

February 23, 2007

Melissa Smith
Coordinator of Administrative Services
Virginia Department of Education
P.O. Box 2120
Richmond, VA 23218-2120

Dear Ms. Smith:

The Virginia Coalition of Students with Disabilities submits the attached public comment in response to the NOIRA for the Regulations Governing Special Education Programs for Children with Disabilities in Virginia.

The organizations listed below support the attached comments.

Please contact us if you have any questions about these comments.

Thank you for the opportunity to provide public comment in advance of the Department drafting proposed regulations. We look forward to providing additional comment after we have reviewed the proposed Regulations.

Autism Society of America
Central Virginia Chapter
P.O. Box 29364
Richmond, Va. 23242
804-257-0192

DAC (disabled Action committee)
14405 Artery Lane, #11
Dale City, VA 22193
703-878-1737

Endependence Center, Inc.
6300 E. Virginia Beach Blvd
Norfolk, VA 23502
757-461-8007

Valley Associates for Independent Living
205-B South Liberty Street
Harrisonburg, VA 22801
540-433-6513

Virginia Board for People with Disabilities
9th Floor
202 North Ninth Street
Richmond, VA 23219
804-786-0016

Virginia Office for Protection and Advocacy
Suite 5
1910 Byrd Avenue
Richmond, VA 23230
804-225-2042

By joining these comments, VOPA does not waive the right to comment separately at later stages in the process nor does it waive the right to challenge any regulations ultimately adopted if such challenge is necessary in the representation of clients or constituents.

**Virginia Coalition of Students with Disabilities Public Comment on
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8 VA Admin. Code § 20-80-10

Recommendation: “Educational Performance” means all aspects of a child’s performance in school including academic achievement, performance on benchmark and other achievement tests, as well as functional performance.

Justification: The 1999 federal IDEA regulations required that IEPs include “a statement of the child’s present levels of educational performance.” The new federal IDEA regulations make this provision more specific by requiring that the IEP includes statements about both the child’s “academic and functional performance.” Both defining educational performance and doing so in this way 1) comports with the above-referenced changes to the new federal IDEA regulations; 2) clarifies that educational performance is more than simply academic achievement; and, 3) clarifies that even children who are able to make passing grades in the general educational curriculum may be entitled to special education and related services if their disability affects their functional performance in school.

8 VA Admin. Code § 20-80-10

Recommendation:

“Change of Placement” means:

1. The child’s initial placement from general education to special education and related services;
2. The expulsion or long term suspension of a student with a disability;
3. The placement change which results from a change in the identification of a disability;
4. *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;*
5. The change from a public school to a private day, residential, or state-operated program; from a private day, residential, or state-operated program to a public school; or to a placement in a separate facility for educational purposes;
6. Termination of all special education and related services; or
7. Graduation with a standard or advanced studies high school diploma.

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).

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8 VA Admin. Code § 20-80-10

“Parent” means

1. A biological or adoptive parent of a child ;
2. A foster parent;
3. A guardian generally authorized to act as the child’s parent, or authorized to make decisions for the child (but not the state if the child is a ward of the state);
4. An individual acting in the place of a biological or adoptive parent (including, but not limited to, a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; or
5. A surrogate parent who has been appointed in accordance with this chapter.

Recommendation:

When the biological or adoptive parent is (a) attempting to act as the parent under this chapter; and, (b) more than one party is qualified to act as a parent, the biological or adoptive parent must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. This presumption is not operative if the biological or adoptive parent is attempting to act as the parent under this chapter. This presumption is also not operative if a judicial decree or order designates that a specific person from sections (1) through (4) of this definition shall act as parent or make educational decisions on behalf of a child. In the case of such a judicial decree, the person identified as the parent in that judicial decree shall be deemed to be the parent for the purposes of this chapter.

Justification: The federal IDEA regulations have overhauled the definition of parent. Changing the definition of parent in the Virginia regulations in the way suggested here both (1) comports with both the changes to the federal regulations; and, (2) makes clear that the presumption in favor of biological or adoptive parents being the parent for the purposes of this chapter only exists if the biological parent is attempting to act as parent. Thus, for example, if the parent of a child in foster care is not acting at all, and a foster parent is enrolling the child in school and otherwise overseeing the care and education of the child, the foster parent is the parent. The biological parent in that example is not the parent. Indeed in that example, forcing schools to presume that the biological parent is the parent could create a situation in which a non-responsive, inactive parent, who might never consent to evaluations, services, or anything else, is the parent.

8 VA Admin. Code § 20-80-10

“Supplementary Aids and Services” means aids, services, and other supports that are provided in regular 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.

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Recommendation:

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, sign language interpreters to students with disabilities.

Justification: The provision of supplementary aids and services is crucial to ensuring that the IDEA's least restrictive environment mandate is carried out. Including a non-exhaustive list of examples of supplementary aids and services gives needs 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. 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.

8 VA Admin. Code § 20-80-10

“Transition Services” means

1. a coordinated set of activities for a student with a disability that is designed within an ~~outcome~~ *results-oriented process that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational ~~training~~ education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;*
2. *are based on the individual child's needs, taking into account the child's strengths, preferences, and interests, and includes—*
 - a. *Instruction, including vocational instruction;*
 - b. *Related services;*
 - c. *Community experiences, including the provision of a mentor or life-skills coach;*
 - d. *The development of employment and other post-school adult living objectives; and*
 - e. *If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.*

Recommendation:

Transition services for students with disabilities may be special education, if provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education.

Justification: These changes to the definition of transition services comply with the changes expanding the definition of transition services in the federal special education regulations. They also include additional examples of what constitutes instruction and community experiences so as to provide clarity to schools and parents as to what types of instruction and community experiences can constitute transition services.

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8 VA Admin. Code § 20-80-10

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 ~~natural~~ *biological or adoptive* parent or parents or guardians are allowing relatives or private individuals to act as a parent

Recommendation:

- 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, has been 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.~~

~~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 § 63.1-206.1 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~~

Justification: Changing this subsection of the Virginia regulation on surrogate parents in this way puts it in line with the new definition of ‘parent’ in the federal IDEA regulations, which allow an expanded list of persons to act as ‘parent’ for the purposes of the special education laws and process.

8 VAC 20-80-30. Functions of the Virginia Department of Education

The Virginia Department of Education (state educational agency) shall perform the following functions:
“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:”

Recommendation: Maintain current Virginia regulations that provide services to children with disabilities beginning at age two.

Justification: Beginning services for children at age two is part of current Virginia regulations and is a crucial part of laying a successful foundation for educational success of Virginia students.

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10. Establish and maintain a state special education advisory committee composed of individuals involved in or concerned with the education of children with disabilities. 34 CFR §§ 300.150; 300.650-653

- a. Membership. The membership shall consist of individuals appointed by the Board of Education who are involved in, or concerned with, the education of children with disabilities. The majority shall be individuals with disabilities or parents of children with disabilities. Membership shall include one or more of the following:
 - (1) Parents of children with disabilities;
 - (2) Individuals with disabilities;
 - (3) Teachers;
 - (4) Representatives of institutions of higher education that prepare special education and related services personnel;
 - (5) State and local education officials;
 - (6) Administrators of programs for children with disabilities;
 - (7) Representatives of other state agencies involved in the financing or delivery of related services to children with disabilities;
 - (8) Representatives of private schools and public charter schools;
 - (9) At least one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities; and
 - (10) Representatives from Virginia's juvenile and adult correctional educational agency.

- b. Duties. The state special education advisory committee shall:
 - (1) Advise the Virginia Department of Education and the Virginia Board of Education of unmet needs within the state in the education of children with disabilities;
 - (2) Comment publicly on any rules or regulations proposed by the Virginia Board of Education regarding the education of children with disabilities;
 - (3) Advise the Virginia Department of Education in developing evaluations and reporting on data to the U.S. Secretary of Education under the Individuals with Disabilities Education Act (20 USC § 1400 et seq.);
 - (4) Advise the Virginia Department of Education in developing corrective action plans to address findings identified in federal monitoring reports under the Individuals with Disabilities Education Act (20 USC § 1400 et seq.);
 - (5) Advise the Virginia Department of Education in developing and implementing policies relating to the coordination of services for children with disabilities;
 - (6) *Advise the Virginia Department of Education on eligible children with disabilities in state, regional, or local adult or juvenile correctional facilities; and*
 - (7) Review the policies and procedures for the provision of special education and related services under 8 VAC 20-80-90 B 1 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.

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Recommendation: Maintain the requirement that the State Advisory Committee advise the Virginia Department of Education on eligible children with disabilities in state, regional, or local adult or juvenile correctional facilities.

Justification: The susceptibility of students with disabilities to become participants in correctional programs merits the need for continued monitoring of programs, policies, and services for these students by the State Special Education Advisory Committee.

8 VAC 20-80-40. Responsibility of local school divisions and state-operated programs.

B. Each local school division shall ensure that all children with disabilities, aged two to 21, inclusive, residing in that school division have a right to a free appropriate public education, including:

Recommendation: Maintain current Virginia regulations that provide services to children with disabilities beginning at age two.

