

**Public Comment of Strother Law Offices, PLC, to Proposed Regulations Governing Special Education Programs for Children With Disabilities in Virginia [8 V.A.C. § 20-80]**

The Individuals with Disabilities Education Improvement Act (IDEIA), passed in 2004, is the legislation that necessitated the 2006 federal regulations with which Virginia's regulations must comply. The IDEIA made patent numerous crucial rights held by disabled children and their families. It also served to clarify the fundamental importance of parents to their children's education. While the IDEIA strode several steps forward in protecting the rights of children with special needs, the draft Virginia regulations proposed to comply with the Act step backwards. While numerous revisions in the proposed regulations are concerning, we identify the following issues as particularly crucial.

A. Protect the rights of disabled children by continuing to recognize parents as indispensable members of their educational team.

In interpreting even the predecessor Act to the IDEIA, which included less stringent goals for special needs children, the Supreme Court of the United States has recognized that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (quoting *Board of Education v. Rowley*, 458 U.S. 176, 205-206 (1982)). In addition, the Supreme Court found that "[i]t is beyond dispute that the relationship between a parent and child is sufficient to support a legally cognizable interest in the education of one's child; and, what is more, Congress has found that 'the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.' §1400(c)(5)." *Winkelman v. Parma City School District*, No. 05-983 (U.S. S. Ct. 5/21/2007) at 17-18.

Moreover, the United States Court of Appeals for the Fourth Circuit, in noting *Rowley's* emphasis on parental participation, also noted the responsibility of school systems to apprise parents of their procedural rights. Without such information, the Fourth Circuit reasoned, "parental participation will rarely amount to anything more than parental acquiescence, because parents will assume they have no real say, and the participatory function envisioned by *Rowley* will go unfulfilled." *Hall v. Vance County Board of Education*, 774 F.2d 629, 634 (4th Cir. 1985).

The proposed regulations reduce the parents' measure of participation at every stage of the administrative process. From the identification of a child with a disability (child study committees, evaluation timelines, and eligibility criteria), to the process to determine how that disability manifests itself (functional behavioral assessments), to the monitoring of progress on IEP goals targeted to the child's needs (objectives or benchmarks), and finally, to the termination of services targeted to that disability, the participation of that child's parents is curtailed or eliminated by the proposed revisions. Parents, if presented with no choice but to file for a due process hearing to protect their child's rights, are even deprived of true impartiality under the proposed revisions, which will wrest control of special education hearing officers from the

Supreme Court of Virginia and grant the Virginia Department of Education, sometimes a defendant, control over these individuals. If a hearing officer's decision is not implemented, moreover, recourse is granted only through a complaint to the VDOE. The proposed structure presents a conflict of interest where a potentially adverse party also serves as judge and jury, with no balancing entity to check its power.

These revisions are inconsistent with the requirements of the IDEIA, which entitle parents to meaningful participation in their children's educations. The proposed regulations replace parental participation with parental acquiescence. Permitting the termination of certain or all special education and related services without parental consent, for example, is contrary to the concept of meaningful participation. If parents' participation is limited to expression of their opinions regarding their children's needs, only to have those opinions disregarded by a termination of their children's special education services, then their participation is not meaningful. To leave parents with the sole recourse of resorting to expensive dispute resolution or litigation procedures if they disagree with that decision is tantamount to depriving their children of an education that is free and appropriate, as defined by 20 U.S.C. § 1401(9). Under the proposed revisions, where parents are afforded a voice at the table at all, that voice will be drowned out. These revisions will not allow the resolution of disagreements in positive and constructive ways (20 U.S.C. § 1400(8)).

B. Protect the rights of disabled children who do not have parents to protect them.

A crucial change is necessary with regard to the definition of "parent" included in proposed regulation 8 V.A.C. § 20-81(1)(c), which is inconsistent with federal regulation 34 C.F.R. § 300.30(a)(3). Subsection (c) of the proposed regulation provides for one definition of "parent" as "a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not a Guardian ad litem, or the state if the child is a ward of the State.)" The language "but not a Guardian ad litem" must be removed from this proposed regulation, as it adds a restriction not present in the federal regulatory definition of "parent." The federal regulation, at 34 C.F.R. § 300.30(a)(3), provides that a parent can be "a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the state if the child is a ward of the state.)"

Notably, the federal regulation makes no mention of guardians *ad litem* and does not exclude them by name. To the contrary, the commentary to the federal regulations recognizes that a guardian *ad litem*, if authorized to make educational decisions for a child by nature of her appointment, *can* be considered to fall within the definition of a "parent." 71 Fed. Reg. 156 (14 Aug. 2006), p. 46566. When a guardian *ad litem* is authorized by an appointing court to make educational decisions for a child, that guardian's participation and ability to consent is crucial to protect the rights of that child, and to initiate and facilitate that child's access to special education. In some cases, the guardian *ad litem* is the *only* non-school representative present at meetings on behalf of the child, and the only individual knowledgeable about the child's background, needs, evaluations, and access to community services. Restricting the capabilities of GALs in a manner not contemplated by federal law deprives indigent, at-risk children from protections otherwise afforded to them by the courts.

C. Protect the rights of children to have their disabilities diagnosed by qualified professionals and recognized by LEAs.

The proposed regulations provide extensive criteria for the identification of children with disabilities, including those with autism and other health impairment (such as ADHD), that are more restrictive than the guidance provided under federal law. A child who has received a diagnosis of a given condition from a qualified professional should not then be subjected to the “diagnosis by committee” process envisioned by the proposed regulations, which permit educators to select criteria from the DSM-IV or checklists and thereby second-guess the diagnosis of professionals who are qualified to make them. The requirements posited by the proposed regulations are tantamount to using “a single measure or assessment as the sole criterion for determining whether a child is a child with a disability” in violation of 34 C.F.R. § 300.304(b)(2). A whole-child approach to determining whether a child is a child with a disability is required, and necessarily includes consideration of information – including diagnoses – obtained by the parent. Overriding these considerations by requiring that a child meet the criteria proposed in the draft regulations is inappropriate and inconsistent with the purposes of the IDEA.

D. Adopt the recommendations of the Virginia Coalition for Students with Disabilities, JustChildren, and the Virginia Office for Protection and Advocacy.

Reports submitted by the Coalition for Students with Disabilities in Virginia, JustChildren, and the Virginia Office for Protection and Advocacy provide extensive comments and effective recommendations regarding the proposed regulations. These recommendations protect the rights of children with special needs, as well as the rights of their parents, and effectuate the findings and purposes of the IDEA. We fully agree with, and urge careful consideration and adoption of, each of these recommendations and concerns.

In accordance with the instructions posted regarding the regulatory revision process at <http://www.doe.virginia.gov/VDOE/duproc/regulationsCWD.html>, our mailing address is provided below so that we may be provided a copy of the summary of all public comments received by the Virginia Department of Education.

Thank you for your dedication to the needs of children with disabilities and their families, and for your consideration of these comments.

Sincerely,

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