Virginia Coalition for
Students with Disabilities

November 6, 2008

Dear Governor Kaine:

Thank you for reaffirming your promise during your recent appearance on WTOP's recent "Ask the Governor" program not to reduce existing parental involvement in the proposed special education regulations. In doing so, you raised the hopes of parents across Virginia that misguided efforts to take away rights from parents of children with disabilities – rights that are vital to ensuring equality and fairness in the parent-school partnership – will not succeed.

We are extremely disappointed that the recently approved regulations reduce parent involvement and consent rights in disregard of the desires expressed in your memo of March 21, 2008 to the Board of Education. With regard to the specific measures you identified, the regulations fail to ensure the right of consent for parents of transfer students and the right to participate in a Functional Behavioral Assessment of their child. You also stated your intention in the memo that parent involvement not be reduced in other areas. However, these final proposed regulations continue to:

- Deny parents the right to participate in the referral and screening process through the elimination of "Child Study Committees" as well as required state-wide uniform procedures and timelines.
- Deny parents the right to receive timely re-evaluation reports due to the approval of an unnecessary extension of the timeline.
- Deny children with disabilities access to appropriate services due to new restrictive and arbitrary eligibility criteria.
- Deny young children with disabilities access to appropriate services due to new limits on the label of "developmental delay".
- Deny parents the right to ensure the inclusion of short-term objectives or benchmarks in their children's IEPs.

We know that some supporters of the recently approved regulations are arguing that they constitute a reasonable compromise between saving money and serving children. This is untrue. The proposed regulations cannot be considered a reasonable compromise when only one party *loses* rights and the other party gains them. Worst of all, the losers in this situation are Virginia's most vulnerable children. For your further review we have attached a full list of all areas where changes in the proposed regulations *roll back* current rights and protections for children.

Parents have contacted you *not* to ask for *new* rights and protections, but to advocate for retaining the rights they *now* have. These are rights that have well served children with disabilities for decades and have no justifiable reason for being eliminated. Certainly, denying services to children who need them will not save money, but will shift the burden for meeting their needs onto unprepared teachers and overstretched schools. Such an approach will only negatively impact classroom instruction, teacher retention, and state performance on standardized tests, while increasing suspension/expulsion rates and leaving many children with disabilities unprepared to face the challenges of adult life.

The proposed regulations represent a significant policy shift for Virginia. If these regulations are approved in their current form, an entire class of citizens in Virginia will lose rights for the first time in over 20 years. Instead of ensuring that Virginia leads the way as you have championed, these regulations will put the Commonwealth years behind by taking away the hard won gains of children with disabilities.

We request an opportunity to directly discuss these significant concerns with you. Please let us know a date and time when you might be available to meet. The individual futures of tens of thousands of Virginia's most vulnerable children are truly at stake and require your direct intervention.

Sincerely,

Maureen Hollowell

Attachment: Comments from the Virginia Coalition for Students with Disabilities on the proposed Regulations Governing Special Education Programs for Children with Disabilities in Virginia

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Virginia Coalition for Students with Disabilities
October 2008

8 VAC 20-81-10. Definitions.

Autism
Recommendation: Amend the definition of autism as follows:
"Autism" means a developmental spectrum disability significantly affecting verbal and nonverbal communication, and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. Difficulties in abstract thinking, flexible thinking, social awareness and judgment may be present as well as perseverative thinking. Delays in fine and gross motor skills may also be present. The order of skill acquisition frequently does not follow normal developmental patterns. Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. ~~A child who manifests the characteristics of autism after age three could be diagnosed as having autism if the criteria in this definition are satisfied.~~
Justification: The inserted changes would help key the Individualized Education Program (IEP) team in on additional considerations when developing the IEP. Changes are framed such that they are not to be used as criteria, but characteristics exhibited on the autism spectrum.

Child study committee
Recommendation: Retain the child study committee definition in current regulations.
Justification: Child study committees serve a vital role in the identification, evaluation, determination of eligibility and development and monitoring of special education programs and placements.

Developmental delay
Recommendation: Use standard age limit of nine years old provided in the Federal Regulations, not the minimum subset. Use early intervening services, as directed by Federal Regulations, 300.226(a) to address disproportionality.

"Developmental delay" means a disability affecting a child ages two by September 30 through ~~five~~ nine inclusive: (34 CFR 300.8(b); 34 CFR 300.306(b))
1. (i) Who is experiencing developmental delays,…

Justification:
1. 34 CFR 300.8 (b) states: "*Children aged three **through nine** experiencing developmental delays. Child with a disability* for children aged three **through nine** (or any subset of that age range, including ages three through five)"[emphasis added].
2. Current federal regulations discussion for § 300.226(a) early intervening services states:
   Under section 618(d)(2)(B) of the Act, LEAs that are identified as having significant disproportionality based on race and ethnicity… are required to reserve the maximum amount of funds under section 613(f)(1) of the Act to provide early intervening services to children in the LEA, particularly to children in those groups that were significantly over-identified. This requirement is in recognition of the fact that significant disproportionality in special education may be the result of inappropriate regular education responses to academic or behavioral issues.

Therefore, the justification being promoted to eliminate services for student-age children with developmental disabilities is egregious. Children who demonstrate developmental delay may not meet eligibility requirements for other disability categories at age 5 and should be allowed to utilize the developmental delay label through age 9 to avoid the potential for inaccurate disability category assignments. The federal regulations state that early intervening services are for children in kindergarten through grade 12, with a particular emphasis on children in kindergarten through grade 3; which more than aptly covers disproportionality through age 9.

3. The number of comments opposing reduction of the DD age limit (1059) was second only to the elimination of parental consent (1238). The opposition to reduce the DD age limit spread over 31 categories of commenters, including special education administrators, LEA personnel, psychologists, speech and language pathologists, occupational therapists, physical therapists, and the SSEAC. Less than 8% of commenters supported reduction of the DD age limit.

Functional behavioral assessment

Recommendation: Amend the definition of functional behavioral assessment (FBA) as follows: "Functional behavioral assessment" means an~~(n) process~~ evaluation with parent participation, to determine the underlying cause or functions of a child's behavior that impede the learning of the child with a disability or the learning of the child's peers. A functional behavioral assessment may include a review of existing data.

Justification: Functional behavioral assessment (FBA) is an evaluation, not an 'assessment.' The United States Department of Education, Office of Special Education Programs (OSEP) Letter to Scheinz was written to address the 1997 IDEA, OSEP has issued another Letter on this same issue since IDEA 2004 was passed, consistent with its earlier finding in Letter to Scheinz that parents are entitled to an independent educational evaluation (IEE) FBA. The new OSEP Letter, Letter to Christiansen, dated February 9, 2007, states:

"If an FBA is used to evaluate an individual child in accordance with 34 CFR §§ 300.304 through 300.311 to assist in determining whether the child is a child with a disability and the nature and extent of special education and related services that the child needs, it is considered an evaluation under Part B and the regulation at 34 CFR § 300.15. If the FBA is conducted for individual evaluative purposes to develop or modify a behavioral intervention plan for a particular child, under 34 CFR § 300.502, a parent who disagrees with the child's FBA would have the right to request an IEE at public expense. These regulatory provisions are consistent with the policy clarification provided in the Scheinz letter."

Parent participation in the FBA provides additional insight and experience into the evaluation being conducted, and will improve the considerations incorporated into the evaluation. Parent participation will also reduce the likelihood of a parent disagreeing with the FBA evaluation.

Implementation plan

Recommendation: Retain current definition for implementation plan.

Justification: The requirement for an implementation plan places responsibility on the LEA to develop a plan for carrying out the decision of a hearing officer, as well as identifying the parties responsible for implementing the plan.

Intellectual disability
Recommendation: Insert the official American Association on Intellectual and Developmental Disabilities (AAIDD) definition for intellectual disability.
"Intellectual disability" means a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before the age of 18.
Justification: An international committee of scholars, educators, psychologists, physicians, researchers, and service providers developed the 2002 definition provided above. This definition can be found in *Mental Retardation: Definition, Classification and Systems of Support (Luckasson et al., 2002),* and from the AAIDD website:
http://www.aaidd.org/Policies/faq_intellectual_disability.shtml
According to federal law, States are free to use a different term to refer to a child with mental retardation, as long as all children who would be eligible for special education and related services under the federal definition of mental retardation receive a free and appropriate public education (FAPE). Additionally, per the legislative process from the Virginia General Assembly session in 2008, the term Mental Retardation, will be legislatively changed to "Intellectual Disability." The Virginia Department of Education (VDOE) should proactively change definitions to adhere to anticipated legislative language.

Interpreting services
Recommendation: Amend the definition of interpreting services as follows:
"Interpreting services" ~~as used with respect to children who are deaf or hard of hearing~~, means services provided by personnel who meet the qualifications set forth under 8 VAC 20-81-40 and includes translating from one language to another (e.g., sign language to spoken English), oral interpreting and transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time transcription (CART), C-Print, and TypeWell."
Justification: There are children who are not deaf or hard of hearing (i.e., oral motor apraxia, Down syndrome) that utilize interpreting services as their main source of communication. To leave out these children would unnecessarily narrow what kinds of interpreting services can be provided.