Justification: Beginning services for children at age two is part of current Virginia regulations and is a crucial part of laying a successful foundation for educational success of Virginia students.

8 VAC 20-80-50. Child Find.

2. Each local school division shall coordinate child find activities for infants and toddlers (birth to age two, inclusive) with the Part C local interagency coordinating council.

Recommendation: Maintain current Virginia regulations that locate and provide services to toddlers from birth to age two, inclusive.

Justification: Transitioning toddlers to preschool services at age two, a critical time developmentally, will begin the structure of a stable foundation of knowledge, social skills and self confidence that will increase the chances of academic success in school.

Comments on Parental Consent Federal Regulations 300.300

8 VAC 20-80-70 E 1 a / Federal Section 300.300

Recommendation: Maintain “Conducting an initial evaluation or reevaluation, including a functional behavioral assessment if such assessment is not a review of existing data conducted at an IEP meeting...” in the state regulations.

Justification: This provision is in current state regulations, and it is important to maintain. Federal law does not include this provision. An FBA is critical to students’ IEP and educational success. Without appropriately addressing challenging behaviors, educational benefit will be difficult to attain.

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8 VAC 20-80-10 NEW definition

Recommendation: Clarify that an FBA is an evaluation in the Definition section VAC 20-80-10.

Justification: As with other evaluations, it is important for parents to have the ability to obtain an independent educational evaluation (IEE) when they disagree with the FBA. Furthermore, current law supports that an FBA is an evaluation (see Letter to Scheinz 34 IDELR 34 June 7, 2000)

8 VAC 20-80-70 E 1b / Federal Section 300.300

Recommendation: Maintain current state regulation that parental consent is necessary for any change in identification of a child with a disability.

Justification: The parent is a member of the IEP team. This decision should not be made without the consensus of the full IEP team including the parent. Without this provision, school personnel could unilaterally change identification. Change of identification has the potential to significantly impact the type, level, and location of services.

8 VAC 20-80-70 E 1c / Federal Section 300.300

Recommendation: Maintain current state regulation that parental consent is necessary for any revision to the child's IEP services, including change in placement.

Justification: As stated above, the parent is a member of the IEP team. This decision should not be made without the consensus of the full IEP team, including the parent. Without this provision, school personnel could unilaterally change the IEP without agreement of the IEP team. While this is not likely the intent of the Federal Regulations, current state regulations make it clear that parental consent is necessary for changes to the IEP. It is necessary to maintain the clarity in the state provision so that needless litigation is not fostered.

8 VAC 20-80-70 E 1d / Federal Section 300.300

Recommendation: Maintain current state regulation that parental consent is necessary for "any partial or complete termination of special education and related services..."

Justification: The parent is a member of the IEP team. This critical decision should not be made without the consensus of the full IEP team, including the parent. Without this provision, school personnel could unilaterally terminate services without agreement of the IEP team. Termination without consent could have a significant effect not only on the child's services, placement, transition planning, and classroom accommodations, but also on standardized testing and future college accommodations.

8 VAC 20-80-70 E 3 / Federal Section 300.300

Recommendation: Clarify that parents have the right to revoke consent. Explain what revocation means, and incorporate in procedural safeguards.

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Justification: Increased understanding and knowledge of the regulations can enhance the ability of parents and school personnel to make informed choices regarding students' education. Furthermore, clearer regulations and stronger parent knowledge can result in less ambiguity that leads to needless litigation.

8 VAC 20-80-70 E 4 / Federal Section 300.300

Recommendation: Maintain current regulation which states that parental consent is not required for administration of a test or other evaluation that is used to measure progress on the child's goals and benchmarks or objectives and is included in the IEP.

Justification: Measurement of student progress towards IEP goals and benchmarks is critical component of the educational process and is needed to facilitate student advancement. Assessment of progress towards goals and benchmarks should be maintained as part of the IEP to provide for ongoing evaluation by school personnel.

8 VAC 20-80-10 NEW definition

Recommendation: Specific definition of evaluation and assessment should be incorporated in state regulations.

Justification: Defining these two comments would provide greater knowledge and less ambiguity for parents. Furthermore, greater clarity reduces the potential for needless litigation.

8 VAC 20-80-70 E 4 / Federal Section 300.300

Recommendation: Clarify that, with parental consent, experts have the right to conduct an evaluation, including, but not limited to classroom observation in accordance with local procedures and guidelines.

Justification: Parents have the right to independent educational evaluations (IEEs). Current practice entails schools denying parent-chosen experts access to classroom observation, effectively denying access to an appropriate IEE in certain circumstances.

8 VAC 20-80-70 E 6 b / Federal Section 300.300

Recommendation: Maintain current regulation which provides examples of reasonable measures to attain parental consent.

Justification: Continue to promote parents' ability to make informed choices about their child's education through active participation in the educational process. Furthermore, a stronger parent knowledge base can result in less ambiguity that leads to needless litigation. By maintaining examples in the regulations, knowledge of processes surrounding special education is enhanced for both parents and school personnel.

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8 VAC 20-80-70 F 1 b and 2 c / Federal Section 300.154 (d) and (e)

Recommendation: With regard to Medicaid, other public insurance, and private insurance, maintain current state regulations that require parental consent to release educational records to the public insurance program for billing purposes in accordance with the provisions of the Management of the Student's Scholastic Record in the Public Schools of Virginia.

Justification: Release of information to insurance companies should not have any lesser protections than other third parties. As stated above, clarity in the regulations provides greater understanding of how information will be used and also avoids needless litigation.

**Comments on Evaluations
Federal Regulations 300.301 – 300.303**

8 VAC 20-80-52 Referral for Evaluation

Recommendation: Maintain the regulations pertaining to Referral for Evaluation in its entirety.

Justification: This current state regulation does not have a counterpart in the federal regulations. It is important for the referral process to be specifically defined. This is the gateway to eligibility, and without a well-defined process in place, there could be confusion, delay in evaluations and eligibility, and needless litigation.

8 VAC 20-80-54 H 1 / Federal Section 300.301 c (1)(i)

Recommendation: The initial evaluation must be conducted within 60 calendar days of parental consent for the evaluation.

Justification: Revise current state regulation to be in compliance with the revised federal regulation. Current state regulation allows for 65 business days, which is approximately 13 weeks, a third of the school year. This is a significant time frame during which appropriate educational services could be delayed for a child in need.

8 VAC 20-80-54 H 2 / Federal Section 300.303

Recommendation: Maintain current state regulation that the evaluation required every three years will be initiated no less than 65 business days prior to the third anniversary of the date eligibility was last determined. The evaluation shall be completed in 65 business days.

Justification: Without a specific timeline in place, necessary evaluations could be delayed, thus postponing provision of appropriate services critical to ensure academic success. Also, without a specific timeline, there is a greater chance of costly litigation.

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Comments on Eligibility

8 VAC 20-80-56 A 1 / Federal Section 300.301 c (1)(i)

Recommendation: Change Virginia state regulations regarding eligibility/initial evaluation to follow Federal regulations provision on initial evaluation timeline, specifically that the decision regarding eligibility for special education and related services is made “within 60 calendar days after parental consent is attained for initial evaluation.”

Justification: Current state law allows for 65 business days which is approximately 13 weeks, in essence a third of the school year. This is a significant time in which appropriate educational services could be delayed for a child in need.

8 VAC 20-80-56 A 3 / Federal Section 300.301 c (1)(i)

Recommendation: Change Virginia state regulations regarding eligibility/initial evaluation to follow Federal regulations provision on initial evaluation timeline, specifically that the decision regarding eligibility for special education and related services is made “within 60 calendar days after the parent(s) is notified of the decision not to reevaluate, made in accordance with appropriate regulatory provision”

Justification: This is a critical time when no special education services are being provided to a child with a potentially serious need for such services. Time is of the essence. Federal regulations set 60 calendar days as sufficient for an initial evaluation. Clearly it should also be a sufficient amount of time to determine eligibility when no additional evaluations are required.

8 VAC 20-80-56 B 4 / Federal Section 300.301 c (1)(i)

Recommendation: Change Virginia state regulation to include on the eligibility team.

a. The child’s regular education teacher

1. If the child does not have a regular education teacher, one qualified to teach a child of that age or
2. For a child less than a school age, an individual qualified to teach a child of that age; and
 - b. At least one person qualified to conduct diagnostic examinations of children, such as school psychologist, speech-language pathologist.

Justification: Participation of these individuals is required under current state regulations with regard to eligibility of students with specific learning disability (SLD). Their participation is necessary and appropriate to convey full information and understanding of the child’s needs. Thus, their presence should be required to enable a fully informed eligibility decision.

8 VAC 20-80-56 C

Recommendation: Maintain additional procedures included in current state regulations that are not incorporated in Federal Regulations, specifically:

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8 VAC 20-80-56 C 2: The group shall provide procedural safeguards in determining eligibility and in ensuring the confidentiality of records.

