound again. Our mortgage payments are behind, we cannot make our payments to our attorney or the hospitals and this will affect our credit rating for years if not forever. We feel the legal system has failed us and Glenn. We were entitled to reimbursement and thought that we would get some relief last summer when the State Level Review Officer made his decision. It has now been nine months and Henrico County has done nothing but appeal the decision. They have not paid what they were ordered to pay. We do not have any resources left and are not sure how we will make any additional tuition payments. We are unable to pay for the additional attorney fees that result from Henrico County's noncompliance of the decision and that of the Federal Regulations. In addition we are at risk of losing our home if we do not get some immediate relief.
>
> It is our understanding that in most states in the country, public schools have to comply with decisions issued by Reviewing officers even if a case is appealed, but Virginia did not follow that rule. We also now understand that the new Federal Special Education Regulations require that the public schools comply with the Reviewing Officer's decision

while a case has been appealed. Please be sure that Henrico County follows the law, complies with the Reviewing Officer's decision, and make an immediate arrangement with the New Community School to fund Glen's tuition there for this coming academic year.[5]

VADOE Letter of Findings:
August 9, 1999

On August 9, 1999 the Virginia Department of Education issued their Letter of Findings.[6] The VADOE Letter of Findings includes the facts of the case and a comprehensive, well-reasoned analysis of the law requiring immediate implementation of the Review Officer's Order which was issued nearly one and a half years earlier:

> A summary of our office's analysis of the issues concludes that:
>
> 1. That the stay-put provision outlined in Section 1214(j) of the IDEA Amendment of 1997 and 34 C.F.R. § 300.514 applies in this case.
>
> 2. That the stay put provision requires Michael to remain in his current placement pending the appeal by HCPSA.
>
> 3. That Michael's current placement is The New Community School.
>
> 4. That HCPS is responsible for maintaining Michael's placement at The New Community School.
>
> 5. That HCPS is responsible for Michael's tuition during the pendency of their appeal which shall include reimbursement for the 1998-1999 school year.

In the Letter of Findings, VADOE ordered Henrico County Public Schools to implement the Review Officer's decision and pay for Glenn's education:

> Submit payment to the private placement in accordance with the review officer's decision, thereby providing for Michael's tuition during the pendency of the appeal in accordance with the requirements of the newly a enacted legislation of June 4, 1997, and its implementing regulations . . . (and to) Provide documentation to the Office of Special Programs which verifies payment in accordance with the reviewing officer's order.

Would Henrico County obey the order from VADOE? Would VADOE cut off funds to Henrico? Would Henrico retreat? Would VADOE pay Glenn's tuition directly to The New Community School while the battle continued between the SEA and LEA? What would happen to Glenn in the interim? A showdown was imminent.

[5] See Exhibit 3, May 25, 1999 letter from Whites to VADOE
[6] See Exhibit 4, August 9, 1999 letter from VADOE to Whites

Henrico Refuses to Obey VADOE Order

Henrico County responded to this Letter of Findings by filing several letters of objection. VADOE stood by their ruling. Apparently, the dates of the parents' May 25, 1999 letter and the school district's earlier August 10, 1998 appeal caused some confusion. At one point, VADOE erroneously stated that Henrico noted their appeal to the Circuit Court in 1999, not 1998.

Henrico County refused to obey the Order from VADOE. On November 15, 1999, VADOE re-asserted their position, as stated in their August 9, 1999 Letter of Findings.

VADOE Reverses Their Position
December 2, 1999

On December 2, 1999, VADOE suddenly reversed their position.[7] In a December 2, 1999 letter, they said the "Department of Education will defer to the decision of the Court." VADOE offered no explanation for this sudden reversal. However, during that week, Dr. Jo Lynne DeMary was appointed Acting Superintendent of the Virginia Department of Education. Formerly, Dr. DeMary worked as an administrator for Henrico County Public Schools. Dr. DeMary also worked as the State Director of Special Education.[8]

The Individuals with Disabilities Education Act requires that the Virginia Department of Education provide written notice whenever such agency "refuses to initiate or change; the identification, evaluation, or educational placement of the child, in accordance with subsection (c) or the provision of a free appropriate public education to the child. The content of such notice shall include an explanation of why the agency proposes or refuses to take the action; other options that were considered, and the reasons why those options were rejected." 20 U.S.C. § 1415(b)(3) and § 1415(c). VADOE failed to comply with this requirement.

Parents Request 2nd Due Process Hearing
December 18, 1999

The parents obtained a favorable ruling from the state Review Officer one and a half years earlier. After investigating the allegations in the parents May, 1999 letter, VADOE issued a Letter of Findings in the parents' favor. Then, on December 2, VADOE reversed, pulling the rug out from under the parents.

On December 18, 1999, the parents, through this counsel, requested a special education due process hearing against the Virginia Department and Board of Education.[9]

A Hearing Officer was appointed and briefs were ordered.

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[7] See Exhibit 5, December 2, 1999 letter from VADOE
[8] Virginia's Monitoring Report, page v.
[9] See Exhibit 6, December 18, 1999 letter from Wright requesting due process hearing against VDOE

On January 7, I filed a brief on behalf of Glenn White and his parents and submitted my list of witnesses and exhibits.[10]

On January 10, 2000, VADOE filed a Motion to Join Henrico County School Board as a Necessary Party, a Motion to Stay Due Process Proceedings, a Motion to Dismiss or Abstain, and a Memorandum in Support of the Motions.[11] Counsel for VADOE did not file a list of witnesses nor did they file exhibits.

