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## THE CHALLENGES OF MEETING THE NEEDS OF VIRGINIA STUDENTS WITH DISABILITIES THROUGH INDIVIDUALIZED EDUCATION PROGRAMS

*Hank Bostwick\* & Courtney Pugh\*\* & LaTonya Slade \*\*\* & Sara*

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\* Hank has been advocating for kids and youth facing juvenile justice and education access issues since he started practicing law in 2003. In 2008, after serving as a court-appointed juvenile defense attorney in Alabama, Hank joined the Virginia legal services community as an education law fellow at the Legal Aid Society of Roanoke Valley, where he successfully litigated and secured private school reimbursement and other services in the matter of *D.B. et al. v. Bedford County School Board*, 708 F. Supp. 2d 564 (W.D. Va. 2010)—a leading special education case in the Commonwealth, which is routinely cited as enduring precedent. In Texas, where he is also licensed, Hank was the education and special education law team manager for Texas RioGrande Legal Aid. Recently, federal litigation in the Western District of Texas Hank filed on behalf of several limited English proficient (LEP) mothers of students with disabilities in the case of *Garcia v. Morath*, 1:21-CV-01011-RP (W.D. Tex. Aug. 29, 2022), brought about much needed changes to the Texas Administrative Code, thereby increasing the access of non-native speakers to language assistance services in the special education context, like interpreters and translated documents. Hank most recently served as a senior attorney for the Southwest Virginia Legal Aid Society. A former public-school teacher, Hank brings almost two decades of experience to LAJC as a Senior Supervising Attorney for the Youth Justice Program, tackling barriers impacting local access to general and special education services and fostering state-wide advocacy to improve the quality of education for all Virginia's K-12 students. Hank recently authored *Suspended Progress 2024*, a report on the state of exclusionary discipline in Virginia's K-12 schools. Hank is licensed in Alabama, Texas, and Virginia.

\*\* Courtney Pugh is the founder of 4 PEAKS Educational Consulting. She graduated from Emory & Henry College with a Bachelor of Science in Business Management & Administration. A parent with two special needs children of her own, Courtney was mentored by another advocate and eventually became a parent advocate in her free time. She was a parent advocate for over seventeen years before starting 4 PEAKS Educational Consulting, LLC. Courtney continues to expand her knowledge and presence within the community, with memberships and certifications in: the Council of Parent Advocate and Attorneys (COPAA) (member since 2013); Wrightslaw Bootcamp – Charleston, WV (April 2013); Master IEP Coach © (March 2020); ISEA Alumni (January 2021); Parents as Collaborative Leaders certified; previously, Parent Educational Advocacy Training Center (PEATC), Virginia; Global Advocacy Director for International Coalition Against Restraint and Seclusion (ICARS); Governor appointee to the Virginia Interagency Coordinating Council for Early Intervention; and Former Boy Scout cubmaster, district chair for Blue Ridge Mountain Council and Chair of ScoutAbilities, an inclusion committee within Boy Scouts/Blue Ridge Mountain Council.

\*\*\* LaTonya Slade is an Education Advocate/Consultant on a mission to advocate, educate, and equip the community with the knowledge they need to help all children unlock their full potential. With a focus on creating the best possible educational experiences, she is empowering parents to be the driving force behind their child's educational success. LaTonya is an experienced professional who has worked with children with behavior and learning disabilities for over a decade. Her expertise includes working with children in school, home, and center-based settings. In addition to her professional experience, LaTonya has firsthand knowledge of the challenges parents face when advocating for their children's education. She understands the challenges of navigating the special education system and takes a comprehensive approach to support parents emotionally and as a parent advocate. LaTonya is also well-versed in local resources and can guide parents toward the best options for their families. LaTonya has successfully completed a graduate-level education in applied behavior analysis, special education, and human services.

*Platenberg \*\*\*\* & Melissa Waugh \*\*\*\*\**

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She is currently pursuing a Master's degree in Education Law at Nova Southeastern University to enhance her expertise and provide exceptional advocacy services. LaTonya's drive to make a positive impact on her community led her to establish Full Potential Education Advocacy and Consulting, LLC. LaTonya leads a fulfilling life outside of serving her clients. She generously volunteers with her church, cherishes quality time with her grandson, stays on top of her schoolwork, and indulges in the pleasure of a good novel.

\*\*\*\* Sara Platenberg is a Special Education Advocate (non-attorney) assisting families with the special education process, across multiple states. Sara assists families through all aspects of the special education process including eligibility, IEP development, implementation and progress monitoring, state and federal complaints, and in mediation. Sara Platenberg graduated from Illinois State with a Bachelor of Science in Criminal Justice Sciences with a focus in Sociology and Juvenile Justice. Sara received her Masters Degree in Education with a focus in Gifted and Talented and Twice Exceptional Populations. She served the public school system in Virginia as a Gifted and Talented Specialist where she focused on Twice Exceptionality and meeting the needs of 2E (twice-exceptional) students while utilizing researched based inclusion strategies. Sara is a mother of three boys, all of which have special needs, including two who also have Type 1 Diabetes. Her years and experience as an educator and experience implementing strategies to meet the needs of students with learning differences, helped support Sara's journey as a new parent when she began navigating the public-school special education system on a personal level. During her first eligibility meeting as a parent, Sara immediately realized the complexities of the special education process for parents and the critical need for advocacy on behalf of parents and students with health and special education needs in the public school system. In 2012, Sara joined Educational Advocacy and Consulting, LLC. Sara presents to parent and professional groups and is an expert witness for special education cases. She is a member of the Council of Parents, Attorneys, and Advocates (COPAA), the National Association for Gifted Children, and a member of the Special Education Advisory Committee (SEAC) for Loudoun County Public Schools. Educational Advocacy and Consulting and The Dyslexia Center assist families with Advocacy and Consulting, Assessments, and Tutoring across a multitude of states. Sara advocates for students in Virginia, Maryland, Pennsylvania, South Carolina, North Carolina, New York, and Illinois.