8 VAC 20-80-56 C 4: The group shall have a written summary that consists of the basis for making its determination as to the eligibility of the child for special education and related services. This summary shall be signed by each group member present. The written summary shall be maintained in the child's scholastic record.

8 VAC 20-80-56 C 5: The local educational agency shall provide a copy of the documentation of the determination of eligibility to the parent or parents.

8 VAC 20-80-56 C 6: The summary statement of the group's essential deliberations shall be forwarded to the IEP team upon determination of eligibility. The summary statement may include other recommendations.

- a. Each group member shall certify in writing whether the report reflects his conclusions. If the group does not reach consensus and the report does not reflect a particular member's conclusion, the group member must submit a separate statement presenting that member's conclusion.
- b. No changes shall be made to a child's eligibility for special education and related services without parental consent.

Justification: One significant benefit of these additional procedures, incorporated in current state regulations, is that they enhance parental understanding of the eligibility process. Increased comprehension is critical at this entry point into the realm of special education. Parents often do not understand the laws and processes surrounding special education and feel overwhelmed, particularly at this early stage. Knowledge and understanding of the process can often facilitate informed choice.

8 VAC 20-80-56 C 7 f / Federal Section 300.311 (a)(5)(i) and (ii)

Recommendation: Replace existing language with: *Whether the child does not achieve adequately for the child's age or to meet State-approved grade-level standards consistent with VAC 20-80-56 G 1 – 3 (new); and the child does not make sufficient progress to meet age or State-approved grade-level standards consistent with VAC 20-80-56 G 2 (new); or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards or intellectual development consistent with VAC 20-80-56 G 2 (new).*

Justification: This new language complies with modified federal regulations concerning documentation for the eligibility determination for a child suspected of having a specific learning disability. The federal requirements have removed the requirement for states to use a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability.

8 VAC 20-80-56 C 7 g / Federal Section 300.311 (a)(6)

Recommendation: Replace existing language with: *The determination of the group concerning the effect of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural*

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factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level; and..

Justification: The eligibility group must determine that the specific learning disability is not the result of any of these conditions, per federal regulation 300.309 (a)(3) and recommended Virginia regulation VAC 20-80-56 G 3.

8 VAC 20-80-56 C 7 h / Federal Section 300.311 (a)(7)

Recommendation: Add the new requirement per federal regulation: *If the child has participated in a process that assesses the child's response to scientific, research-based intervention, the instructional strategies used and the student-centered data collected; and the documentation that the child's parents were notified about – the State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided, strategies for increasing the child's rate of learning, and the parents' right to request an evaluation.*

Justification:

This provision ensures compliance with the Federal Regulation. Furthermore, pursuant to the Federal Regulations, scientific, research-based intervention may be used as part of the eligibility determination of a specific learning disability. Documentation of this process facilitates greater knowledge and understanding of the eligibility decision by the full IEP. Greater knowledge by the team fosters better decision-making by all participants.

8 VAC 20-80-56 F

Recommendation: Maintain current state regulations that include developmental delay as a disability category for preschoolers 2-5 and school aged children 5-8.

Justification: The language is permissive with respect to utilizing the label of developmental delay for school age children, giving LEAs the flexibility to determine its appropriateness of use. Although many children have a clear diagnosis of disability by this time, that is not always the case. When there is no definitive diagnosis but the child clearly needs special education and related services, the label of developmental delay facilitates the provision of services without providing what may be an inaccurate disability "label" to the child at such a young age.

8 VAC 20-80-56 H

Recommendation: Maintain current state regulations that state "Nothing in this chapter requires that children be identified by their disability, as long as each child has a disability under this chapter and by reason of this disability needs special education and related services and is regarded as a child with a disability. Children with disabilities may be identified as having more than one disability.

Justification: Certain disabilities entail significant social stigma. This provision enables a child (or parent on behalf of the child) to make the choice not to be identified by a certain label, yet still attain the

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necessary special education and related services the child needs to address his or her disability. Educational need, not disability label should be the focus.

8 VAC 20-80-56 I

Recommendation: Maintain current regulation that states “Children found not eligible for special education. Information relevant to instruction for a child found not eligible for special education shall be provided to the child’s teachers or any appropriate committee. Parental consent to release information shall be secured for children in private schools, as necessary.”

Justification: If a student has been evaluated for eligibility for special education services, it is generally because he/she has demonstrated educational or behavioral challenges that have impeded learning. While the student may not have met the threshold of special education eligibility, the information gathered through the eligibility process, including assessments and evaluations could yield valuable information that could contribute to appropriate instruction and successful outcomes.

**Additional Procedures for Identifying Children With Specific Learning Disabilities
Federal Sections 300.307 – 300.309**

New/Federal Section 300.307 a 3

Recommendation: Include in Virginia state regulations “permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in 300.810.”

Justification: This entails both compliance and clarification of current Federal regulation. The Federal regulations states “may permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in 300.810.” The proposed language is less ambiguous and would eliminate needless litigation with regard to when alternative research-based procedures are permitted and when they are not permitted.

8 VAC 20-80-56 G 1 thru 3 / Federal Section 300.309 (a)

Recommendation: Revise Virginia regulations as follows to be consistent with federal regulations which specify the criteria for determining the existence of a specific learning disability.

1. The child does not achieve *adequately for the child’s age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade-level standards:*

- a. Oral expression;
- b. Listening comprehension;
- c. Written expression;
- d. Basic reading skill;
- e. *Reading fluency skills;*

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- f. Reading comprehension;
- g. Mathematical calculations; or
- h. Mathematical *problem solving*

2. The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified above in paragraph 1 of this section when using a process based on the child's response to scientific, research-based intervention; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with VAC 20-80-54.; and

3. The group determines that its findings under 1 and 2 of this section are not primarily the result of

- a. A visual, hearing, or motor *disability*;
- b. Mental retardation;
- c. Emotional disturbance;
- d. *Cultural factors*;
- e. Environmental or economic disadvantage; or
- f. *Limited English proficiency.*

Justification: Federal regulation 300.307 prohibits a state from requiring the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability. This federal regulation also prohibits cultural factors and limited English proficiency from being used to wrongly identify students as having an SLD. Also added are other important provisions regarding determination of a math learning disability, and with respect to required observations and documentation of performance, the child's response to interventions, and instructional observations.

Federal Section 300.309 c New

Recommendation: The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services:

1. If prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction.
2. Whenever a child is referred for an evaluation.

Justification: This ensures compliance with the Federal regulations and facilitates the evaluative process.

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**Comments on Virginia Regulations pertaining to
Federal Regulations Sections 300.320 – 300.323**

Note: In all places where the term “general curriculum” is used, replace this term with general education curriculum”. In definitions, this term is clarified to mean the same curriculum used with students without disabilities.

8 VAC 20-80-62 B 6a

Recommendation: Any lack of expected progress toward the annual goals and in the *general education curriculum*, if appropriate;

Justification: The federal regulations have revised the term “general education” to general education curriculum.” The term is defined in the federal regulations. Revising the state regulations ensures greater clarity and consistency.

8 VAC 20-80-62 C 1d (2) / Federal Section 300.321 (a)(4)(ii)

Recommendation: Knowledgeable about the *general education curriculum*; and

Justification: The federal regulations have revised the term “general education” to general education curriculum.” The term is defined in the federal regulations. Revising the state regulations ensures greater clarity and consistency.

8 VAC 20-80-62 C 2a / Federal Section 300.321 (b)(1)

Recommendation: The local educational agency shall invite *the student with a disability to attend his/her IEP meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the student and the transition services needed to assist the student in reaching those goals.*

Justification: As part of the transition process, the drafting of postsecondary goals for the student should be specified, per federal regulations Section 300.320 (b). These goals are important in helping the student achieve independence and employment upon graduation. The IEP should not only address transition services to be provided by other agencies but also postsecondary goals to be monitored by the local educational agencies. It is critical for the student to be a part of this process, as it allows for a person-centered process.

8 VAC 20-80-62 C 2c / Federal Section 300.321 (b)(3)

Recommendation: With the consent of the parents or the child who has reached the age of majority, the local educational agency also shall invite a representative of another agency that is likely to be responsible for providing or paying for transition services. If an agency invited to send a representative to a meeting does not do so, the local educational agency shall take other steps to obtain the participation of the other agency in the planning of any transition services.

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Justification: In order to comply with federal regulations, the local educational agency must obtain consent from the parent to invite other participating agency representatives.

8 VAC 20-80-62 C 3 / Federal Section 300.321 (f) NEW

Recommendation: Add the new federal requirement to invite, at the request of the parent, the Part C service coordinator to the IEP meeting for the child transitioning from Part C to Part B services. *“In the case of a child who is transitioning from Part C to Part B services, the local educational agency will invite, at the request of the parent, the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services.”*

Justification: This addition to the IEP team complies with new federal regulation Section 300.321 (f).

