

## DRAFT (1-9-08)

TO: Special Education Regulations Revision Process

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FROM:

On behalf of the \_\_\_\_\_, the following comments are submitted to the Virginia Department of Education (VDOE) regarding the revision of the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*.

The *Individuals with Disabilities Education Act* (IDEA) ensures that children with disabilities have a Free Appropriate Public Education available to meet their unique needs and prepare them for further education, employment and independent living. We believe the current *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* have well served children with disabilities and their parents in the Commonwealth, and have ensured effective implementation of federal law. We further believe that those existing regulations do not require the wholesale revision that is being proposed in order to comply with the 2004 amendments to IDEA.

Virginia has been in the forefront of promoting and protecting the necessary parent-school partnership that ensures children with disabilities are properly identified and effectively served by our local schools. The proposed regulations represent a step backwards in Virginia's historic guarantee of parental rights in special education. The Virginia Board of Education must not allow the roll back of these important civil rights for parents of children with disabilities in Virginia.

### ***Virginia's important parent protections***

The \_\_\_\_\_ supports Virginia's commitment to the rights of parents in the special education process through long-standing requirements for parent consent in three basic areas: (1) identification and eligibility of a child with a disability; (2) initial implementation and changes to a child's *Individualized Education Program* (IEP); and (3) termination of a child's special education eligibility or services. Virginia developed these rights of consent to protect parental involvement in all aspects of the education of a child with a disability. Virginia-specific parental rights of consent serve to protect Virginia's most vulnerable citizens.

The argument made by VDOE for the proposed deletions of Virginia-specific parental rights and protections from the current regs is "to respect the intent of Part B of the Act [IDEA 2004] to minimize the number of rules, regulations and policies to which local educational agencies and schools are subject." While IDEA 2004 does indicate that the states should "minimize the number of rules, regulations, and policies to which the local educational agencies and schools located in the State are subject," minimization of state regulations is a common theme in federal legislation and not some specific mandate for IDEA.

The regulations that the federal government promulgates are considered the minimum standard that states must follow. States can, and regularly do, exceed federal regulations because they respond to the

needs of their particular citizens, as is their right. The effort to minimize differences between the federal and Virginia special education regulations must *not* mean the minimization and disregard of long-standing civil rights currently guaranteed to our state's citizens.

The priorities listed below reflect the \_\_\_\_\_'s position on select areas which affect Virginia's historic guarantee of parental rights in the revision of the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*. These priorities are areas that are important to continuing the guarantee of rights in Virginia to children with disabilities and their parents:

## **1. Parent Consent Provisions**

### **Parental Consent to the Termination of Services:**

The \_\_\_\_\_ *opposes* the elimination of the current requirement for parental consent for the termination of special education eligibility and related services. (*8 VAC 20-80-70 E.*) The \_\_\_\_\_ rejects the position that Virginia's guarantee of the parental right of consent to the termination of services is particularly burdensome or costly to schools and, therefore, should be eliminated from the regulations.

Virginia has historically recognized the essential parental right to participate in any decision on the continued services of their child because this right of consent:

1. Ensures that the *best interests of the child* are served.
2. Guarantees that the parent is treated as a *full and equal member of the IEP team* as required by IDEA.
3. Protects the *integrity of the IEP team process* outlined in IDEA.
4. Prevents schools from making eligibility and service termination decisions by fiat and not by the *consensus of the IEP team* as intended by IDEA.
5. Acts as a *counterbalance* to the pressure on school personnel to eliminate children from their special education services due to limited school district resources.

Without the right of consent to the partial or full termination of services, parents have no ability to prevent LEAs from ending services when it is not in the best interest of the child. Practically speaking, the fear of termination may also cause parents to accept less adequate IEPs and services than what their child's needs indicate. In addition, disabilities are by nature lifelong conditions; services should not be removed just because they have been successful.