On January 17, 2000, the due process hearing was held. This hearing consisted of oral arguments.

During the hearing, the assistant attorney general argued that the authority to operate school districts in Virginia lies exclusively with the local school board.

> The Virginia constitution vests primary authority for education in local school boards and Virginia regulations implementing the IDEA provide for final administrative review by an independent hearing officer selected by the Virginia Supreme Court, but not -- they do not provide a mechanism that usurps the authority or the responsibility of the local school division. (Transcript of January 17, 2000 Oral Argument, pages 49-50)[12]

The assistant attorney general claimed that the Review Officer's decision must be implemented by the LEA, not the SEA.

> Any decision by the State Review Officer must be implemented by Henrico County School Board. That is the constitutional scheme in Virginia. It is not the constitutional scheme in many other states with have a unified educational system. But in Virginia, by the constitution, Article 8 of the constitution, the authority for running the local public schools and providing a free education is the responsibility of the local school divisions. Excuse me. (Transcript of January 17, 2000 Oral Argument, page 50)

And counsel for VADOE threw down the gauntlet against your agency, stating that:

> . . . I submit that the new federal regulation (34 C.F.R. § 300.514) exceeds the statutory authority granted to the United States Department of Education under the IDEA.
>
> U. S. Department's authority to enact the stay-put provision in 34 CFR Section 300.514 can exist only under the corresponding statutory section, which is 20 USC 1415(j). That statutory section contains nothing which would class a State Hearing Officer's decision as a consent by the State as the new federal regulations would do.
>
> . . .
>
> The statute specifically states that unless the State or the local agency and the parents agree otherwise -- and the parents agree otherwise, the child's stay-put placement continues to be their current placement. The regulations have substituted the necessity for

[10] See Exhibit 7, January 7, 2000 Brief of behalf of White
[11] See Exhibit 8, January 10, 2000 VADOE Three Motions and Memorandum
[12] See Exhibit 9, January 17, 2000 Transcript of Oral Argument

> the school's agreement with that for the State Review Officer. And I submit they have done that impermissibly
>
> U. S. Department of Education's promulgation of Section 300.514(c) exceeded the statutory authority by providing an alternative process by which to establish a stay-put placement that is not found in the IDEA and contradicts the governing statute. Therefore, the regulation should not be applied to this case and the parents' request for funding of the stay-put placement should be denied. (Transcript of January 17, 2000 Oral Argument, page 49-51)

Conclusion

VADOE is responsible for ensuring that LEAs comply with the law. Henrico County Public Schools has refused to comply with the Review Officer's decision **and** refused to comply with VADOE's August 19, 1999 Order. Henrico will not comply with the law unless or until there are **clear and certain consequences for their failure to comply** with the law. VADOE has imposed no clear and certain consequences on Henrico for their ongoing, persistent failure to comply with the law.

The U. S. Department of Education is responsible for ensuring that VADOE enforces the law. VADOE will not enforce the law unless or until there are **clear and certain consequences** for their ongoing, persistent failure to correct noncompliance and enforce the law.

The Individuals with Disabilities Act authorizes OSEP to withhold funds from States in whole or in part, depending on the degree of noncompliance. 20 U.S.C. § 1416(a).

As a remedy, we respectfully request the U. S. Department of Education to exercise its authority to withhold funds from VADOE as follows:

- a sum equal to the funding that VADOE receives for enforcement and compliance, and;
- a sum equal to the funding that VADOE provides Henrico County Public Schools for special education and related services.

The Individuals with Disabilities Act explicitly authorizes the Department of Education to refer non-compliant states to the U. S. Department of Justice. 20 U.S.C. § 1416(b).

As a remedy, we respectfully request that the U. S. Department of Education immediately refer this case to the U. S. Department of Justice so they can investigate and enforce the Individuals with Disabilities Act.

On January 28, 2000, The National Council on Disability issued the "IDEA Compliance Report." According to this Report:

> Almost a quarter of a century following passage of the Individuals with Disabilities Act (IDEA), students with disabilities and their families still commonly face obstacles to securing the free appropriate education (FAPE) that the law promises. The impact of

> noncompliance with IDEA is difficult to overestimate . . . The stress of working with a recalcitrant school system that [does] not want to work with a parent to educate a disabled child can be tremendous."
>
> "**Parents have a reasonable expectation that the federal and state agencies charged with monitoring and enforcement will do their jobs**."

NCD found that:

> As a result of 25 years of non-enforcement by the Federal Government, **parents are still a main enforcement vehicle for ensuring compliance with IDEA**." (Finding #II.1B)

NCD made the following recommendation:

> The Department of Education **must exercise leadership in enforcing the law**, with parents as partners and resources in carrying out their enforcement role. (Recommendation #II.1A)

As you think about how this case should be resolved, I ask that you read the parents' letter to VADOE, which says in part:

> We have been so financially burdened that we have even sold the piano that my great-grandmother and great-grandfather gave me when I was eight. We are in such financial trouble now that we are worried we will never get financially sound again. Our mortgage payments are behind, we cannot make our payments to our attorney or the hospitals and this will affect our credit rating for years, if not forever. We feel the legal system has failed us and Glenn.

The "legal system" did not the parents. VADOE failed the parents. This family has been damaged by the persistent failure of VADOE to enforce the Individuals with Disabilities Education Act.

I look forward to hearing from you. If you have any questions, please advise. Thanks.

Sincerely,

Peter W. D. Wright

cc: Mr. and Ms. White

Enc.