Level I services
Recommendation: Retain current definition which includes "and related services" for students receiving Level I services.
"Level I services" means the provision of special education and related services to children with disabilities for less than 50% of their instructional school day (excluding intermission for meals). The time that a child receives special education services is calculated on the basis of special education services described in the individualized education program (IEP), rather than the location of services.
Justification: Children receiving Level I services may also be receiving related services.

Other Health Impaired
Recommendation: Retain arthritis and tuberculosis on the list of examples of health impairments that are cover by this category.

Justification: The Coalition is unaware of any problems that currently exist due to the inclusion of these two conditions in current Virginia regulations. Virginia has a longstanding policy of including these two examples in this definition.

Parent

Recommendation: Amend the definition of foster parent as indicated.

1. Persons who meet the definition of "parent":
   a. a biological or adoptive parent
   b. a foster parent:
      ~~i. if the biological parent(s)' authority to make educational decisions on the child's behalf has been extinguished under §§ 16.1-283, 16.1-277.01 or 16.1-277.02 of the Code of Virginia or a comparable law in another state;~~
      i. the child is in permanent foster care pursuant to § 63.2-900 et seq. of the Code of Virginia or comparable law in another state; and
      ii. the foster parent has an on-going, long-term parental relationship with the child, is willing to make the educational decisions required of the parent under this chapter, ~~and has no interest that would conflict with the interests of the child.~~ of social services, even if the child is in the custody of such an agency.

Justification: The Coalition suggests incorporating all of the federal definition of 'parent,' including the less restrictive circumstances in which a foster parent is a 'parent,' in the Virginia regulations. The criteria for when foster parents can be parents in the current Virginia regulations are too limiting. In contrast, the federal definition allows foster parents, who often know the children very well and are therefore best positioned to act on their behalf, to act as parents when the biological or adoptive parents are not acting as parents. Moreover, the proposed Virginia regulation regarding when a foster parent can be a parent is confusing. School staff, foster parents, and social workers have reported they do not understand when foster parents can act as parents.

Recommendation: Amend the definition of biological or adoptive parents as indicated.

4. The biological or adoptive, when attempting to act as the parent under this part and when more than one party is qualified under this section to act as a parent, shall be presumed to be the parent for purposes of this section unless the natural or adoptive parent does not have legal authority to make educational decisions for the child <u>or a judicial decree or order has identified another specific person under subdivision 1.a. through 1.e to make educational decisions on behalf of the child.</u>
5. Non-custodial parents whose parental rights have not been are entitled to all parent rights and responsibilities available under this chapter, including access to their child's records.
6. Custodial step parents have the right to access the child's record. Non-custodial step parents do not have the right to access the child's record.

Justification: The new federal definition protects biological and adoptive parents' rights by ensuring that they will be the parent when they act as parents. In addition the Coalition also supports adding the italicized language to subsection 4 of this definition so that it clearly comports with subsection 2.

Private school children with disabilities
Recommendation: Expand the definition to include children ages three through five who are placed by their parents in private school that do not qualify as elementary schools.
Justification: IDEA 2004 provides that LEAs have the responsibility to spend a proportionate amount to provide services to children with disabilities who have been parentally-placed in private elementary schools and secondary schools. If the district determines that a private school student with a disability should receive some services, a service plan is formulated for that child. The IDEA regulations state that children ages three through five are not considered to be parentally-placed private school children for these purposes unless they are enrolled in a private school that meets the definition of elementary school. Since most private preschools are not in elementary schools, without this change their students may not qualify for any services that may be provided under the IDEA provisions for "parentally-placed private school children." (CFR 300.132)

Specific learning disability
Recommendation: Remove the first sentence regarding dyslexia.
"Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; of mental retardation; of environmental, cultural, or economic disadvantage.
~~1. Dyslexia is distinguished from other learning disabilities due to its weakness occurring at the phonological level. Dyslexia is a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge.~~
Justification: The paragraph regarding dyslexia improperly narrows the requirements of IDEA 2004 and the federal regulations. It is absent from federal law. It may result in the denial of eligibility to Virginia students who have a right to IDEA eligibility under federal requirements.

Supplementary aids and services
Recommendation: Insert the following underlined statement into definition:
"Supplementary aids and services" means aids, services, and other supports that are provided in general 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.
<u>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, interpreting services to students with disabilities.</u>

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

Timely manner
Recommendation: Revise the definition of "Timely manner" as follows:
"Timely manner" if used with reference to ~~the requirement for National Instructional Materials Accessibility Standard~~ 8 VAC 20-81-230.K means that the local educational agency shall take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials before, or at least at the same time as other children receive instructional materials.
Justification: Timely manner should not be limited to use of National Instructional Materials Accessibility Standard (NIMAS), but tied to the provision of proper instructional materials at the same time as other children, regardless of what agency is contracted or method LEAs adopt. School staff need to ensure that all materials students with disabilities need to keep up with the class are available at or before the time their peers are learning the same information. Old textbooks and supplemental materials the teacher uses, or supplemental material that a child may use (such as a dictionary), may not be available through NIMAS.

8 VAC 20-81-20. Functions of the Virginia Department of Education.

Recommendation: Add "modifications" to assessment provisions in 8 VAC 20-81-20.4.
4. Ensure that each local educational agency includes all children with disabilities in all general Virginia Department of Education (VDOE) and division-wide assessment programs, including assessments described in section 1111 of ESEA, with appropriate accommodations, modifications, and alternate assessments where necessary and as indicated in their respective IEPs and in accordance with the provisions of the Act at section 1412.
Justification: Modifications to assessments is another IEP consideration to help enable students to participate in taking assessments and progress toward goals.

Recommendation: Amend proposed regulation 8 VAC 20-81-20.15.b.(6) as follows:
Review the Annual Plan, including new or amendments to policies and procedures for the provision of special education and related services, submitted in accordance with 8 VAC 20-81-230. B.2. submitted by state-operated programs, the Virginia School for the Deaf and the Blind at Staunton.
Justification: To align with recommendation and justification given in 8 VAC 20-81-240. Checks and balances are needed to ensure procedural changes to the provision of FAPE are appropriately crafted.

Recommendation: Retain current language corresponding to 8 VAC 20-81-20.22:
Disburse the appropriated funds for the education of children with disabilities in Virginia to local school divisions and state-operated programs which are in compliance with state and federal

laws and regulations pertaining to the education of children with disabilities including submission of revised policies and procedures for provision of special education and related services.
Justification: To align with recommendation given in 8 VAC 20-81-240.

8 VAC 20-81-40. Special education staffing requirements.

Recommendation: Delete E.4.

4. For a child who is not deaf or hard of hearing but for whom sign language services are specified in the IEP to address expressive or receptive language needs, the sign language services shall be provided by an individual meeting the requirements determined appropriate.

Justification: LEAs should not be allowed to set their own standards for interpreters under any circumstances. The state needs to set a standard that is consistent and not allow the for the possibility of staff that are not qualified to act as interpreters for any student.

Recommendation: Change Appendix A Figure 1 and 2 to include developmental delay caseloads for children through the age of nine.
Justification: Federal regulations, §300.8(b), allow the developmental delay category to include children through the age of nine.

8 VAC 20-81-50. Child Find.

Recommendation: Retain 60 day timeline in current regulations
Screening (C) - "Screening.

1. Each local school division shall have procedures~~, including timelines~~, that ensure that all children are screened within 60 business days of enrollment, including transfers from out of state as follows:
   a. Children shall be screened in the areas of hearing and vision in accordance with the requirements of 8 VAC 20-250-10.
   b. Children shall be screened for scoliosis in accordance with the requirements of 8 VAC 20-690-20.
   c. Children shall be screened in the areas of speech, voice, language, and fine and gross motor functions to determine if a referral for an evaluation for special education and related services is indicated.
   d. Children who fail any of the above screenings may be rescreened after 60 days if the original results are not considered valid.
   e. The screening may take place up to 60 business days prior to the start of school. The local educational agency may recognize screenings reported as part of the child's pre-school physical examination required under the Code of Virginia if completed within the above prescribed time line.
   f. Children shall be referred to the special education administrator or designee no more than 5 business days after screening or rescreening if results suggest that a referral for evaluation for special education and related services is indicated. The referral shall include the screening results.

Justification: The proposed regulation deleted the specific 60 business day timeline as in the current Virginia regulation. The proposal leaves it open to each LEA to designate their own timelines. It is noted that this is to minimize state regulations that exceed federal requirements. However, maintaining the current Virginia regulation by having a specific timeline in the regulation sets a stronger measure of accountability.

Recommendation: Keep current Virginia regulations regarding child study committee and delete the sections on Referrrals, D1-6. If a decision is made to retain the new regulation, add the child's parent to the referral team as #5.

a. The team shall include:
(1) The referring source, as appropriate (except if inclusion of a referring source would breach the confidentiality of the child);
(2) The principal or designee;
(3) At least one teacher; and
(4) At least one specialist.
(5) The child's parent

Justification: Child study committee has bee n deleted from the proposed regulations. The proposed regulations leave it up to each LEA to designate procedures to handle referrals of children suspected of having a disability.