8 VAC 20-80-62 C / Federal Section 300.321 (e)

Recommendation: The new federal regulations that specify IEP team attendance and permit IEP team members to be excused from IEP Team meetings with parental permission, should not be added to the Virginia regulations.

Justification: These regulations could potentially add an unnecessary layer of complexity to scheduling the IEP team meeting and could result in delaying the IEP meeting. This delay would then delay the student’s access to needed accommodations, program modifications, and supplementary aids and services.

8 VAC 20-80-62 D 2b(1) / Federal Section 300.322 (b)(2)

Recommendation: Maintain the additional IEP notice requirements for students, ages 14 or younger, who are beginning the transition process. Although the federal regulations remove the age 14 provisions, it is very important for Virginia to retain the age 14 regulations.

Justification: Transition planning is one of the most critical aspects of the IEP process. Without appropriate transition planning, the time and energy expended by the IEP teams to ensure an appropriate educational foundation on which to build a future will be ineffective. Without the mandate to begin at age 14, many students will not receive transition planning at this age and will lose years of transition planning that could have fostered such results as independence and access to higher education. The cost of requiring transition planning to begin at 14 are minimal if not nonexistent; the cost of children with disabilities not receiving transition planning early enough is grave.

8 VAC 20-80-62 D 2b(2)(a) / Federal Section 300.322 (b)(2)(i)(A)

Recommendation: Indicate that a purpose of the meeting will be the consideration *of the postsecondary goals and transition services for the student*; and

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Justification: The federal requirement is for the IEP of the student, age 16 or younger, to include postsecondary goals and the transition services that will enable the student to meet those goals.

8 VAC 20-80-62 F 1 / Federal Section (a)(1)

Recommendation: A statement of the child's present levels of *academic achievement and functional* performance, including how the child's disability affects the child's involvement and progress in the *general education curriculum* or, for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

Justification: The federal statute and regulations emphasize that functional needs, performance, and goals be included in the IEP for the child. The federal regulations also change the term general curriculum to general education curriculum, clarifying that this is the same curriculum used for students without disabilities.

8 VAC 20-80-62 F 2 / Federal Section 300.320 (a)(2)

Recommendation: A statement of measurable annual *academic and functional* goals, including benchmarks or short-term objectives, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the *general education curriculum*, and meet each of the child's other educational needs that result from the child's disability.

Justification: The federal regulations include the development of functional goals for the child as well as academic goals. The federal regulations have removed the mandate to include benchmarks or short-term objectives for each measurable annual goal, except for students who take alternate assessments aligned to alternate achievement standards. The benchmarks or short-term objectives should continue to be used for all students because they are a valuable tool used by teachers to pace the student's progress toward meeting the annual goals. They provide the necessary specificity that enables teachers, parents, and students to understand how goals will be reached and to assess/measure if goals are being reached in a timely manner. Further providing parents and the full IEP team with information about how the child is progressing, fosters discussion and enables adjustments to be made by the entire IEP team without unnecessary delay, thus enabling the child to consistently attain an appropriate education.

8 VAC 20-80-62 F 3 / Federal Section 300.320 (a)(4)

Recommendation: 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 for the child *to enable the child*:

Justification: The special education, related services, and supplementary aids and services are to be based on peer-reviewed research. 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.

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8 VAC 20-80-62 F 9 / Federal Section 300.320 (b)

Recommendation: Although the federal regulations remove the age 14 provisions, it is very important for Virginia to retain the age 14 regulations.

Justification: Students in Virginia, ages 14 and younger, greatly benefit from the transition services that focus on a course of study that prepares the student for a future career. Transition planning is one of the most critical aspects of the IEP process. Without appropriate transition planning, the time and energy expended by the IEP teams to ensure an appropriate educational foundation on which to build a future will be ineffective. Without the mandate to begin at age 14, many students will not receive transition planning at this age and will lose years of transition planning that could have fostered such results as independence and access to higher education. The cost of requiring transition planning to begin at 14 are minimal if not nonexistent; the cost of children with disabilities not receiving transition planning early enough is grave.

8 VAC 20-80-62 F 9 / Federal Section 300.320 (b)

Recommendation: Beginning with the first IEP to be in effect when the student turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and the transition services, including courses of study, needed to assist the student in reaching those goals. **Justification:** The federal regulations specify that postsecondary goals be included in the IEP of the student turning 16. These goals are to be driven by transition assessments related to skills and education the student needs to live and work independently. The transition services to be provided to the student are those needed to assist the student in reaching the postsecondary goals. The above referenced language enables compliance with the Federal regulations.

**Comments on Development of IEP
Federal Regulations 300.324 – 300.325**

8 VAC 80-20-62 E 1 a – d / Federal Section 300.324 (a)(1)(i) thru (iv)

Recommendation: Add “c” below and maintain “d”.
In developing each child’s IEP, the IEP team shall consider:

- a. The strengths of the child and the concerns of the parent or parents for enhancing the education of their child;
- b. The results of the initial or most recent evaluation of the child;
- c. *The academic, developmental, and functional needs of the child;* and
- d. As appropriate, the results of the child’s performance on any general state or division-wide assessment programs.

Justification: Federal regulation 300.324 (1)(iv) specifies that academic, developmental, and functional needs of the child be considered by the IEP team in the development of the child’s IEP. In addition,

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with its important focus on SOLs and access to the general education curriculum, Virginia should maintain the current provision regarding consideration of state and division-wide assessments.

8 VAC 80-20-62 E 2 a / Federal Section 300.324 (a)(2)(i)

Recommendation: In the case of a child whose behavior impedes the child’s learning or that of others, consider *the use of positive behavioral interventions and supports, and other strategies, to address that behavior;*

Justification: Revise wording to be consistent with the federal regulation. The new language emphasizes the importance of using positive behavioral interventions.

8 VAC 80-20-62 E 3 / Federal Section 300.324

Recommendation: Maintain the current provision. “If, in considering the special factors, the IEP team determines that a child needs a particular device or service, including an intervention, accommodation, or other program modification in order for the child to receive a free appropriate public education, the IEP team must include a statement to that effect in the child’s IEP.”

Justification: Maintain this Virginia regulation which ensures that there is documentation of IEP team consensus that the child requires certain services or devices and supports as a result of special factors impacting their education.

8 VAC 80-20-62 E 4 a / Federal Section 300.324 (a)(3)(i)

Recommendation: Appropriate positive behavioral interventions *and supports and other strategies* for the child;

Justification: The federal regulation adds supports to interventions and strategies. Supports help sustain the intervention where as strategies imply a way of implementing the intervention. It is important that the IEP includes the precise assistance a child needs based on evaluative tools to appropriately address challenging behaviors. Without the incorporation of necessary and appropriate assistance with regard to behavioral issues, behavior may impede academic progress and educational benefit. Thus it is important to cover the full range of behavioral assistance that may be necessary for a child, not only behavioral intervention and strategies, but supports as well.

8 VAC 80-20-62 E 4 b / Federal Section 300.324 (a)(3)(ii)

Recommendation: Supplementary aids and services, *accommodations*, program modifications or supports for school personnel that will be provided for the child.

Justification: Maintain the current language in the Virginia regulation that includes accommodations. The federal regulation does not include the term “accommodations”, which are different from program modifications or supplementary aids and services. Accommodations may be critical to student learning, performance on state assessments, and overall student outcomes.

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8 VAC 80-20-62 E 6 / Federal Section 300.324

Recommendation: Maintain current regulation that specifies the IEP team will work toward consensus and provides provision for prior written notice should the team not reach consensus.

Justification: This state provision, although not specified in the federal regulations, should be maintained because it clarifies the requirement that the IEP team work towards consensus and provides specific guidance regarding the requirement for prior written notice if consensus cannot be achieved.

8 VAC 20-80-66 A 1 thru 9 / Federal Section 300.325

Recommendation: Maintain all current provisions which provide specific guidance with respect to private school placements by a local school division or Comprehensive Services Act (CSA) team.

Justification: State regulations contain provisions specific to CSA placements which are important to ensuring FAPE for students so placed and which delineate school division responsibility. The provision, 8 VAC 20-80-66 A 1 5 c, regarding parental and local school division involvement in reevaluations undertaken by the private school ensures that all responsible and interested parties are involved throughout the educational process. The provision makes it clear to private schools that they cannot unilaterally change the child's program. Regulation 8 VAC 20-80-66 A 6 makes it clear that the local school division is to remain responsible for ensuring compliance with FAPE and other requirements when a child is placed in a private school by the local school division or the CSA team. Regulations 8 VAC 20-80-66 A 7 and 8 ensures the child's right to "stay put" in the event of a dispute and ensures that parents maintain all procedural rights.

8 VAC 20-80-68. Discipline procedures.

Unique Circumstances Removals.

Recommendation: The regulations must make clear that the ability to consider unique circumstances in deciding on a case-by-case basis to remove a child must be exercised consistent with the other requirements in 8 VAC 20-80-68 and 34 CFR § 300.530 and may not be used to circumvent these requirements.

