

DATE: April 17, 2008

TO: Special Education Regulations Revision Process

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FROM:

I am writing as a citizen concerned about this issue. I am a citizen and member of The Arc of Northern, which represents approximately 7000 parents, children and individuals with intellectual disabilities across Northern Virginia, 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. I believe the current *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* are superior in many ways to the proposed regulations. I further believe that the existing regulations do not merit 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 served by our local school divisions. 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 this roll back of civil rights in Virginia for children with disabilities and the parents who advocate for them.

Virginia's important parent protections

I support Virginia's long-standing commitment to the right of parental consent in three basic areas: (1) identification to determine the existence of a disability and a child's eligibility for special education and related services; (2) initial implementation of and changes to a child's *Individualized Education Program (IEP)*; and (3) termination of a child's special education eligibility or services. IDEA requires parental consent to initiate services as a matter of ensuring parent involvement; the rights of consent to changes in a child's IEP and for termination of services are Virginia-specific, and were added to promote a greater level of partnership between parents and schools.

VDOE's stated argument for the proposed deletions of Virginia-specific parental rights and protections from the current regulations 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." However, minimization of state regulations is a common theme in federal legislation and not a specific mandate for IDEA.

Regulations promulgated by the federal government 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

state special education regulations must *not* mean the elimination of long-standing Virginia-specific rights currently guaranteed to our state's citizens.

The priorities listed below reflect my position on select areas of the proposed *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* which significantly impact Virginia's historic guarantee of rights to children with disabilities and their parents. These specific areas are important to continuing the existing civil protections in Virginia that are essential to the *free appropriate public education* (FAPE) of children with disabilities:

1. Parent Consent Provisions

Parental Consent to the Termination of Services: [8 VAC 20-81-90, provision of existing regulation, not included]

I **oppose** the elimination of the current requirement that a parent consent to the termination of special education eligibility and related services. I reject the claim that Virginia's guarantee of the parental right of consent to the termination of services is particularly burdensome or costly to schools.

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, and
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 would be unable to prevent *local education agencies* (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. In addition, disabilities are by nature lifelong conditions; services should not be removed simply because the child has improved.

Parental Consent to Services for Transfer Students: [8 VAC 20-81-120, provision of existing regulation, not included]

I **oppose** the elimination of the current requirement for parental consent prior to providing special education services to transfer students. The proposed regulations would require only a "consultation" with the parent. Such a proposal could permit an 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 [8 VAC 20-81-50, provision of existing regulation, not included]

I **oppose** the elimination of Child Study Committees as currently required in the existing regulations. VDOE's proposal to leave the referral procedures up to LEAs removes the protection of timelines and the *guarantee* that parents will participate in the referral process. The proposal also eliminates the requirement that classroom interventions not delay the evaluation. Existing Child Study Committee requirements outlining the procedures LEAs 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 the referral process. Consistent referral procedures also ensure that LEAs do not set additional timelines that unduly extend the time between when a child is referred for services and a parent consents to an evaluation.

3. Functional Behavioral Assessments (FBAs) [8 VAC 20-81-10, pg. 27-28]

I **oppose** permitting the process of developing a Functional Behavioral Assessment (FBA) to be merely a review of existing data that does not require input of the parent. The regulations 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. Failure to effectively investigate behavior which impedes learning defeats the purpose of the FBA to change such behavior and allow the student to participate as much as possible in a least restrictive environment. 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. (For additional discussion of FBAs, see #10.)

4. Transition [8 VAC 20-81-110, pg. 155]

I **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. 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 [8 VAC 20-81-60, pg. 97]

I **oppose** 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 4 weeks longer than allowed by the federal guideline 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, I **recommend** parent consent should be sought to extend the limit by a maximum of 10 additional business days. In addition, this timeline should apply to both initial evaluations and reevaluations. I further **recommend**

that a clear time limit be established from date of referral to the date of parent consent for an evaluation so that an LEA does not attempt to unduly extend the timeframe.

6. Developmental Delay [8 VAC 20-81-80, pg. 121]

I *oppose* limiting the developmental delay category to the ages of 3 to 5 and *recommend* the current VA regulations' definition of developmental delay from the ages of 2 to 8 inclusive. The developmental delay label is especially important for young children who exhibit deficits and require 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 on that child's education and emotional development.

7. Definition of Autism [8 VAC 20-81-10, pgs. 12-13]

I *recommend* that the proposed Virginia regulation defining autism reflect that of federal regulation, which states, "A child who manifests the characteristics of autism after age three could be *identified* as having autism if the criteria in this definition are satisfied." [Italics added.] Virginia regulations have substituted the word "diagnosed" for "identified" and is an improper term to use for educational purposes. School personnel are not qualified to make medical diagnoses.