Response to comments note that "child study has been replaced by a framework for a school based structure for referrals, including timelines, required team members and procedures for the referral process. It is noted that these provisions provide LEAs with greater flexibility to use scientific, response to intervention methods while maintaining procedural protections for students." While supportive of response to intervention practices, the elimination of child study eliminates uniformity among school divisions with regard to screening for children with disabilities. Families across Virginia should be able to rely on and expect the same process to exist for determining eligibility for special education services, including screening. Services are already extremely variable from one locality to another forcing parents to "shop" for localities that will appropriately serve their children.

If child study committees are deleted, it will have a negative impact on students and will further alienate parents from the screening process by removing the guarantee that they will be participants. If this regulation is kept than at a minimum the child's parent must be added to the referral team to ensure parental involvement at the earliest stages of decision-making.

Recommendation: If the referral section is maintained in its current form, add specific time-frame for referral to special education evaluation implementation of interventions in Section D (4)(b).

4(b). If the child has not made adequate progress after ~~an appropriate period of time~~ 60 calendar days of ~~during~~ the implementation of the interventions, the team shall refer the child to the special education administrator or designee for an evaluation to determine if the child needs special education and related services (34 CFR §300.309)

Justification. While it is understood that children will respond in different timeframes to various interventions, it should be clear within a two month period as to whether the child is making sufficient progress to continue the intervention or to examine whether more specialized services are needed.

8 VAC 20-81-60. Referral for initial evaluation.

Recommendation: Amend section B.1.d as indicated:
d. Inform the parent(s) of the procedures for the determination of needed evaluation data ~~and request any evaluation information the parent(s) may have on the child;~~
Justification: Regarding section B.1.d., VDOE inserted language that is not in current regulations. This may be construed by parents and educators as a demand instead of an option and should be removed.

Recommendation: Add a provision at B.1.h. to provide a child early intervening services upon granting an extension of the 65-day timeline until eligibility is determined.
h. The parent and eligibility group may agree in writing to extend the 65-day timeline to obtain additional data that cannot be obtained within the 65 business days. The child shall receive early intervening services, based upon input from the parent and information gathered to date, for the interim of the extension period until the eligibility determination is made.
Justification: Parents may feel pressured to agree to extensions in order to avoid being portrayed as uncooperative. The intervening services would at least provide the child with some kind of intervention during the delay period; as delays will occur.

Recommendation:. Revise D to ensure parents and the eligibility group have sufficient data available at eligibility.
D. A written copy of the evaluation report shall be provided at no cost to the parent(s). The evaluation report(s) shall be available to the parent(s) no later than two business days before the meeting to determine eligibility. (34 CFR 300.306(a)(2))
1. A written copy of the evaluation report(s) shall be provided to the parent(s) prior to or at the meeting where the eligibility group reviews the evaluation report(s) ~~or immediately following the meeting, but no later than 10 days after the meeting~~.
~~2. The evaluation report(s) shall be provided to the parent(s) at no cost.~~
Justification: Parents should be afforded the opportunity to review data before the eligibility meeting to help parents familiarize themselves with the terminology used in the eligibility assessments as well as have time to acclimate to the potentially emotional realization contained in the reports. As a worst case, parents and all participants making eligibility determination should have the reports available to them at the meeting to assist the group in making an informed decision. It must not be provided afterward. Additionally, D.2 is redundant with the first sentence of D.

8 VAC 20-81-70. Evaluation and Reevaluation.

Recommendation: Revise B.4 to remove eligibility decisions from data collection section of regulations.

4. Requirements if additional data are not needed:

a. If the team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, ~~the local educational agency shall provide the child's parent(s) with prior written notice, including information regarding:~~
~~(1) the determination and the reasons for it; and~~
~~(2) the right of the parent(s) to request an evaluation to determine whether the child continues to be a child with a disability and to determine the child's educational needs.~~
~~b. T~~the local educational agency is not required to conduct the ~~evaluation~~ assessment to gather additional information to determine whether the child continues to have a disability and to determine the child's educational needs, unless the child's parent(s) requests the assessment for these specific purposes.
~~c. The child's parent(s) has the right to resolve a dispute through mediation or due process as~~
~~described in this chapter.~~

5~~4d~~.~~-~~This process shall be considered the evaluation if no additional data are needed.
6~~5~~. If the team determines not to evaluate a child suspected of a disability, prior written notice, in accordance with 8VAC20-81-170, shall be given to the parent(s), including the parent's rights to appeal the decision through due process proceedings.

Justification: The function of Section B is to determine what data is needed to make a determination of needed evaluation data for initial evaluation or reevaluation, not to make an eligibility determination at this point. Including prior written notice, due process, and mediation language changes the scope to proposing changes in eligibility, not collecting data. Also such changes would compromise the reinstated parental consent protections. Additionally, Subsection 4.c. is not included with the additional data portion of 34 CFR 300.305(d). "Assessment" is used in lieu of "evaluation" in 34 CFR 300.305(d). Subsection "4.d." should be subsection "5" to reflect the evaluation process included in steps 1 through 4.

Recommendation: Delete proposed regulation H.3.

h. The parent and eligibility group may agree in writing to extend the 65 day time

Recommendation: Add a provision at H.3 to provide a child early intervening services upon granting an extension of the 65-day timeline until eligibility is determined.

3. The parent and eligibility group may agree in writing to extend the 65-day timeline to obtain additional data that cannot be obtained within the 65 business days. <u>The child shall receive early intervening services, based upon input from the parent and information gathered to date, for the interim of the extension period until the eligibility determination is made</u>.

Justification: Parents may feel pressured to agree to extensions in order to avoid being portrayed as uncooperative. The intervening services would at least provide the child with some kind of intervention during the delay period; as delays will occur.

Recommendation: Clarify LEA responsibility to the parent <u>and child</u> upon graduation.

I. The local educational agency is not required to evaluate a child with a disability who graduates with a standard diploma or advanced studies diploma. Since graduation is a change in placement, the local educational agency is required to provide the parent with prior written notice in accordance with 8VAC20-81-170. (34 CFR 300.305(e)(2)) <u>The public agency must also provide</u>

the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

Justification: 34 CFR 300.305(e)(3) should be included along with 34 CFR 300.305(e)(2) to help ensure the provisions of 34 CFR 300.305(e) are met.

8 VAC 20-81-80. Eligibility.

Recommendation: For 8 VAC 20-81-80, eliminate provisions setting forth specific eligibility criteria for each disability (sections J-W, with the exception of "T"). [Deleted sections are not shown in order to save space.] Modify language in Section H as follows:

H. For all children suspected of having a disability, local education agencies shall:
   1. use the applicable criteria ~~adopted by the Virginia Department of Education as outline in this section, for~~ federal definitions of disability category for determining whether a child has a disability; and
   2. have ~~documented~~ evidence that by reason of the disability, as documented through appropriate evaluations and assessments as required under 8 VAC 80-70 the child needs special education and related services.

In the alternative, maintain sections listed above, including recommended language for section "H" with modification for uniformity so that all sections (J-W) read as follows:

Eligibility for a child with (specify disability)
The group may determine that a child as (specify disability) if
   a. the definition of (name disability) is met in accordance with 8 VAC 20-81-10; and
   b. there is an adverse effect on the child's educational performance due to one or more documented characteristics of the (name disability)

Justification: Definitions and the language above are sufficient. New criteria, not required under federal regulations other than for the category of learning disabilities, set forth additional unneeded hurdles for families and students with respect to eligibility determinations. The new provisions place eligibility teams in the position of having to be diagnosticians, a role for which they are not qualified. As noted in VDOE's own response to public comment, the key to establishing eligibility is whether a disability has an adverse impact on the child' educational performance. The additional criteria place the focus on the disability vs. the child's educational needs. With non-categorical endorsements and focus on outcomes, the focus on establishing very specific criteria beyond federal definitions for disability identification is contra-indicated and will delay the process of identification and require unnecessary evaluations. It further places the focus on level of disability vs. educational needs.

The provisions are particularly specific with respect to determining eligibility for children with autism spectrum disorder. The language noting that "children with autistic disorder (or Children with Asperger's disorder) "demonstrate" implies that all children demonstrate all of these characteristics. This is not accurate, adds to stereotypes of children with autism spectrum disorder and will lead to under identification and unnecessarily conflict with parents. These provisions will lead to increased litigation, delays in eligibility determinations and battles

between "experts" representing the schools vs. families. It will be costly for both families and school divisions and is simply unnecessary. At most, these provisions should be part of a Guidance/Techncial assistance document and not part of an overly restrictive regulations.