Justification: The removal of children from the classroom can hurt the child, in the long-term and the short-term. Removed children are likely to fall further and further behind; a school year is a short period of time. Every week can count, particularly for children whose disabilities can 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 rigorously protected the rights of children who are being disciplined, including the manifestation determination and other requirements. School districts may not use the ability to consider unique circumstances on a case-by-case basis in determining whether to change a placement to circumvent the requirements of 34 CFR § 300.530 and 8 VAC 20-80-68. The ability to consider unique circumstances was meant to protect children from zero tolerance rules. For example, if a child had not received

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appropriate behavioral or other support and supplementary aids, the child should not be removed even if the school district otherwise would have the authority to do so.

B. Short-term removals.

Recommendation: Require that a Functional Behavioral Assessment be performed for children who are given a 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 as they are removed from the classroom. They are also deprived of their right to be educated with their non-disabled peers. It is far better to address and resolve problem behaviors. Functional behavioral assessments are important so that interventions can address the actual cause of the behavior. Given the risk to a child of repeated short-term removals, the LEA should be required to perform an FBA for any child who is removed for any period after being removed for 10 cumulative school days in the year.

C. Long-term removals.

Recommendation: In revising C(1)(b) to comply with 34 CFR §300.536 and require school districts--in deciding whether a series of short-term removals is a pattern--to consider whether behavior is substantially similar to that in other incidents that caused removals, Virginia should define "substantially similar" to include behaviors that were caused by the child's disability or had a direct and substantial relationship to it.

Justification: Removal from the regular educational placement can cause substantial harm to children with disabilities, and repeated short-term removals pose a particular risk because the children is not entitled to the same protections as a child whose placement was changed for 10 school days. In defining whether a series of short-term removals are considered a pattern that constitutes a change in placement, the new regulations permit consideration of whether the conduct causing the removals is substantially similar. A child may engage in behaviors that could appear different on the surface but are substantially similar in that they are all caused by or related to the disability. It is the disability that ties the behaviors together and is the substantial similarity in them. 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. Moreover, if the child were removed for 10 or more consecutive school days, the child would be entitled to a manifestation determination review and the child's placement could not be changed if the behavior was a manifestation--even if the behaviors seems to differ on the surface. A school district should be able to engage in a series of short-term removals for behaviors that are the manifestation of the disability and thereby circumvent the discipline protections in IDEA.

Recommendation: In revising C(2)(b) to permit special-circumstances removals for longer than 45 days, the definition of serious bodily injury must be the definition in 18 U.S.C. § 1365(3)(h) and may not be changed to permit removal for lesser injury.

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Justification: IDEA 2004, 20 U.S.C. § 1415(k)(7)(D) permits removal only for serious bodily injury as defined in 18 U.S.C. § 1365(3)(h). The statute does not permit a 45-day special circumstances removal for other injuries and the protection provided by federal law may not be weakened.

Recommendation: Retain the requirement in C(2)(c) that the interim alternative education setting must enable the child to "(1) continue to progress in the general curriculum, although in another setting, (2) Continue to receive those services and modifications including those described in the student's current IEP that will enable the student to meet the IEP goals; and (3) Include services and modifications that address the behavior and are designed to prevent the behavior from recurring."

Justification: 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 and that address and deter the behavior. The IDEA does not permit the provision of something less than full FAPE to children who are in interim alternative placements.

Recommendation: In revising C(2)(d), the regulation should require that a Functional Behavioral Assessment and Behavioral Intervention Plan will be developed to address the behavior, and that if there is an existing FBA or BIP that is over one year old, a new one will 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 addressing student problem behavior. Failure to base the intervention on the actual cause (function) often results in interventions that are both 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. Because misbehavior can result in the exclusion of children from the classroom and placement in a more restrictive environment, it is important that FBAs be validly conducted and both FBAs and BIPs be up to date.

Recommendation: Retain existing C(2)(e), requiring that if a child with a Behavioral Intervention Plan is removed for 10 school days and then subjected to a further removal that is not a change in placement, 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 Least Restrictive Environment, 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 best-educated about a child and his/her behavior.

Recommendation: Retain current regulation (C)(3)(b) regarding services during a subsequent removal that is not a change in placement, and add the words "including the provision of FAPE, as required by 34 CFR § 300.101(a)."

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

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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. 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), which requires SEAs to provide FAPE to children who are removed or suspended. IDEA 2004 does not contemplate the provision of FAPE-light or less-than-FAPE to removed children. Moreover, the existing language in 20-80-68(C)(3) requiring the LEA to provide services necessary to enable the child to advance toward achieving IEP goals should be retained as a means on implementing 300.530(d)(1)'s requirements.

Recommendation: Revise (C)(3) 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 FAPE. The heart of the IDEA is ensuring that all children receive FAPE, and that school districts do not use removal procedures to attempt to defeat this.

Recommendation: Retain existing (C)(3)(c) requiring that for removals for more than 10 school days that are not a change in placement, school personnel shall consult with the child's special-education teacher to determine the extent to which services are necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP.

Justification: The special-education teacher is most knowledgeable about the child's disability, how it effects his/her learning, and what appropriate services the child needs so that he/she will receive FAPE. Nothing prevents Virginia from exceeding the new federal regulation that permits consultation with one teacher, or from clarifying that the teacher will be the special-education teacher. Allowing consultation with a teacher unfamiliar with the child's learning needs that result from his/her disability will only result in provision of a poorer education to the child who has been removed from the classroom.

Recommendation: Retain the factors in current (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; whether the LEA has 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 meets the requirements of subdivision 2 c.

Justification: All of these factors remain an important part of the hearing officer's decision, even though 34 CFR § 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

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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: In revising C(5)(b), to specify that the Manifestation Determination review shall be conducted by the LEA, parents, and relevant IEP team members as determined by LEA and parents, provide that LEAs must make bona fide efforts to work with parents in selecting IEP team members, and that ultimately, as provided in 20-80-62(C)(1)(f), the parents or LEA has the discretion to include all individuals with special knowledge or expertise regarding the child, particularly regarding how a student's disability can impact on behavior or on understanding, or the impact and consequences of behavior, or the student and the student's disability.

Justification: A Manifestation Determination Review is a serious matter that could result in changing the child's placement and removing him/her from the Least Restrictive Environment and a weakening of 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, this right to include such team members is required by 20-80-62(C)(1)(f). School districts should not be permitted to prevent parents from designating MDR team members.

Recommendation: In revising C(5)(b) to reflect the new federal requirement that the team review all relevant information in the child's file, including IEP, teacher observations, and relevant information provided by the parent, specify that this includes all education records of the child, as well as new information that parents or school districts have.

Justification: Given the potential for the Manifestation Determination Review 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. 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 school district 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: In revising C(5)(b) to reflect the new manifestation standard in 20 U.S.C. § 1415(k)(1)(E), the regulations should specify that if behavior has a direct and substantial relationship to the disability the child's disability where the disability significantly impairs the child's behavioral controls.

Justification: The language in the Conference Report 108-779 specifying that behavior is a manifestation if "that 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

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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.

Recommendation: Revise C(5)(c) to state that if the child's behavior is a manifestation of the disability, the child's educational placement may be changed only through by parent consent or by the LEA's compliance with C(2)(b) (relating to special circumstances removals, as described in 34 CFR § 300.530(g)), C(4) and C(7)(c) (relating to removals ordered by a hearing officer because the LEA establishes that child's behavior is likely to result in injury).

Justification: This is required for the regulations to comply with IDEA 2004, and the federal regulations, 34 CFR § 300.530(e), 300.530(g) and 300.532(c). If the child's behavior is a manifestation, the child must be returned to his setting and his placement may not be changed, absent parent consent, 34 CFR § 300.530(g). Given the potential harm that removal poses for children with disabilities, both in terms of their educational progress and right to be in the least restrictive environment, it is important that these procedures be followed.

Recommendation: Modify C(5)(c)(2) to require that when behavior is a manifestation, the IEP team must comply with the functional behavior assessment and behavioral intervention plan requirements of 34 CFR § 300.530(e).

Justification: IDEA 2004 and 34 CFR § 300.530(e) require that when behavior is a manifestation of the child's disability, the LEA must conduct a functional behavioral assessment, unless the it had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child, and must review any existing behavioral intervention plan and modify it, as necessary, to address the behavior. Virginia's regulations must comply with this minimum in federal law.

Recommendation: Retain the requirement in C(5)(e) that if the child's behavior was deemed a manifestation of the disability because the conduct in question was the direct result of the LEA's failure to implement the IEP, the LEA must take immediate steps to remedy those deficiencies.

Justification: This change is required by 34 CFR § 300.530(e)(3). It would be unconscionable to allow a child to remain in a situation where his/her IEP was not being implemented, as the child is being denied FAPE. Moreover, problematic behavior is likely to recur.

Recommendation: Even if behavior is not a manifestation of the child's disability, the IEP team should be required to review positive behavioral strategies and develop an appropriate behavioral intervention plan after a functional behavior assessment.