### **Parental Consent to Services for Transfer Students:**

The \_\_\_\_\_ *opposes* the elimination of the current requirement for parental consent prior to providing special education services to transfer students. (*VAC 20-80-56*) The proposed regulations would require only a "consultation" with the parent. Such a proposal could permit a LEA to implement an IEP that does not offer comparable services to the student's previous school district. Parents would have no ability to require an LEA to come to consensus on the delivery of services upon transfer, as is otherwise required in the development and amendment of existing IEPs.

## **2. Child Study Committees**

The \_\_\_\_\_ *opposes* the elimination of Child Study Committees as currently required in the existing regulations. (*VAC 20-80-50 C.3.; VAC 20-80-52*) VDOE's proposal to leave the referral procedures up

to LEAs removes the *guarantee* that parents be participants in the referral process and the protection of timelines. The proposal also eliminates the requirement that classroom interventions not delay the evaluation. Existing Child Study Committee requirements outlining the procedures local school divisions must use to refer students for special education ensure consistency in the application process across all Virginia jurisdictions and are vital to parents' understanding of and participation in referral process.

### **3. Functional Behavior Assessments (FBAs)**

The \_\_\_\_\_ *opposes* permitting the development of a Functional Behavior Assessment (FBA) to be a merely a review of existing data that does not require input of the parent. (*VAC 20-80-10*) This provision should clearly state that an FBA is an evaluation that consists of a systematic collection and analysis of direct and indirect data, and may include a review of existing data. It is the frequent experience of parents that schools conduct FBAs in name only, failing to explore the actual function of a child's behavior and hastily compiling previous observations into a paper trail to justify disciplinary action. To determine an appropriate Behavioral Implementation Plan (BIP), a formal FBA must be conducted, and for an assessment to be effective, the parents must participate as a matter of parental consent.

### **4. Individualized Education Program and Transition.**

The \_\_\_\_\_ *supports* the continued allowance in the proposed regulation that directs transition services be put into effect when the child turns 14, two years younger than the federal guideline. (*VAC 20-80-62 F. 9. & 10.*) Parents and children need to plan for postsecondary goals well before the age of 16 in order to devise a correct curriculum that aims to improve long-term outcomes and to accumulate necessary information for decision making on further education, employment and independent living.

### **5. Timelines for Evaluations and Reevaluations.**

The \_\_\_\_\_ *opposes* the proposed 65 business day timeline for an eligibility decision rather than adhering to the federal guideline of 60 days from the date of parental consent for evaluation. This proposal could cause a child with a disability to wait an additional 3-5 weeks over existing procedures to be found eligible. Intended by federal law to prevent a child who may need services from waiting unnecessarily to receive them, the 60 day limit provides ample time for an evaluation in most cases. In those instances where additional time may be necessary to produce the required data, parent consent should be sought to extend the limit by a maximum of 10 additional business days.

### **6. Developmental Delay.**

The \_\_\_\_\_ *opposes* limiting the developmental delay category only to the ages of 2 to 5 and supports the IDEA 2004 definition of developmental delay from ages 2 to 9. (*8 VAC 20-80-56 F*) The developmental delay label is especially important for young children who exhibit delays and benefit from early intervention, but who may not be easily categorized. These children benefit from maintaining the developmental delay label and delaying a decision on the determination of their essential disability. Rushing to label a child's disability may have serious long term repercussions to that child's education and emotional development.

## 7. Eligibility Criteria.

The \_\_\_\_\_ *opposes* the definition of eligibility criteria for disabilities that exceed those specifically defined in the federal regulations. Such overreaching provisions may work to the disadvantage of children who would otherwise qualify for services as a child with a disability. For example, in defining the criteria for eligibility under autism, the proposed regulations may exclude children with an autism spectrum disorder who do fit the narrow DSM-IV autism diagnostic criteria contained in the provisions. Federal law includes autism as a covered disability under IDEA; it does not endeavor to define the various educational criteria for the autism disability as a spectrum disorder. Furthermore, if the VDOE determines eligibility criteria for autism, which it has not done previously, it will be taking away flexibility away from the LEAs.