Recommendation. Maintain current state regulations that include developmental delay as a disability category for preschools 2-5 and school aged children 6-9. Modify language as follows:
[~~N~~M]. Eligibility as a child with developmental delay. (34 CFR 300.111(b))
1. [The group may determine that a child has a developmental delay if:
a.] the local educational agency [~~may include~~ permits the use of] developmental delay as [one of ~~the~~a] disability [~~categories~~ category]when determining whether a preschool child, aged two by September 30 to ~~five~~ nine, inclusive, is eligible under this chapter; [and] [b.the definition of "developmental delay" is met in accordance with 8VAC20-81-10; or
c. the child has a]physical or mental condition which has a high probability of resulting in a developmental delay.
[2. Eligibility as a child with a disability for children ages 2 through ~~5~~ 9 shall not be limited to developmental delay if eligibility can be determined under another disability category.
3. A local educational agency is not required to adopt and use developmental delay as a disability category for any children within its jurisdiction. If the local educational agency permits the use of developmental delay as a disability category, it shall comply with the eligibility criteria outlined in this section.
Justification. Current Virginia regulatory 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. VDOE reports that school divisions that have eliminated the upper range (ages 6-8) report success in providing direct support to children who are at risk of :"academic or behavioral" difficulty in the general education classroom. VDOE notes that this has reduced the over identification of children and places more emphasis on timely interventions. However, although many children have a clear diagnosis of disability by this time, that is not always the case and elimination of the DD category is not the appropriate solution for over-identification of children who are minorities or are economically disadvantaged. If anything, the permissive use of developmental delay should help ensure that these children are also not labeled at too early an age. 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 a child at a young age. There is no need to eliminate this flexibility.

8 VAC 20-81-90. Termination of special education and related services.

Recommendation: Amend regulation D as indicated:
Prior to any partial or complete termination of special education and related services, the local educational agency shall comply with the prior written notice requirements of 8 VAC 20-81-170 C., ~~but parental consent is not required.~~ and obtain parental consent.
Justification: See Justification in 8 VAC 20-81-170 Procedural safeguards

Recommendation: Revise 8 VAC 20-81-90D.2, Summary of Academic Achievement and Functional Performance, to offer the summary if the child exits school prematurely.

If a child exits school without graduating with a standard or advanced studies high school diploma or reaching the age of 22, including if the child receives a general educational development (GED) credential or an alternative diploma option, the local educational agency shall offer to ~~may~~ provide the child, or parent(s) of the child, with a summary of academic achievement and functional performance when the child exits school. However, if the child resumes receipt of educational services prior to exceeding the age of eligibility, the local educational agency shall provide the child with an updated summary when the child exits, or when the child's eligibility terminates due to graduation with a standard or advanced studies high school diploma or reaching the age of 22.

Justification: The child or parent may not otherwise be aware that receipt of the summary is an option. This is a simple solution to make the child or parent aware of the summary and be given an opportunity to elect receipt of the summary.

8 VAC 20-81-100. Free appropriate public education.

Recommendation: Remove language from proposed regulations regarding that restricts services to students based on their age. Retain language in current regulations under section A.1, identifying LEA responsibility for setting goals, with modification on goal date to match new goal date.

A. Age of eligibility.

1. A free appropriate public education shall be available to all children with disabilities who need special education and related services, aged two to 21, inclusive, ~~who meet the [definition of "]age of eligibility [" requirements as outlined] in 8VAC20-81-10 and~~ who reside within the jurisdiction of each local educational agency. This includes children with disabilities who are in need of special education and related services even though they have not failed or been retained in a course or grade and are advancing from grade to grade, and students who have been suspended or expelled from school in accordance with the provisions of 8VAC20-81-160. The Virginia Department of Education has a goal of providing full educational opportunity to all children with disabilities aged birth through 21, inclusive, by 2015. Each local educational agency shall establish a goal of providing a full educational opportunity for all children with disabilities from birth to 21, inclusive, residing within its jurisdiction by 2015.(§22.1-213 of the Code of Virginia; 34 CFR 300.101 and 34 CFR 300.109)

Justification: The age restriction added into proposed regulations is intended to prevent students over the age of five in the developmentally delayed category from receiving services and should be removed. Students with developmental delays should be served through age nine as the federal law allows. Retaining current language requires LEAs to remain engaged, responsible and accountable for setting goals that demonstrate their partnership with students and parents for providing full educational opportunities for students with disabilities.

8 VAC 20-81-110. Individualized education program.

Recommendation: Amend proposed regulation 8 VAC 20-81-110 B.2.d to better align with least restrictive environment (LRE) requirements.

2. Each local educational agency shall ensure that an IEP:
   d. Is implemented as soon as possible following parental consent to the IEP, not to exceed 10 calendar days

Justification: Leaving an open ended time line could cause a delay in providing services and cause a disadvantage for children with disabilities, especially when IEP meetings for the school year are typically held one or two months after the school starts in the fall. Additionally, IEPs are already formatted to prescribe specific dates when services begin and end. This existing format provides parent awareness and consent when services begin and end. Proper IEP team construction provides the members who can commit resources and those who are implementing the IEP. There should be little surprise or need to provide for unexpected delays. Ten calendar days is a reasonable time limit on implementation of an IEP.

Recommendation: Amend originally proposed regulation 8 VAC 20-81-110 B by retaining 7, with amendments indicated, to better address lack of progress.

7. This chapter ~~does not~~ requires that ~~any~~ the local educational agency~~, teacher, or other person to~~ be held accountable if a child does not achieve the growth projected in the annual goals, including benchmarks or objectives. ~~However,~~ LEAs have an obligation to provide the child with FAPE. If the child is not meeting his or her expected progress by the middle marking period, the IEP team shall be given IEP meeting notice in accordance with the requirements of 8 VAC 20-81-170 A.1.b to address the lack of progress. The Virginia Department of Education (VDOE) and local educational agencies are not prohibited from establishing their own accountability systems regarding teacher, school, or agency performance.

Justification: Encourages a collaborative approach to address the child's lack of progress.

Recommendation: Amend originally proposed regulation 8 VAC 20-81-110 B.10 to ensure parent(s) receive a copy of the amended IEP.

10. In making changes to a child's IEP after the annual IEP team meeting for the school year, the parent(s) and the local educational agency may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.
    a. If changes are made to the child's IEP, the local educational agency shall ensure that the child's IEP team is informed of those changes;
    b. ~~Upon request, a~~ The parent(s) shall be provided with a revised copy of the IEP with the amendments incorporated. Implementation requirements of subdivision B.2 and timeline requirements subdivision E.8 also apply;

Justification: Parents need to be made aware that their child's IEP changed, what those changes are, and when they are being implemented. Without the recommended changes above, parents may be of a different understanding of what services are being provided to the child. Parents should have a current record of the IEP since it is core document laying their child's educational program. The cost to the LEA to ensure the IEP is to the terms agreed upon is minimal, and parents would otherwise likely not know of the option/right to request a copy.

Recommendation: Delete proposed 8 VAC 20-81-110 C.2 that gives determination of school personnel required for IEP meetings to the LEA.

Justification: The guidance from the United States Department of Education applies to excusals and determining the specific personnel, not the representation of IEP team members, to attend the meeting. http://idea.ed.gov/explore/view/p/,root,dynamic,QaCorner,3, states:

"Although the public agency, not the parent, determines the specific personnel to fill the roles of the public agency's required participants at the IEP team meeting, the public agency remains responsible for conducting IEP meetings that are consistent with the IEP requirements of the Act and the regulations. Accordingly, it may not be reasonable for a public agency to agree or consent to the excusal of the public agency representative if that individual is needed to ensure that decisions can be made at the meeting about commitment of agency resources that are necessary to implement the child's IEP that would be developed, reviewed, or revised at the IEP team meeting."

Application of the proposed 8 VAC 20-81-110 C.2 would significantly impede upon collaboration to decide upon IEP team representation and ultimately, upon IEP content. For example, parents can opt to include representation of related service personnel (per C.1.f) if the parent wants to discuss specific related services issues. Restricting what is allowable education discussion at IEP meetings, by limiting participation of personnel, would be detrimental to the education of the child.

Recommendation: Revise proposed 8 VAC 20-81-110 D.2.b as follows:

2. A required member of the IEP team may be excused from attending the IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of curriculum or related services, if:
   a. the parent and the local educational agency consent in writing to the excusal, and
   b. ~~the member submits, in writing , to the parent and the IEP team input into the development of the IEP prior to the meeting.~~ the excused member submits in writing to all IEP team members, sufficient information to aid in the development of the IEP prior to the day of the meeting. The information shall be forwarded to the parent(s) at the same time as the other IEP team members.

Justification: Requiring IEP team members to be given the sufficient details at the same time facilitates informed parent/team participation. It is important that parents receive the input far enough in advance of the IEP meeting to adequately consider it, and possibly ask resultant questions from the excused member in advance.

Recommendation: Revise proposed 8 VAC 20-81-110 E.2.b(2)(c) and add subdivision (d) to clarify who will perform the inviting of specific other agencies.

(2) For secondary transition, the notice shall also:
   (a) Indicate that a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child;
   (b) Indicate that the local educational agency will invite the student; and
   (c) Identify any other agency whom the local educational agency ~~that~~ will ~~be~~ invite~~d~~ to send a representative.
   (d) Identify any other agency whom the parent(s) will invite to send a representative.

Justification: Often there is confusion as to who will invite which outside agency, the parent or the school. This can lead to no representation by an outside agency because each thought the other was responsible for the invitation. Documenting who will invite each outside agency on the notice will avoid this potential confusion and missed opportunities during transition meetings.