Justification: FBAs are designed to prevent problem behaviors from recurring by determining the causes of the behavior. Since good behavior benefits all students, even when misbehavior is not a manifestation of the disabilities, 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.

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8. Protection for students not yet eligible for special education and related services.

Recommendation: Revise 8(b) to specify that if a parent does not know how to write or has a disability that prevents a written statement, the LEA must provide personnel and services to enable the parent to express in writing his/her concerns that a child is in need of special education and related services, and information regarding this service must be provided to all parents.

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 isn't yet eligible, if the parent provides notice in writing of their concerns that the child needs special education and related services. A child should not face forego this protection simply because his/her parents cannot write. Rather, the LEA should be obligated to provide writing services and to publicize this throughout the district.

Recommendation: The regulations should clarify that a finding of ineligibility based on an evaluation that is more than 3 years old cannot be the basis for finding the school district is not deemed to know a child has a disability.

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.

8 VAC 20-80-70. Procedural safeguards.

A. Opportunity to examine records; parent participation.

Recommendation: Retain requirement in 1(a)(2) that parents be given notice of meetings regarding identification, evaluation, and placement of child "early enough to ensure that they have an opportunity to participate" and all of the current requirements of that notice.

Justification: Parents are equal team members, and need sufficient notice to attend IEP meetings. They are not as knowledgeable about the intricacies of special-education law and regulations as are school district representatives, who have greater experience with the various procedures. It is important that parents continue to know that they can bring others to IEP meetings who have special knowledge and expertise.

Recommendation: Retain current language in 1(b)(2) stating that meetings do not include informal conversations by LEA personnel on methodology, lesson plans, or service coordination "if those issues are not addressed in the child's IEP."

Justification: It is important to protect the rights of parents to be involved in discussions about their child's IEPs and any modifications to the IEP—even if done informally through an unscheduled conversation. Parents are equal team members and should be involved in such conversations. Virginia took the proper approach in the current regulations and should retain this language.

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Recommendation: Retain current (1) (c)(2)-(3) requiring school district to make arrangements for parents to participate in IEP and placement meetings, including by telephone or videoconferencing, and that placement decisions may be made without parents only if LEA has a record of attempts to involve parents in accord with 8 VAC 20- 80-62.

Justification: Keeping the current requirements is important to protect the rights of parents and children, the two primary purposes of the IDEA. IEP and placement meetings have always provided one of the primary venues for parental participation in the educational lives of their children. It is important that parents be involved in all meetings regarding placement and that adequate records be kept to ensure that school districts actively attempt to involve parents. A parent who cannot attend because of illness or inability to get time off work is different from a wholly silent parent. This is in accord with new federal regulation, 30 CFR §300.501.

Recommendation: Retain current d(4) requiring LEA to make reasonable efforts to ensure parents understand and participate in placement discussions, including arranging for interpreters when appropriate.

Justification: It is important to facilitate participation for all parents, including those who have language barriers or hearing and sight disabilities. The use of interpreters is required for IEP meetings and should be required for placement meetings. That other statutes already require interpreters is not a reason to eliminate this regulation. Although it has been eliminated from the federal regulation 34 CFR § 300.501 on the basis that other laws like the ADA and Rehabilitation Act require the provision of interpreters, retaining this in the special-education regulations will ensure that all school districts adhere to it and that parents know their rights. This is much fairer than expecting parents to look up other laws and statutes. It is well-settled that state regulations can provide more than the IDEA minimum and exceed federal law and regulations in the protections they provide. *Burke Co. Board of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Amelia County School Bd. v. Virginia Bd. Of Education*, 661 F.Supp. 889 (E.D. Va. 1987).

B. Independent Evaluations.

Recommendation: Retain existing language with changes in accord with current federal regulations, 34 CFR §300.502. This includes that parents are not limited to one IEE in a child's entire school career.

Justification: The right to an independent evaluation is a right parents have had since 1983 and the federal regulation ensuring that right may not be altered. The U.S. Department of Education has made clear that parents are entitled to at least one IEE every time the school district conducts an evaluation parents disagree with, and that parents are not limited to one in a child's school career. A school district may not use cost as a barrier to an IEE, as this would deprive parents of an essential right.

Recommendation: Ensure that Virginia regulations are in accord with new federal regulations regarding the use of privately-obtained IEEs by parents. Specifically, if a parent shares with the public agency an evaluation obtained at private expense, it may be presented as evidence at due process hearings. But if a parent does not, then it may not be used as evidence.

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Justification: Virginia regulations should conform to federal regulations, 300.502. The IDEA does not require parents to produce evaluations that they do not intend to use in the hearing or otherwise share with the school, 70 Fed. Reg. 46690. Parents should be able to obtain independent evaluations at their own expense for their own use to assist their child. Parents may be more reluctant to pay for private evaluations if they know that the school districts can obtain them. Rather, they could seek them at public expense, raising costs for school districts.

C. Prior Written Notice

Recommendation: The regulations should specify that the requirement to provide prior written notice "a reasonable time" before the LEA takes or declines to take action, as described in 20-80-70(C)(1), prohibits an LEA from delaying the notice until it receives a due process request unless it is not aware of the requested change until the due process notice is received.

Justification: Congress has made clear that an LEA can delay giving prior written notice until it receives the due process complaint only if it is "learning of a dispute for the first time in parent's due process complaint." Sen. Rep. No. 108-185 at 36 (2003). In all other situations, the LEA must give the notice at the time of the proposed/refused action.

D. Procedural Safeguards Notice.

Recommendation: At a minimum, the procedural safeguards notice must be given to parents as often as required by the new federal regulations, and contain all issues required by the federal regulations, including information about resolution sessions and parents' rights and responsibilities with regard to them, 34 CFR §300.504. Placing a copy on an internet website is no substitute for giving the notice to parents in hard copy.

Justification: At a minimum, the procedural safeguards notice must comply with federal requirements. Moreover, not all parents have access to the internet and parents should receive a hard copy that they can review themselves.

E. Parental Consent.

Recommendation: Maintain Current E: Informed consent must be obtained before conducting an initial evaluation or reevaluation, an FBA, a change in identification, and the initial provision of special-education or related services to parents.

Justification: These current portions of the Virginia regulations protect parent rights and also are required by the new federal regulations. Without informed consent, parents cannot make informed necessary decisions about their children's educations, and be equal partners in the IEP process.

Recommendation: In accord with federal regulation 34 CFR § 300.300 and 300.322, LEAs LEA should keep a record of attempts to secure consent, including detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parent or parents and any responses received; and detailed records of visits made to the parent's or parents' home or place of

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employment and the results of those visits. In addition, LEA personnel should explain in writing and orally to parents the consequences of withholding consent and the reason the LEA recommends that the child be evaluated or needs special education.

Justification: IDEA 2004 allows LEAs to decline to evaluate and provide services if consent is withheld or the parent fails to respond to a request for consent. If parents don't consent, the LEA is not responsible for providing FAPE. This is a very severe penalty for a child to bear, and it should happen only after serious attempts are made to obtain parental consent and documented in the child's file, and after the parent fully understands the consequences of refusing to consent. This can only happen if the LEA is required to explain the consequences of withholding consent to parents. In addition, Virginia's current regulations recognize the importance of having concrete steps to seek consent and record attempts to do so, 8 VAC 20-80-70(E)(6)(b), as do the federal regulations, 34 CFR § 300.300 and 300.322.

Recommendation: Retain current Virginia requirements that informed consent be obtained before re-evaluations, functional behavioral assessments, change in identification, the initial provision of services to children, partial or complete termination of special education and/or related services, and accessing a parents' insurance proceeds.

Justification: These requirements ensure that parents are able to make informed decisions about their children's education. Parents are responsible for their children's education and upbringing and their informed consent is vitally important. Without informed consent, parents cannot make appropriate decisions and will be reduced to guessing.

G. Confidentiality of Information

Recommendation: retain current 8 VAC 20-80-70 (G) regarding confidentiality and the right to access records but modify to require that copies be provided to parents at reasonable cost.

Justification: Virginia's current regulations appropriately protect the confidentiality of records and the rights of parents to access them, including by a representative, and nothing in IDEA 2004 or the new federal regulations affects this. When many of the access statutes were initially written, photocopying was an expensive procedure. Today, most offices are equipped with photocopying machines and the cost of copying is relatively low. Permitting parents copies of their children's educational records enable them to be better prepared to discuss their children's educational program and to be informed participants in the process. Most school districts give parents copies anyway. Consequently, the regulations should be amended to allow parents photocopies of their children's records under all circumstances.

8 VAC 20-80-72. Transfer of rights to students who reach the age of majority.

No additional comments.

8 VAC 20-80-74. Mediation.

A. Availability of Mediation.

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Recommendation: Revise (A) in accord with IDEA 2004 and federal regulations to ensure that mediation is available at all stages of the process, not just due process.

Justification: This revision is required by federal law. It also encourages amicable dispute resolution.