## 8. Discipline Procedures

The \_\_\_\_\_ *opposes* the elimination from the regulations of the requirement that any child with a disability removed for longer than 10 days be provided services that enable the child to *progress* in the general education curriculum. (8 VAC 20-80-68 C. 2. d.) Services provided for students during removal lasting longer than 10 days are already grossly inadequate, and the student's disciplinary problems are greatly compounded by the failure to meet the child's needs. The proposed regulatory change would eliminate all requirements on local school divisions to attempt to remedy this shortcoming in the provision of special education services.

The \_\_\_\_\_ *opposes* a regulation that gives schools the option of keeping a student in an interim placement until the expiration of the 45 day period. This provision should state that once the *Manifestation Determination Review* has been concluded, the student must be returned immediately to the original placement, unless the IEP team determines that a change in placement is in the best interest of the student. Interim placements are often entirely unsatisfactory as a means of educating a child; homebound services, for example, are totally inadequate and often greatly delayed in their implementation. Should the proposed regulation go into effect, parents in desperation may feel it necessary to refuse homebound services or other placements altogether as a means of pressuring the staff to allow the child to return to school sooner.

Furthermore, the \_\_\_\_\_ believes this section should be clarified to say that the original placement means the original school, not simply the same level of services. Currently in Fairfax County Public Schools, principals are given the option of expelling children from their school and forcing them to go to another school even if the *Manifestation Determination Review* is concluded in the student's favor.

The \_\_\_\_\_ also believes that, for disciplinary purposes, the definition of "serious bodily injury" should be the same as the federal definition. Schools should not allow removal for a lesser injury.

## 9. Due Process Hearing System

The \_\_\_\_\_ *opposes* removing the implementation of the due process hearing system from the Supreme Court of Virginia and shifting it exclusively to VDOE. (8 VAC 20-80-76) The proposed removal of the special education due process hearing system from the judiciary to the regulating agency presents a conflict of interest and would improperly create a new, non-independent judicial system.

Furthermore, the \_\_\_\_\_ *opposes* the elimination of the current requirement to develop and submit an implementation plan following the rendering of a due process decision or the withdrawal of a hearing

request. The proposal that VDOE be provided by the LEA, upon request, with documentation that the area(s) have been corrected is only an after-the-fact requirement upon school divisions. Parents would no longer have the assurance of written guidance or timelines to set their expectations for correction.

#### **10. Special Education Advisory Committee (SEAC) Guidelines.**

##### **LEA participation on local advisory committees:**

The \_\_\_\_\_ *opposes* the change in the proposed regulations which allows LEA personnel to act as voting members on local advisory committees. (8 VAC 20-80-90 E) A conflict of interest would prevent LEA employees from acting in a truly independent capacity. In addition, the proposal thwarts the purpose of the advisory committee in offering honest critiques of the LEA's special education policies and programs. It is hard to see how a member of the advisory committee who also works for the LEA could operate effectively if the member had to consider his or her employer in considering any committee decisions.

##### **Gender restrictions on membership of local advisory committees:**

The \_\_\_\_\_ *opposes* the proposed requirement that local advisory committees reflect the gender of the local school division. This is highly discriminatory against women in their roles as advocates for their children. Women make up the majority of professionals in education and as volunteers on PTAs. Such a gender requirement is not made of LEAs in hiring administrators, teachers and other professionals, nor is this gender requirement typically made of other school board advisory committees. Certainly, a gender requirement for membership is not endorsed by the National PTA, which was created by mothers and started as a national women's movement to advocate for children. PTAs today rely heavily upon women volunteers at the local, state and national level.

##### **Ethnic representation in membership of local advisory committees:**

The \_\_\_\_\_ further *opposes* the proposed requirement that local advisory committees reflect the ethnic makeup of the local school division. This direction is so vague as to be unusable. For example, in many areas of Northern Virginia the ethnic diversity is so broad that it is not uncommon to see more than 50 different cultures represented in a single school. A local advisory committee that contained a proportional representation of every ethnic group in Fairfax County would create an entity whose size would completely paralyze and render it useless.