Recommendation: Amend the proposed change to 8 VAC 20-81-110 E.8. as indicated.
8. The local educational agency shall give the parent(s) a copy of the child's IEP at no cost to the parent(s) at the IEP meeting~~, but no later than 10 calendar days from the date of the IEP meeting~~. If the local educational agency is working from a draft, a copy of the draft shall be provided to the parent at the same time the information is made available to school personnel so the parent can follow along and mark up the copy during the IEP meeting if desired.
Justification: There should not be a delay in providing a copy of the IEP to the parent. The parent draft copy will also facilitate participation during the IEP meeting and provides an opportunity for the parent to keep track of intended changes until receipt of the final copy.

Recommendation: Amend the proposed regulation 8 VAC 20-81-110 F.5 to be flexible instead of restrictive.
5. Nothing in this section shall be construed to ~~require~~ prohibit:
   a. the IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP; or
   b. that additional information be included in the child's IEP beyond what is explicitly required in this chapter.

Justification: The Discussion section of the federal regulations for Section 300.320(d) states: "Section 300.320(d), consistent with section 614(d)(1)(A)(ii)(I) of the Act, does not prohibit States or LEAs from requiring IEPs to include information beyond that which is explicitly required in section 614 of the Act." If additional information in the IEP helps make the IEP easier to follow, that would help ensure FAPE for the child. If additional information helps provide FAPE, or assists staff in the provision, then that information should not be prohibited from being included.

Recommendation: Retain the current regulations to include benchmarks and short-term objectives in 8 VAC 20-81-110 G.2.
G. Content of the individualized education program. The IEP for each child with a disability shall include:
   2. A statement of measurable annual goals, including benchmarks or short-term objectives, and academic and functional goals designed to:

Justification: As with the justification given for using the proposed regulations in 8 VAC 20-81-110 G.1, measurable terms and relevant performance information are the cornerstone for effectively building, applying, and monitoring IEPs. Short term objectives provide a more real-time indictor of progress. As such, any areas of identified lack of progress can be addressed by the IEP team within the child's school year.

Recommendation: Under section G.10.a. (2) include the language from the IDEA regulations Preamble which clarifies that IDEA funds may be used for a student to participate in a transitional program on a college campus, if the student's IEP team includes such services on the IEP.
Justification: Many LEAs and parents are not aware that the IEP team may place a (typically 18 to 21 year old) student who is still eligible for IDEA services in a transition program on a college or university campus and that funding would then be provided for the placement. Virginia has a growing number of high-quality transition and postsecondary programs for students with

disabilities. Including this language would clarify that IDEA funds may be used to support these students.

8 VAC 20-81-120. Children who transfer.

Recommendation: Retain rights from current regulations by amending proposed regulation A.2. as indicated.

2. The new local educational agency shall provide a free appropriate public education to the child, ~~including ensuring that the child has available special education and related services~~, in consultation with the parent(s), by implementing the child's IEP from the previous local educational agency, until the new local educational agency either:

   a. Adopts [~~and implements~~] the child's IEP from the previous local educational agency with the parent's consent; or

Justification: Current regulations allow for FAPE provision by immediate implementation of the child's current IEP until a new one can be developed. The Coalition believes this practice prevents a gap in service provision for students who transfer. Students should not lose this right to FAPE that is being proposed under these new regulations.

Recommendation: Retain current regulations that require parental consent for service provision to transfer students.

4. If the parent(s) and the local educational agency are unable to agree on interim services or a new IEP, the LEA shall implement the child's IEP from the previous local education agency. The parent(s) or local educational agency may initiate the dispute resolution options of medication or due process to resolve the dispute. During the resolution of the dispute, the local educational agency shall provide FAPE in consultations with the parent(s), ~~including services comparable to those described in the child's IEP from the previous local educational agency.~~ by the implementation of the child's IEP from the previous local educational agency.

Justification: Retaining parental consent for IEP development and implementation for transfer students allows parents full participation in the IEP process. Under current regulations the IEP transfers with the student and implementation of the IEP from the previous LEA allows the student the right of stay put during a dispute situation. For the same reasons that parental consent is important before services are terminated, it is important to have parental consent before a transfer IEP is altered by transferring schools. This was the rule in Virginia for many years. Moreover, the child's IEP team who knows him/her well has studied the PLOPs and evaluation data and determined that the IEP provides FAPE; the parents have consented. By adopting the child's transfer IEP, the new school district is not left to guess on its own as to FAPE. Indeed, by adopting the transfer IEP, there is clear guidance on what is FAPE and thus less potential for litigation. Furthermore, A child's stay-put rights should not be randomly decided based on whether his parents move inside or outside the county for work or for any other reason. Many children in foster care and many military families move, and it is important to protect their rights, too.

8 VAC 20-81-130. Least restrictive environment and placement.

Recommendation: Incorporate alternative methods discussed in federal regulations regarding preschool children and least restrictive environment. Add section 1.c.

1. Each local educational agency shall ensure: (34 CFR 300.114)
   a. That to the maximum extent appropriate, children with disabilities, [aged two to 21, inclusive], including those in public or private institutions or other care facilities, are educated with children without disabilities; ~~and~~
   b. That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily~~.~~; and
   c. Must explore alternative methods to ensure that the requirements of this section are met for preschool children. Examples of such alternative methods might include placement options in private preschool programs or other community-based settings. Paying for the placement of qualified preschool children with disabilities in a private preschool with children without disabilities is one, but not the only, option available to public agencies to meet the requirements of this section. Local school divisions that do not operate programs for preschool children without disabilities are not required to initiate those programs solely to satisfy these requirements. Local school divisions that do not have an inclusive public preschool but can provide all the appropriate services and supports must explore alternative methods

Justification: Options for preschool age children must be clarified/identified to ensure children are afforded appropriate educational opportunities.

8 VAC 20-81-150. Private school placement.

Recommendation: Amend language in proposed regulation C.1.a.(1) to include private preschools that do not qualify as elementary schools.

1. Definitions applicable to this subsection.
   a. The term "private school" includes:
      (1) Private, denominational, or parochial schools in accordance with § 22.1-254 of the Code of Virginia that meet the definition of elementary school or secondary school in subdivision 1.of this subsection;
         (a) Private, denominational, or parochial preschools that do not qualify as elementary schools

Justification: IDEA provides that LEAs have the responsibility to spend a proportionate amount to provide services to children with disabilities who have been parentally-placed in private elementary schools and secondary schools. If the district determines that a private school student with a disability should receive some services, a service plan is formulated for that child. The IDEA regulations state that children ages 3-5 are not considered to be parentally-placed private school children for these purposes unless they are enrolled in a private school that meets the definition of elementary school. Since most private preschools are not in elementary schools, their students would not qualify for any services that may be provided under the IDEA provisions for "parentally-placed private school children." Since most private preschools are not

in elementary schools, without this chance, their students may not qualify for any services that may be provided under the IDEA provisions for "parentally placed private school children."

8 VAC 20-81-160. Discipline procedures.

Recommendation: A. General.
Clarify that case-by-case basis consideration to remove a child must be exercised consistently with the requirements in 8 VAC 20-80-160 and 34 CFR §300.530, and may not be used to circumvent these protections.
Justification: Every week a child stays removed from regular placement can be harmful, particularly for children whose disabilities 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 protected the rights of children who are being disciplined, including the manifestation determination and other disability-related requirements. Thus, consideration of unique circumstances must not be used to circumvent the important protections in 34 CFR § 300.530 and 8 VAC 20-80-160. The ability to consider unique circumstances was meant to protect children from zero tolerance rules.

Recommendation: B.2.b. Short-term removals
Amend the proposed regulation B.2.b. as underlined, to require that for additional short-term removals that are not a pattern, that the LEA provide services to the extent determined necessary to provide a free appropriate public education as required by IDEA 2004 § 612(a)(1) to enable the student to continue to ~~participate~~ appropriately progress in the general education curriculum and to progress toward meeting the goals of the student's IEP.
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 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 and thus, the Virginia regulation must make clear that LEAs must provide 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)." IDEA 2004 does not contemplate the provision of FAPE-light or less-than-FAPE to children who are removed, even for additional short-term periods. Indeed, to the extent that the language" to progress toward meeting the goals of the student's IEP" implies this, it is important to include the requirement that children receive FAPE.

Recommendation: Amend the proposed regulation B.2.b. 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 a free and appropriate public education. Discipline studies have shown that removals do not improve educational outcomes, and that the best course of action is to provide educational services. The heart of the

IDEA is ensuring that all children receive FAPE, and that LEAs do not use removal procedures to attempt to defeat this.

Recommendation: C. Long-term Removals
Amend the proposed regulation C.2.b. to define "substantially similar" to include behaviors those that were caused by the child's disability or had a direct and substantial relationship to it.
Justification: Inappropriate removal from the regular educational environment can cause great harm to children, both by causing them to fall further and further behind and by removing them from the least-restrictive environment. This is particularly true when a school district removes children for a series of short-term removals, as these removals can add up to a long period of removal. Hence, the regulations seek to protect children by prohibiting LEAs from using a pattern of short-term removals to improperly change a child's placement. But the new federal and state regulations state that a pattern occurs only if the child's behavior is "substantially similar" to other behaviors that caused one of the removals. A child may engage in behaviors that could appear different on the surface but are substantially similar because they are all caused by or related to the disability. 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. On the surface, these might appear different, but they are substantially similar as they were caused by the child's disability.