E. Mediation Agreements.

Recommendation: Retain requirement that mediation be held in a timely manner and location convenient to both parties. In accord with IDEA 2004 and federal regulations, modify regulation to require that an agreement be signed by a parent and LEA representative with the authority to bind the agency, and that discussions remain confidential and may not be used as evidence in subsequent due process hearings or civil proceedings, and that any mediation agreement contain a pledge to that. Also modify regulation to provide that mediation agreements are enforceable in any State court of competent jurisdiction or in a district court of the United States.

Justification: Changes are required by federal law. Current Virginia regulation does not specify that the parties signing the agreement include an LEA representative with authority to bind the agency as IDEA 2004 requires.

F. Individuals Who Serve as Mediators.

Recommendation: Retain current F(1) specifying that individuals who serve as mediators may not be employees of any LEA or of the Virginia Department of Education if it is providing direct services to a child who is the subject of the mediation process.

Justification: It is important for Virginia to retain this provision to ensure that mediation is effective and the parties are willing to use the system. Mediation is approximately 1/10th the cost of litigation. If parents know that the person charged with impartially mediating their dispute comes from another school district they will be less likely to choose mediation. In 1999, the Department of Education correctly recognized that LEA employees should not act as mediators:

"[I]n order for mediation to be effective, it must be an attractive alternative to both public agencies and parents and it must be an impartial system which brings the proper parties into a confidential discussion of the issues and allows for a binding agreement that resolves the dispute. . . .the use of current LEA employees as mediators would make mediation a much less attractive alternative to parents."

64 Fed. Reg. at 12611 (Mar. 12, 1999) (emphasis added). Virginia should retain this provision in its regulations. It is well established that state regulations can provide more than the IDEA minimum and exceed federal law and regulations in the protections they provide. *Burke Co. Board of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Amelia County School Bd. v. Virginia Bd. Of Education*, 661 F.Supp. 889 (E.D. Va. 1987).

8 VAC 20-80-76. Due process hearing.

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B. Basis for Due Process hearing request.

Recommendation: Current (B)(2) permits the LEA to initiate due process to resolve a disagreement when the parents withhold consent which is required to provide services to a child who has been identified as a student with a disability or suspected of having a disability. This should be revised in accord with the new IDEA regulations to prohibit the LEA from doing so with regard to the initial provision of services, if the parents have not provided consent. 34 CFR § 300.300(b). The regulation should also provide that when parents who place their children in private school or homeschool them refuse to give consent for an evaluation or re-evaluation, the school may not initiate due process to override the failure to give consent, in accord with new 34 CFR § 300.300(d)(4).

Justification: Changes required by IDEA 2004 and new federal regulations.

C. Procedure for requesting a due process hearing.

Recommendation: Revise (C)(2) in accord with IDEA 2004 to state that notices which meet the six requirements of IDEA 2004, §615(b)(7)(A), are sufficient, and the hearing officer cannot require pleading with specificity or require any more than the six elements set forth in the statute.

Justification: Section 615(b)(7)(A)(ii) and the accompanying 34 CFR § 300.508 state that a complaint is sufficient if it provides the child's name, address/contact information, school, "a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem," and "a proposed resolution of the problem to the extent known and available to the party at the time." All of this, except for the new contact information requirement for homeless children, is identical to IDEA '97, and must be interpreted the same way. 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: Add new section stating that parties do not 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 doing so, 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 very

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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: 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: A new resolution session will not be required if parties amend their complaint in response to a finding of insufficiency.

Justification: The U.S. Department of Education has stated in the Regulations Commentary that "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 would be very unfair to children to put them 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.

Recommendation: The regulations should specifically prohibit hearing officers from granting extensions of time for school districts to respond to parents' due process complaint notices.

Justification: The IDEA is clear on its face: parties have 10 days from receipt of a due process hearing notice to respond. See also 71 Fed. Reg. 46700. There is no room for extensions. Granting additional extensions only delays further the ability of the child to receive FAPE. A month is a long time when compared to a school year.

Recommendation: Establish the 2-year statute of limitations in the Virginia regulations, permitting parents to file a due process action within 2 years of when the parent knew or should have known of the alleged violation, except that timelines do not apply if the parent could not file for due process because the LEA made misrepresentations that it had resolved the problem forming the basis of the complaint, or it withheld information that Part B of IDEA required to be provided to the parent.

Justification: IDEA 2004 and the regulations explicitly state that parties have 2 years in which to file due process action, 20 U.S.C. § 1415(b)(6)(B), 34 CFR § 300.507(a), 300.511(e). Virginia currently applies a 2 year statute of limitations by case law. The same 2-year statute of limitations should continue to apply. Virginia should not shorten it. Parents unfamiliar with their rights may need 2 years to bring a case, after carefully weighing the information. Too short of a timeline may result in more

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cases being filed as parties rush to protect their rights. The exception is required by federal law, 20 U.S.C. § 1415(f)(3)(D); 34 CFR § 300.507(a), §300.511(e).

Recommendation: In accord with IDEA 2004's legislative history, permit parents to file actions seeking compensatory education for not just the last 2 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 2 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. *Id.* If a child has been denied FAPE for longer than 6 years, it is insufficient to only provide services to make up for 2 years.

Recommendation: Add a new provision stating that if parents file a due process complaint notice, it will toll the statute of limitations, in the event that further amendments are required.

Justification: The filing of a due process complaint notice should toll the statute of limitations, so that the statute of limitations is applied on the date they 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.

Resolution Sessions.

Recommendation: Incorporate into the Virginia regulations the rights of parents to bring advocates and others with special knowledge of the child to the resolution meeting.

Justification: Required by new regulations. 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: 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 5 days of receiving the complaint 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 5 days of receiving the due process complaint notice. Because the new federal regulations, 34

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CFR § 300.510(b)(4), permit school districts to dismiss due process complaints if parents do not participate—a harsh remedy—school districts must make every effort to schedule the resolution session at a mutually-agreed upon time and place. Otherwise, school districts could simply dismiss cases by scheduling sessions when parents cannot attend.

Recommendation: 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 U.S. Department of Education recognized in the Commentary, 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: LEAs must make diligent efforts to including secure parent participation in resolution sessions, including telephone calls, letters, and visits, and must carefully detail their efforts to involve parents in resolution sessions in accord with 34 CFR 300.322. Only after having done so, may an LEA seek to dismiss a case for failure of parents to take part in a resolution session.

Justification: As the U.S. Department of Education concluded, an LEA must make diligent efforts to secure parent participation in resolution sessions before filing a motion to discuss. 71 Fed. Reg. 46702. This is a very harsh penalty that has the potential to seriously hurt children who have been denied FAPE or whose rights have otherwise been violated. As a result, Virginia should require LEAs to make all diligent efforts to secure parent participation and keep detailed records of those attempts, just as LEAs must do for IEP meetings under 34 C.F.R 300.322. It is well-settled that state regulations can provide more than the IDEA minimum and exceed federal law and regulations in the protections they provide. *Burke Co. Board of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Amelia County School Bd. v. Virginia Bd. Of Education*, 661 F.Supp. 889 (E.D. Va. 1987).

Recommendation: Require the parents and LEA together will determine the relevant IEP team members to attend the resolution session, and require the LEA to consult parents to select relevant team members within 5 days of the complaint notice.

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: Require that the 45-day timeline for issuing a final hearing officer decision begins at the end of the period 30 days after receipt of the due process hearing notice. The 45-day timeline shall begin one day after: (1) both parties agree in writing to waive the resolution session; (2) before the 30 day period ends but after mediation or a resolution session begins, and both sides agree that agreement

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cannot be reached; or (3) both parties agree to continue mediation at the end of the 30 day period but one party withdraws from the agreement.

Justification: Change required by new federal regulations, 34 CFR § 300.510(b)(1)-(2), 300.510(c). The resolution session period exists to give time to work on achieving resolution, not to serve as a 30-day waiting period if the parties waive the resolution session or an agreement cannot be reached.

Recommendation: Require if the LEA fails to convene the resolution session within 15 days with the required personnel, parents may seek a ruling from the hearing officer to start the 45-day due process timeline.

Justification: Change required by new federal regulations, 34 CFR § 300.510(b)(5).

Recommendation: 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 3 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 CFR § 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: The regulations should ensure 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 school districts 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: Permit parents to seek a hearing officer determination that they did participate in the resolution session and obtain an order requiring the hearing to proceed without delay.

Justification: A parent who has participated in a resolution session must have an opportunity to dispute an LEA's claim that he/she did not participate. Otherwise, the ability to move forward to a due process hearing will be entirely within the control of the party that is being sued. An LEA should unilaterally be allowed to stop the resolution timelines.

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Recommendation: Require that all discussions during a resolution session and all information shared as part of the resolution process must remain confidential.