8. Eligibility Criteria [8 VAC 20-81-80, pg. 119-120]

I *oppose* including any eligibility criteria for disability categories in the regulations 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, by defining the criteria for eligibility under autism, the proposed regulations may exclude children with an autism spectrum disorder who do not fit the narrow diagnostic criteria contained in the proposed regulations. 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 VDOE sets specific criteria for autism, which it has not done previously, it will be taking away flexibility from LEAs in making individual eligibility determinations.

9. Definitional Terms for Disabilities [8 VAC 20-81-10, pgs. 36, 24-25]

I *recommend* the regulations use the term "intellectual disability" in place of "mental retardation." The term is outdated and offensive to many. Use of the term "mental retardation" tends to lower expectations of educators on children who meet the criteria for the disability. Similarly, I *recommend* use of the term "emotional disability" rather than "emotional disturbance." The term "emotional disability" conveys less negative stigma on the child than "emotional disturbance," while summarizing the nature of the eligibility that it is intended to denote.

10. Discipline Procedures [8 VAC 20-81-160, pg. 183-195]

I *oppose* elimination of the current requirement for the IEP team to convene to conduct an FBA and implement or modify a behavioral plan for any child with a disability under a long-term removal. Students with disabilities whose behavior warrants such removals need greater intervention from their IEP teams, not less. IEP teams must act proactively to determine the causes of behavior and plan ways to prevent future episodes that prevent the student from being successful.

In addition, I *oppose* elimination of the current provision that states students who are short-term removed should be provided services that enable the child to *appropriately progress*, not just *participate* in the general education curriculum. Services provided for such students are already grossly inadequate, and the student's disciplinary problems are greatly compounded by the failure to meet the child's educational needs. The proposed regulatory change would eliminate all requirements on local school divisions to attempt to remedy this shortcoming.

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

11. IEP Progress Reports [8 VAC 20-81-110, pg. 154, provision of existing regulation, not included]

I *oppose* the proposed elimination of the current requirement that IEP progress reports be provided for students with disabilities at least as often as periodic report cards are provided to non-disabled students. There is no justification for the change in providing progress reports to students with disabilities *less frequently* than they are provided to students without disabilities.

12. Short Term Objectives [8 VAC 20-81-110, pg. 151]

I *recommend* the regulations clarify that IEP teams must consider including short-term objectives for all students. Unless consideration of these objectives is included on the IEP meeting agenda checklist, these useful tools will go unused, much to the loss of students with disabilities for whom benchmarks are necessary to determine if their educational program is actually working. As every good teacher knows, reaching IEP goals is unlikely without short-term objectives.

13. Prior Written Notice [8 VAC 20-81-170, pgs. 201-202, provision of existing regulation, not included]

I *oppose* the proposed limitations in relation to current regulation on when schools need to provide Prior Written Notice. Prior Written Notice is one of the few ways that parents can get their questions answered by reluctant schools and must not be chipped away from the existing rights of parents in Virginia.

14. Due Process Hearing System [8 VAC 20-81-210, pg. 234-264]

I *oppose* removing appointment of due process hearing officers from a list maintained by the Supreme Court of Virginia and shifting responsibility for the entire hearing system exclusively to VDOE. The proposed change presents a possible conflict of interest and would improperly create a non-independent judicial system which could not guarantee the impartiality of hearing officers that is required by IDEA.

Furthermore, I *oppose* 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 so that they know when to expect corrections to occur and ensure their child receives FAPE.

15. Special Education Advisory Committee Guidelines [8 VAC 20-81-230, pg. 273-274]

LEA participation on local advisory committees:

I *oppose* the change in the proposed regulations which would allow LEA personnel to act as voting members on local advisory committees. 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 which is to offer 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 when weighing in on committee deliberations and decisions.

Gender and ethnic restrictions on membership of local advisory committees:

I *oppose* the proposed requirement that local advisory committees reflect the gender and ethnic makeup of the local school division. This proposed requirement is highly discriminatory against women in their roles as advocates for their children. Women also make up the majority of professionals in education and volunteers on local school organizations, such as PTAs. A gender requirement is not imposed upon LEAs in hiring administrators, teachers and other professionals, nor is such a gender requirement typically made of other school board advisory committees.

I further *oppose* the proposed requirement that local advisory committees reflect the ethnic makeup of the local school division. This requirement 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. Even if the appropriate volunteers among parents of children with disabilities could be found, a local advisory committee that contained a representation of every ethnic group in Fairfax County would create an entity whose size would completely paralyze and render it useless.

Name: _____

Address: _____