Moreover, without this change, LEAs could remove children for repeated nine school day periods and circumvent IDEA's manifestation determination requirement. When children are removed for ten consecutive school days, they are entitled to a manifestation determination review. Their placement cannot be changed if the behavior was a manifestation, even if the behaviors seem to differ on the surface. The same standard should apply here: children should not be subject to repeated short-term removals for what are manifestations of their disabilities.

Recommendation: Amend the proposed regulation C.3. to provide that if an LEA determines that a series of short-term removals is not a pattern, the LEA shall notify the parent(s) of the decision and provide the parent(s) with the procedural safeguards.
Justification: A series of removals of less than ten school days can quickly add up and result in a child being removed for a cumulatively long period of time. Successive removals of several days only disrupt the child's educational environment and cause the student to fall further behind, particularly if the child's disability impedes the ability to learn. For that reason, particular care should be taken to ensure that parents know their procedural safeguards and can challenge this decision. Providing a copy of the notice is relatively low cost, simple, and does not impose a burden of any significance on LEAs.

Recommendation: Require a functional behavioral assessment (FBA) be performed for children who are given a subsequent 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, and these children lose the right to be educated with their non-disabled peers. It is far better to address and resolve problem behaviors. FBAs, by addressing the actual cause of the behavior, ensure that interventions are appropriate and effective, abating the behavior.

Recommendation: Retain the current Virginia regulation 20-80-68 C.2.(e), requiring that if a child with a behavioral intervention plan (BIP) is removed for ten school days and then subjected to a further short-term removal that is not a change in placement, then 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 LRE, 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 most knowledgeable about a child and his/her behavior. Children who are removed for repeated series of periods less than 10 school days can be left without educational services for long cumulative periods of time. It is important to take all steps to prevent this, including having an appropriate BIP in place.

Recommendation: Amend the proposed regulation C.5. "Special Circumstances" as underlined and crossed out, to provide that "school personnel may remove a child with a disability to an appropriate interim alternative educational setting for ~~the same~~ no more than the amount of time that a child without a disability would be subject to discipline. . ."
Justification: School personnel, in exercising their discretion under 8 VAC 20-81-160(A), should be allowed to remove a child for less time than a child without a disability because of unique circumstances. The team should be free to consider extenuating circumstances and reduce the removal period if appropriate. The Coalition applauds the VDOE for proposing to ensure that children with disabilities are not subject to longer periods of removal than children without disabilities. This is in accord with the Americans with Disabilities Act and other nondiscrimination statutes.

Recommendation: Amend the proposed regulation C.6.a.(1) as underlined to provide that a child receiving a long-term removal receives services to enable the student to continue to receive educational services so as to receive a free appropriate public education as required by IDEA 2004 § 612(a)(1) and to enable the student to continue to participate in the general educational curriculum, although in another setting…
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 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 and thus, the Virginia regulation must make clear that LEAs must provide FAPE. Indeed, IDEA 2004 requires this: § 1415(k)(1)(D) states that children who are removed for more than 10 school days from their current placement must "continue to receive educational services, as provided in section 1412(a)(1)." IDEA 2004 does not contemplate the provision of FAPE-light or less-than-FAPE to children who are removed, even for additional short-term periods. Indeed, to the extent that the language " to progress toward meeting the goals of the student's IEP" implies this, it is important to include the requirement that children receive FAPE.

Recommendation: Amend the proposed regulation C.6.a.(2) as underlined and crossed out, so that it provides that children who are long-term removed "continue to receive those services and modifications including those described in the child's current IEP ~~that will~~ to enable the child to

progress toward meeting the IEP goals . . ."
Justification: An IEP contains the services and goals that the IEP team has determined are necessary for a child to receive the legally-required FAPE. By definition, an IEP contains services necessary to make progress towards those goals and receive FAPE. 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. Thus, children who are subject to long-term removals must continue to receive the services in their IEPs. It would be inappropriate to allow LEAs to pick and choose among the services based on what school personnel might believe are necessary to enable a child to make progress.

Recommendation: Amend the proposed regulation C.6.a.3. to require that a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) be developed to address the conduct that resulted in the child's exclusion, and that if there is an existing FBA or BIP that is over one year old, a new one must 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 understanding student problem behavior. Failure to base the intervention or BIP on the actual cause (function) often results in interventions that are ineffective and unnecessarily restrictive. Outdated FBAs and BIPs often fail to effectively address the child's current behavior. 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 old data 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 for FBAs to be effectively conducted and both FBAs and BIPs remain up-to-date. It is important that children have appropriate FBAs and BIPs so as to abate future problematic behavior. This is important so that the child is not subjected to further discipline. Disciplinary actions on a student's record can severely limit the opportunities students with disabilities have for employment, vocational training, and post-secondary education.

Recommendation: Amend proposed regulation D.7. by adding the following language to require that a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) be developed to address the conduct that resulted in the child's exclusion, and that if there is an existing FBA or BIP that is over one year old, a new one must be developed. If the FBA or BIP is over a year old, the FBA cannot be limited to reviewing existing data in the file.

a. conduct a functional behavior assessment, unless the local educational agency had conducted this assessment before the behavior that resulted in the change in placement occurred, and implement a behavioral intervention plan for the child; or
b. If a behavioral intervention plan already has been developed, review this plan and modify it, as necessary, to address the behavior

Justification: Functional behavioral assessments are an important problem-solving process for understanding student problem behavior. Failure to base the intervention or BIP on the actual cause (function) often results in interventions that are ineffective and unnecessarily restrictive. Outdated FBAs and BIPs often fail to effectively address the child's current behavior. A year is adequate time to determine the appropriateness of a BIP and a FBA.

Recommendation: D. Manifestation Determination
Amend proposed regulation D.2. to specify that in selecting the manifestation determination IEP team members, LEAs must make bona fide efforts to work with parents. Ultimately, as required by 20-81-110 C.1.f. and 34 C.F.R. §300.321(a)(6), the parents or LEA must have the discretion to include all individuals with special knowledge or expertise regarding the child; particularly regarding how a student's disability can impact behavior and understanding consequences of behaviors.
Justification: A manifestation determination review (MDR) is a serious matter that could result in changing the child's placement and removing him/her from the LRE; thus weakening 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, parents' rights to include those IEP team members whom they consider to have appropriate expertise is required by 8 VAC 20-81-110 C.1.f. and 34 C.F.R. §300.321(a)(6). LEAs should not be permitted to prevent parents from designating MDR team members.

Recommendation: The Coalition supports the proposed D.2. requiring that the manifestation determination IEP team convene "immediately, if possible" but not later than 10 school days after the decision to change the placement of the child is made. We recommend, however, strengthening the language to require that the team meet as soon as possible, and if that is not possible, then the school district must document the specific facts that made it impossible.
Justification: Removing a child from their regular placement can cause harm to the child's education and take him/her away from the LRE. If the manifestation team is capable of meeting in fewer than 10 school days, it must do so, rather than waiting the 10 school days. To allow LEAs to wait until the 10th school day is to allow them to exclude children for 20 school days (4 calendar weeks or more). LEAs could suspend a child for 10 school days, and on the 10th school day notify parents of a change in placement and then take another 10 days to convene the manifestation team. Documentation provides the impetus to show efforts are being made to take immediate action for the child. It can also facilitate identifying unnecessary delays by supervisory personnel.

Recommendation: Amend the proposed regulation D.3 to specify that the review of all relevant information in the child's file includes all of the child's education records, as well as new information that parents or LEAs have.
Justification: Given the potential for the manifestation determination review (MDR) 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 team. 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 LEA 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: Amend the proposed regulation D.4 to state that behavior has a direct and substantial relationship to the disability if the disability significantly impairs the child's behavioral control.

Justification: The language in the Conference Report 108-779 specifying that behavior is a manifestation if "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 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. This is an appropriate and accurate definition and Virginia should include it.

Recommendation: Amend the proposed regulation D.4. to provide that in determining whether or not a student's behavior was a manifestation of his or her disability, the IEP team should continue to be required to ask if the IEP is appropriate and should continue to be required to look at the current placement.
Justification: These are essential elements of the manifestation determination and should not be eliminated. Without looking at the appropriateness of the IEP or at the student's current placement, the team may miss critical information about the student's disability, his or her behavior, and the services and program he or she is receiving. These all have a substantial bearing on the relationship between the student's behavior and his or her disability and on what ought to happen to the student in the disciplinary process.

Recommendation: Amend the proposed regulation D.6.a and D.6.b to require a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) be developed to address the conduct that resulted in the child's exclusion. If an existing FBA or BIP is over one year old, a new one must be developed and not be limited to reviewing existing data in the file.
Justification: FBAs 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 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. Misbehavior can result in the exclusion of children from the classroom and placement in a more restrictive environment For that reason it is important to address the cause of the conduct so that it is abated, which requires appropriate FBAs and BIPs. Otherwise, children may be subject to further unnecessary discipline which not only results in poorer educational outcomes, but also limits the child's opportunities for employment, vocational training, and post-secondary education.

Recommendation: Amend the proposed regulation D.6.a to require that in reviewing and developing a BIP, the LEA consider and implement positive behavioral strategies.
Justification: FBAs and BIPs are designed to abate problem behaviors by determining the causes of the behavior and how to minimize recurrence.