Justification: The purpose of the resolution session is to achieve a mutually-agreed upon solution. It would be wrong to permit school districts to use it for one-sided discovery, to obtain information from parents in preparation for the hearing, instead of its true process. Confidentiality in mediation is designed to encourage use of mediation and the same would be true of confidentiality for resolution activities. Otherwise, parents will be deterred from sharing information with the school district and a solution may not be reached. It is well-settled that state regulations can provide more than the IDEA minimum and exceed federal law and regulations in the protections they provide. *Burke Co. Board of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Amelia County School Bd. v. Virginia Bd. Of Education*, 661 F.Supp. 889 (E.D. Va. 1987).

Recommendation: 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 the State to allow parties to enforce a resolution agreement through the Complaint Procedures if they choose to do so, 34 CFR § 300.510(d). Virginia should permit parents to do so, as the Complaint process is simpler and less expensive.

D. Assignment of hearing officer.

Recommendation: Retain current D(3) requiring VDOE to promptly share the hearing officer's qualifications.

Justification: It is important for both sides to a due process hearing to know the hearing officer's qualifications. IDEA 2004 and the corresponding new federal regulations have new provisions requiring enhanced qualifications on the part of hearing officers. They must know & understand the IDEA, Federal and State regulations and case law; have knowledge and ability to conduct hearings in accord with appropriate, standard legal practice; and have knowledge and ability to render and write decisions in accord with appropriate, standard legal practice. 20 U.S.C. § 1415(f)(3)(A)(i); 34 CFR § 300.511(c).

Recommendation: Revise D(4) to provide that persons who are employees of elementary and secondary school-related organizations cannot serve as hearing officers.

Justification: The present D(4) 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.

E. Child's status during administrative or judicial proceedings.

Recommendation: Retain the current 20-80-76(E) regarding pendency.

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Justification: Current 20-80-70(E) complies with the requirements of federal law, both IDEA 2004, 20 U.S.C. § 1415(j) and the case law that has developed thereunder. E(3) simply puts into the regulation the Supreme Court's determination in *Town of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985), that a hearing officer's decision agreeing with the parents that a change of placement is appropriate is to be treated as an agreement between the SEA or LEA and the parents for purposes of IDEA § 615(j), and accordingly 34 CFR § 300.518(a).

Recommendation: Do not incorporate the portion of §300.518(c) in the federal regulations 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). 34 CFR § 300.518(c) 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.

F. Rights of parties in the hearing.

Recommendation: Revise current F(1)(c) and (F)(2), requiring an exchange of evidence and evaluations 2 business days prior to an expedited hearing to require the exchange 5 business days before the expedited hearing.

Justification: 34 CFR § 300.532(c)(1) requires that expedited hearings comply with the requirements of §300.510 through 300.514, with certain limited exceptions. §300.512(a)(3) requires the exchange of evidence for all hearings 5 business days before the hearing. This is further required by IDEA 2004. 20 U.S.C. § 1415(f)(2) specifically mandates that parties exchange evidence five business days before all hearings. § 1415(f)(2) applies to hearings pursuant to § 1415(f)(1), which specifically includes discipline hearings pursuant to § 1415(k). In addition, reducing the period to two business days would impose a gross hardship on parents. School districts have the discipline evidence; parents do not.

I. Responsibilities of the local educational agency

Recommendation: Subsection I should clarify that parents need not use the due process complaint form provided by the LEA.

Justification: In accord with 34 CFR § 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.

J. Responsibilities of the hearing officer.

Recommendation: Revise J(1) to provide that decisions in expedited disciplinary hearings must occur within 10 school days after the end of the hearing.

Justification: Revision required by IDEA 2004, 20 U.S.C. § 1415(k)(4)(B) and 34 CFR § 300.532.

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K. Authority of the hearing officer.

Recommendation: Revise Current K(1) and K(2), requiring an exchange of evidence and evaluations 2 business days prior to an expedited hearing, to require the exchange 5 business days before the expedited hearing.

Justification: 34 CFR § 300.532(c)(1) requires that expedited hearings comply with the requirements of §300.510 through 300.514, with certain limited exceptions. §300.512(a)(3) requires the exchange of evidence for all hearings 5 business days before the hearing. This is further required by IDEA 2004. 20 U.S.C. § 1415(f)(2) specifically mandates that parties exchange evidence five business days before all hearings. § 1415(f)(2) applies to hearings pursuant to § 1415(f)(1), which specifically includes discipline hearings pursuant to § 1415(k). In addition, reducing the period to two business days would impose a gross hardship on parents. School districts have the discipline evidence; parents do not.

Recommendation: Delete K(8) permitting hearing officers to grant extensions of deadlines beyond the periods allowed in the regulations.

Justification: The new deadlines in IDEA 2004 were set by federal statute, and hearing officers do not have the right to extend them. This includes the 20 days for expedited disciplinary hearings, the 10 days for expedited disciplinary decisions, the 15 days for resolution sessions, the 15 days for a resolution after that, and the 10 days for an answer and 15 days for an insufficiency motion.

Recommendation: Add new provision requiring Hearing Officers to administer oaths to witnesses.

Justification: The evidence provided in the due process hearing is used by the hearing officer to determine whether or not there was a violation of the IDEA. It is important to ensure that witnesses be truthful. Without such a requirement, false testimony could be provided with no penalty. The IDEA's due process provisions are made meaningful only by truthful testimony. Virginia should follow the same rules that other states do and administer oaths to witnesses, e.g., Texas Administrative Code, Title 19 (Education) § 89.1170(b); New York Regulations of the Commissioner of Education Part 200.5(j)(3)(iv).

M. Timelines for expedited due process hearings.

Recommendation: Revise M(1) to require that final written decisions in expedited hearings must be rendered within 10 school days of conclusion of the hearing, without exception or extensions.

Justification: This change is required by IDEA 2004, 20 U.S.C. § 1415(k)(4)(B) and 34 CFR § 300.532.

N. Costs of due process hearing and attorneys' fees.

Recommendation: Provide that LEAs may recover their attorneys' fees only under the terms of IDEA 2004 and §300.517.

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Justification: IDEA 2004 restricts the ability of LEAs to recover attorneys' fees to situations in which the parents' complaint is frivolous, unreasonable, or without foundation or the parent had filed the case for an improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. This is the standard from *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). As these standards are already clear in current caselaw, any regulatory clarification must reflect these standards and may not go beyond them.

O. Right of appeal.

Recommendation: Retain Current (O)(1) permitted an appeal to be filed from a hearing officer decision to court within one year of issuance or two years in federal court as permitted by case law.

Justification: Virginia's regulations and court-provided periods for filing an appeal protect the rights of parties to engage in a full review of their case and determine whether or not to seek review. Virginia should continue to allow these periods of time for the filing of a case in court, and should not shorten it. The federal regulations permit Virginia to adopt such regulations.

Recommendation: Retain current O(3) requiring that if the hearing officer agrees with the parents that a change in placement is appropriate, the hearing officer's order must be implemented while the case is being appealed.

Justification: The retention of this provision in O(3) is required by federal regulation, 34 CFR § 300.518(d).

P. Special authority of the Virginia Department of Education.

Recommendation: Revise (1) to ensure that the Virginia Department of Education takes action to ensure that hearing officers comply with the new requirements in IDEA, 2004 20 U.S.C. § 1415(f)(3)(A)(i) and 34 CFR § 300.511(c), to know & understand the IDEA, Federal and State regulations and case law; have knowledge and ability to conduct hearings in accord with appropriate, standard legal practice; and have knowledge and ability to render and write decisions in accord with appropriate, standard legal practice.

Justification: IDEA 2004 and the regulations require that hearing officers meet these standards and the Virginia Department of Education should be empowered to ensure that they do.

Recommendation: Revise 3 to require that training requirements for hearing officer must include the elements of §300.511(c)(ii)-(iv).

Justification: IDEA 2004 and the regulations require that hearing officers have knowledge of the IDEA, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts; appropriate, standard legal practice for conducting hearings, and rendering and writing decisions. Thus, the training criteria should be required to include them.

8 VAC 20-80-78. Complaint procedures.

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Recommendation: Retain current (C)(5) requiring the Virginia Department of Education, in resolving a complaint, to consider remediation for denial of services, including compensatory services, monetary reimbursement, and other corrective action, and appropriate future provision of services for all children with disabilities.

Justification: This is required by federal regulation, 34 CFR § 300.151(b). In addition, retaining these provisions helps encourage parents to use the lower-cost complaint system.

Recommendation: The Virginia Department of Education should permit the use of mediation to resolve complaints but not other forms of dispute resolution, some of which involve the giving up of rights by parents.

Justification: Mediation is well defined under IDEA 2004 § 615(e) and proposed regulation § 300.536. The mediator must be impartial and there are strict confidentiality requirements. Other forms of alternative dispute resolution could result in parents giving up rights. They could mean voluntary binding arbitration or other private means of resolution. Private entities resolving complaints will not be subject to public accountability, which is essential because complaints often deal with allegations that a public agency has acted improperly in providing an education for a child. Congress rejected binding arbitration as a solution to due process. If it had wanted to permit binding arbitration to resolve IDEA issues, it would have said so.