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. Positive behavioral interventions have sustained impact on children's behavior and are effective in correcting it. Positive behavioral supports have been shown to effectively reduce and prevent disruptive behavior. Coercion and negative interventions, by contrast, are rarely effective and can be harmful and dangerous.

Recommendation: Even if the child's conduct is not a manifestation of the child's disability, the IEP team should be required to review positive behavioral strategies and develop an appropriate BIP after a FBA.
Justification: Regardless of whether misconduct is related to a child's disability, FBAs and BIPs are designed to abate problem behaviors. Since good behavior benefits all students, even when misbehavior is not a manifestation of a disability, 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.

Recommendation: Amend proposed regulation D.6.c. as indicated.

c. Return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change in placement as part of the modification of the behavioral intervention plan. ~~The exception to this provision is when the child has been removed for not more than 45 school days to an interim alternative educational setting for matters described in subdivision C.5.a.of this section. In that case, school personnel may keep the student in the interim alternative educational setting until the expiration of the 45 day period.~~

Justification: Current state regulation does not allow for placement change to continue once a behavior has been identified as a manifestation of a disability. This proposed change would allow unilateral placement change even when behavior is clearly identified as a manifestation of a disability.

Recommendation: When a child is removed for a 45-day period under F.1. and F.3, the regulations should require that a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) be developed to address the conduct that resulted in the child's exclusion, and that if there is an existing FBA or BIP that is over one year old, a new one must 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 understanding student problem behavior. Failure to base the intervention or BIP on the actual cause (function) often results in interventions that are ineffective and unnecessarily restrictive. Outdated FBAs and BIPs often fail to effectively address the child's current behavior. 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.

Recommendation: Retain the factors in current regulations, (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. Consider if the LEA 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 to which the child is long-term removed meets the requirements of C.6.a.

Justification: All of these factors remain an important part of the hearing officer's decision, even though 34 C.F.R. § 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 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: H. Protection for children not yet eligible for special education and related services.
The Coalition supports retaining all factors of the current regulation VAC 20-80-68.C.8.b.
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 is not yet eligible, if the parent provides notice of his/her concerns that the child needs special education and related services. A child should not forego this protection simply because his/her parent cannot write or has a disability preventing a written statement. Virginia is currently taking the appropriate steps to protect children in such a situation. This recommendation would also retain the current requirement regarding knowledge that "the behavior or performance of the student demonstrates the need for these services."

Recommendation: Clarify the proposed regulation H.3.(b) so that it provides as follows:
A local educational agency would not be deemed to have knowledge that a child is a child with a disability if. . . (b) The child has been evaluated <u>within the last 3 years</u> in accordance with 8 VAC 20-81-70 and 8 VAC 20-81-80 and determined ineligible for special education and related services.
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. Otherwise, a child who is evaluated and found ineligible at age five is deprived of discipline protections when he/she is 13 and he/she would otherwise be entitled to these protections. But a child who didn't go through the process years ago would receive the protections.

<u>8 VAC 20-81-170. Procedural safeguards.</u>

Recommendation: Delete section indicated.
B. Independent educational evaluation.
2. Parental right to evaluation at public expense.
~~e. A parent is entitled to only one independent educational evaluation at public expense each time the public educational agency conducts an evaluation component with which the parent disagrees.~~

Justification: This section should be deleted. It goes beyond federal regulations and can be interpreted as more restrictive than the federal regulations in that it would limit the right to an independent educational evaluation. In order to eliminate litigation we should look to the federal language in this circumstance.

Recommendation: Amend the proposed regulation as indicated.

C. Prior written notice by the local educational agency; content of notice

1. Prior written notice shall be given to the parent(s) of a child with a disability within a reasonable time, but in no case more than 24 hours before or after the local educational agency: …

Justification: The term reasonable time leads to misunderstandings and litigation between the LEA and the parent. Expectations are made clear when there are specific time lines. For example, if there is a necessity for a parent to file a due process regarding the requests made in the IEP meeting, an open ended time frame for the completion of the required prior written notice can be used to delay access to the due process proceeding as the parent is now required to file a detailed complaint.

Recommendation: Retain the current requirements of notice distribution.

D. Procedural safeguards notice.

1. A copy of the procedural safeguards available to the parent(s) of a child with a disability shall be given to the parent(s) by the local educational agency ~~only one time a school year~~, ~~except that a copy shall be given to the parent(s)~~ upon:

a. Initial referral for or parent request for evaluation

b. Review regarding reevaluation of the child;

~~b~~c. If the parent requests an additional copy;

d. Each notification of an IEP meeting;

~~c~~e. Receipt of the first state complaint during a school year

~~d~~f. Receipt of the first request for a due process hearing during a school year; and

~~e.~~g. On the date on which the decision is made to ~~make~~ take a disciplinary action, including a disciplinary removal that constitutes a change in placement ~~because of a violation of a code of student conduct.~~

Justification: It is important to include parents in all decisions regarding the education of their children and to make sure they are aware of their rights. Providing notice at the identified critical junctions of the education process is essential to ensuring parents are informed. Reevaluation of the child was a trigger event identified in the current Virginia regulations requiring a copy of the procedural safeguards notice. This was deleted in the current proposed Virginia regulations. While acknowledging the need to reduce the resources used to produce these safeguards, it is critical that students and parents are fully aware of all their rights and the process of reevaluation is a significant event which could result in termination or substantial change of services. This event should be retained in the Virginia regulations. The trigger points should be at the review of data and when the team is determining whether or not to reevaluate the child or what components to evaluate.

Recommendation: Amend proposed regulations as indicated. Timeline should be no more than five business days after request has been made for review of educational records.

G. Confidentiality of information.

1. Access rights.
   a. The local educational agency shall permit the parent(s) to inspect and review any education records relating to their children that are collected, maintained, or used by the local educational agency under this chapter. The local educational agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing in accordance with 8 VAC 20-81-160 and 8 VAC 20-81-210, or resolution session in accordance with 8 VAC 20-81-210, and in no case more than ~~45 calendar days~~ 5 business days after the request has been made.

Justification: The 45 calendar day timeline is unnecessarily lengthy. Usually when a parent is requesting a review of records there is a time sensitive reason for such and there should be no reason that this could not be accommodated within five business days. The proposed timeline only serves to potentially delay services for a student.

8 VAC 20-81-180. Transfer of rights to students who reach the age of majority.

Recommendation: Change timeline for C.3.d certification that the adult student is incapable of providing informed consent to be consistent with eligibility timelines in the rest of the document.

d. The certification that the adult student is incapable of providing informed consent may be made as early as 60 calendar days prior to the adult student's eighteenth birthday or ~~65 business days~~ 60 calendar days prior to an eligibility meeting if the adult student is undergoing initial eligibility for special education services.

Justification: All eligibility timelines need to be consistent. A 60 calendar day timeline from referral to eligibility has been recommended by the Coalition.

8 VAC 20-81-190. Mediation.

Recommendation: Amend the proposed regulation as indicated by inserting the underlined text into section C.

C. The local educational agency or the Virginia Department of Education may establish procedures to offer parents and schools who choose not to use the mediation process an opportunity to meet, at a time and location convenient to them, with a disinterested party who is under contract with a parent training and information center or community parent resource center in Virginia established under § 1471 or § 1472 of the Act; or an appropriate alternative dispute resolution entity. The purpose of the meeting would be to explain the benefits of and encourage the parent(s) to use the mediation process. 300.506(b)(2)) Such a meeting cannot be used to delay or deny a due process hearing.

Justification: The proposed addition to subsection C would ensure clarity regarding whether the meeting referenced in that subsection could delay a due process hearing. The rational stated by VDOE in their Summary of Public Comment document was that the language was already included. This language is not already included in section C which pertains to a pre-meeting to explain the benefits of mediation and not to the mediation itself.

Recommendation: Remove the sentence in section E(3) which reads as follows:

"Parties to the mediation process may be required to sign a consent form to mediate containing a confidentiality pledge prior to the commencement of the mediation process."
Justification: The proposed addition has been removed from the federal regulations as redundant under 300.506(b)(8) and will just add more paperwork to the process. Also, although the commentary in the Federal Register states that removing 300.506(b)(9) is not intended to prevent States from allowing parties to sign a confidentiality pledge to ensure that discussions during the mediation process remain confidential irrespective of whether the mediation results in a resolution, it does not state that States can require it.
In addition the word "consent" has recently been added to this section and should be removed as parental consent is no longer required for mediation.

Recommendation: Add the following underlined sentence to E(2):
2. Conclude with a written legally binding agreement if an agreement is reached by the parties to the dispute that,
a. states that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;
b. is signed by both the parent and a representative or the local educational agency who has the authority to bind the local education agency, and
c.Is enforceable in any state or federal court of competent jurisdiction and identifies procedures for incorporating relevant terms of the mediation agreement into the child's IEP
Justification: Although there is nothing in the Act requiring that the IEP be modified to include terms of the legally binding agreement prepared during Mediation, the purpose of the Mediation will often include changes to services or placement which should be incorporated into the IEP where they exist.

8 VAC 20-81-200. Complaint resolution procedures.

Recommendation: Retain language from current regulations regarding D.4.f timeframe required for initiation of corrective action.
f. Notify the parties in writing of any needed corrective actions and the specific steps that shall be taken by the local educational agency to bring it into compliance with applicable timelines. The local educational agency will be given 15 business days from the date of notice of noncompliance to respond and initiate corrective action.
Justification: The underlined section is in the current Virginia regulations, but deleted from the proposed regulations. This language should be retained to ensure a timely response and corrective action.

8 VAC 20-81-210. Due process hearing.

Recommendation: Strike proposed D.4, permitting the VDOE to require that decisions be reissued if there are concerns about readability or if there are conflicts in "data."
~~3. Reviewing and analyzing the decisions of special education hearing officers, and the requirement for special education hearing officers to reissue decisions, relative to correct use of citations, readability, and other errors such as incorrect names or conflicting data, but not errors of law that are reserved for appellate review.~~
Justification: Proposed regulation D.4. oversteps the VDOE's authority in regulating hearing

officers. It permits the VDOE to request that decisions be reissued to improve readability. Permitting staff to review decisions for "readability" is too vague and arbitrary. Suggesting edits to a hearing officer decision may change the facts or result in other substantive changes to the decision, which inappropriately invades judicial decision-making authority. Indeed, a review of the special education regulations in other states in the Mid-Atlantic region does not show that any have given the State Department of Education such review powers. IDEA provides that the decision of the hearing officer is final and this means that State Department of Education staff do not have the authority to alter it.

The proposed regulation further implies that the VDOE has authority to change decisions when staff believe there are errors in fact stating that the VDOE may request changes when there are conflicts in "data." To the extent that the VDOE means that staff could review an opinion for an error in the name of the child's school or his age or address, this needs to be addressed with much narrower and very specific language. Virginia's regulations must make clear that review of both errors in fact and errors in law are reserved for the courts. IDEA reserves such review for either impartial appellate hearing officers (which Virginia has rejected), 20 U.S.C.1415(g), or a court of law, 20 U.S.C.1415(I). Hence, a court, not VDOE staff, should decide whether a hearing officer has committed factual error and if so, how to resolve it. In many situations, whether there is a factual error will depend on the evidence presented and the officer's decisions about witness credibility. Moreover, IDEA provides that "A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final," 20 U.S.C. §1415(I), meaning that State Department of Education staff do not have the authority to review it.

Recommendation: Amend E.1. to make a provision for continuing violations or tolling the statute if an individual is incapacitated or whether the timeline is tolled by the filing of a complaint if amendments to the complaint are necessary.
Justification: Clarification is needed to prevent individuals from being misinformed with regards on their rights and due process.

Recommendation: Amend H.4.b as indicated
b. Is an employee of the Virginia Department of Education or ~~the local educational agency that is involved in the education and care of the child~~ of an employee of any local education agency in Virginia.
Justification: This change is necessary to provide fairness in the system.

Recommendation: Amend H.4.c. as indicated
c. ~~Represents schools or parents in any matter involving special education or disability rights, or is an employee of any parent rights agency or organization, or disability rights agency or organization.~~
Justification: These regulations as proposed would allow employees of elementary and secondary school related agencies or organizations serve as hearing officers but restrict employees of parents rights or disability rights agencies from serving as hearing officers. This represents an inequity and does not allow fairness in the system.

Recommendation: N.17Responsibilities of the local educational agency. Retain current regulations which require implementation of plans within 45 calendar days of a hearing decision,

and also requiring that hearing decisions be implemented while a case is being appealed.
Justification: It is important that the LEAs implement hearing decisions and not delay their implementation. Current regulations require the submission of implementation plans within 45 days. Allowing LEAs to wait to delay up to a year allows for the possibility of denial of FAPE to a student for that time frame. This can mean a student could be due compensatory education services for an increased time period or even more services as remedy for the lengthy lag in services that can take place under the new time frame.

8 VAC 20-81-220. Surrogate parent procedures.

Recommendation: Amend regulation as indicated.

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 biological, adoptive parent(s) or guardians are allowing relatives or private individuals to act as a parent;
    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, 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.~~
    c. ~~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 § 63.2-908 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 proceedings.~~
2. The local educational agency shall appoint a surrogate parent for a child, aged two through 21, inclusive, who is suspected of having or determined to have a disability when:
    c. The child is a ward of the state and the provisions of 8 Va. Admin. Code § 20-81-220(B)(1) do not apply;
4. The local educational agency shall establish procedures in accordance with this regulation for determining whether a child needs a surrogate parent.

Justification: Changing subsection B(1) to reflect changes in the definition of 'parent' in the federal IDEA regulations because we also support the definition of 'parent' in the federal IDEA regulations be substituted for the definition current and proposed Virginia regulations. The change would also save LEAs administrative time and money otherwise spent training and recruiting surrogates because fewer surrogate parents would be needed if more persons could act as parents under the definition of 'parent' in the federal regulations.

The above change to subsection B(2) would clarify when LEAs are responsible for appointing surrogate parents.

The proposed change to subsection B(4) clarifies that the LEA procedures for appointing surrogates must comply with the provisions of this regulation.

8 VAC 20-81-230. Local educational agency administration and governance.

Recommendation: Retain current regulation requirement for checks of revisions/amendments to policies and procedures by respective parties (Special Education Advisory Committee (SEAC), local school board, VDOE) in 8 VAC 20-81-230.B.

1.a. Assurances that the local educational agency has in effect policies and procedures for the provision of special education and related services in compliance with the requirements of the Act, the policies and procedures established by the Virginia Board of Education, and any other relevant federal and state laws and regulations and any revisions to such policies and procedures. Local school divisions shall first submit revisions to the policies and procedures to their local school board for approval.;

2. Prior to submission to the Virginia Department of Education, the annual plan shall be reviewed by the local school division's local advisory committee, and approved by the local school board. State-operated programs and the Virginia School for the Deaf and Blind at Staunton shall first submit any revisions to the policies and procedures with their annual plan to the state special education advisory committee (SEAC) for review prior to submission to the Virginia Department of Education.

Justification: Oversight is imperative to ensure provision of FAPE is upheld. Our system of government is based on a system of checks and balances. By otherwise giving LEAs such autonomy, the VDOE will be less aware if LEAs are correctly crafting procedural changes to the provision of FAPE. Via Virginia's Education statute, Virginia may impose additional requirements in providing state funds to LEAs. Consequently, it is appropriate to continue to require changes to procedures and supporting documentation be submitted to the VDOE.

Recommendation: Require that the teacher member who serves on the SEAC committee also be a parent of a student receiving services under IDEA.

D.1.b The committee shall include one teacher who is also the parent of a student receiving services under IDEA.

Justification: School personnel currently have the right to be members on SEACs, serving as consultants. Their participation allows them to provide specific information, advice and assistance. If a teacher is allowed to be a voting member, it should be a teacher that also has the parent perspective.

Recommendation: Retain current regulation requirements for checks of revisions/amendments to policies and procedures by respective parties (SEAC, local school board, VDOE) in 8 VAC 20-81-230.2.e

e. Review the policies and procedures for the provision of special education and related services prior to submission to the local school board; and the Virginia Department of Education; and

Justification: Oversight is imperative to ensure provision of FAPE is upheld. Our system of government is based on a system of checks and balances. By otherwise giving LEAs such autonomy, the VDOE will be less aware if LEAs are correctly crafting procedural changes to the provision of FAPE. Via Virginia's Education statute, Virginia may impose additional requirements in providing state funds to LEAs. Consequently, it is appropriate to continue to require changes to procedures and supporting documentation be submitted to the VDOE.

Recommendation: Amend the proposed regulation by adding a subsection for LEAs to adopt a guidance document for the provision of instructional materials. Insert new subsection 4 as follows and renumber proposed subsection "K.4" as "K.5" for Definitions.

4. The local educational agency shall adopt a guidance document outlining the reasonable steps the local education agency will take to facilitate providing instructional materials in accessible formats in a timely manner. The adopted guidance shall also give consideration to availability of supporting assistive technology, supplemental books and materials, advance availability of teacher syllabuses, and availability of trained personnel to proof non-NIMAS documents prior to student receipt.

Justification: The guidance document will facilitate consideration of planning aspects which otherwise would impede students' access and use of instructional materials at the same time as other students.

8 VAC 20-81-240. Eligibility for funding.

Recommendation: Retain current regulations regarding submittal of amendments or revision to local policies and procedures.

A. Each local school division and state operated program shall maintain current policies and procedures and supporting documentation to demonstrate compliance with the Act and the Virginia Board of Education regulations governing the provision of special education and related services, licensure and accreditation. Changes to the local policies and procedures and supporting documentation shall be submitted upon amendment or revision ~~made~~ as determined by local need, as a result of changes in state or federal laws or regulations, as a result of required corrective action, or as a result of decisions reached in administrative proceedings, judicial determinations, or other findings of noncompliance.

Justification: Oversight is imperative to ensure provision of FAPE is upheld. Our system of government is based on a system of checks and balances. By otherwise giving LEAs such autonomy, VDOE will be less aware if LEAs are correctly crafting procedural changes to the provision of FAPE. It is appropriate to continue to require changes to procedures and supporting documentation be submitted to the VDOE.