\*\*\*\*\* Melissa Waugh is a skilled attorney in practice for over twenty years. She has practiced special education law for the last thirteen years. Melissa represents parents at IEP meetings, in mediation, with state and federal complaints, in due process hearings, and in federal and state litigation. Her representation includes matters arising under the IDEA, the ADA, Section 504, and Title IX. Melissa graduated *cum laude* from the University of North Texas with a Bachelor of Applied Arts and Sciences with a focus in biology, chemistry, and physics. Melissa received her Juris Doctor degree, *cum laude*, from the University of Houston Law Center in 2000. While attending law school, Melissa served on the *Houston Journal of International Law* as Articles Editor, the Student Bar Association as 1st Vice President & Section Representative, the Honor Court as a Justice, the Health Law Organization, and the Public Interest Law Organization. She also won first place in the Tom Newhouse Mediation Competition. Melissa also holds a Masters of Public Health from the University of Texas-Health Science Center. Melissa and her husband, Lt. Col. Bryan "Marty" Waugh (Ret.), are the parents of two amazing children who happen to have special needs. After adopting their children from foster care in 2010 and being exposed for the first time to special education and IEPs, Melissa quickly realized how complicated this area of the law is and the dire need for more attorneys representing the interests of parents of children with disabilities in our schools. Melissa started her own law firm to assist families of children with disabilities and has served as a Guardian *ad Litem* for children in court. She joined Belkowitz Law, PLLC in 2018. Melissa regularly presents to parent and professional groups and has served as faculty for COPAA, the Institute for Special Education Advocacy at William & Mary Law School, and the National Business Institute. She is a long-time member of COPAA, and a member of the Special Education Advisory Committee ("SEAC") for Loudoun County Public Schools. Melissa is licensed to practice law in Virginia, Maryland, and Washington, D.C. She has been admitted to the United States District Court for both the Eastern and Western Districts of Virginia.

## ABSTRACT

*The authors were honored to participate in a panel on “Understanding the IEP” at the Richmond Public Interest Law Review’s Symposium on October 27, 2023. The recommendations and strategies in this article are rooted in decades of combined experience and anecdotal observations from two special education attorneys and three special education advocates who serve Virginia’s children and families and help to develop appropriate Individualized Education Programs (“IEPs”) pursuant to the Individuals with Disabilities Education Act (“IDEA”). Recent criticism of Virginia’s system of special education and related services by state and federal agencies has laid bare deep-seated inconsistencies in how schools in the Commonwealth identify, evaluate, and serve students with disabilities. Moreover, inadequate guidance from the Virginia Department of Education (“VDOE”) about the IEP development process has left both schools and parents confused and frequently at odds. In this article, the authors outline the history of the IDEA, in the context of the Civil Rights Movement, to meet the educational needs of students with disabilities. The authors then lay out the fundamental elements of an IEP; identify the central deficits in Virginia’s system of special education and related services and their impact on the development of IEPs; provide practical guidance for attorneys and advocates using vignettes based on authentic encounters in the field; and offer suggestions for how various processes related to IEPs can be improved in the Commonwealth.*

## INTRODUCTION: IDEA AND THE CIVIL RIGHTS MOVEMENT TO MEET THE EDUCATIONAL NEEDS OF STUDENTS WITH DISABILITIES

The Civil Rights Movement to guarantee equal access to a free and appropriate public education (“FAPE”) for students with disabilities has its genesis in the United States Supreme Court’s landmark decision in *Brown v. Board of Education*, which relegated the concept of “separate but equal” to the dustbin of history by holding that “[s]eparate educational facilities are inherently unequal.”<sup>1</sup> While *Brown’s* historic ruling addressed racial discrimination in the education setting, parents of students with disabilities found in this ruling a constitutional basis for taking legal action against their schools’ practice of excluding and warehousing disabled children away from their non-disabled peers in separate, inherently substandard “educational”

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<sup>1</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

settings.<sup>2</sup> Arguably in response to the initial wave of this nascent movement, Congress enacted the Elementary and Secondary Education Act (“ESEA”) in 1965, which was amended the following year to create a grant program for handicapped children.<sup>3</sup> This grant program was replaced in 1970 by the Education of the Handicapped Act.<sup>4</sup> Unfortunately, neither law had mandates on the use of public funds for special education, nor did either lead to any significant improvement in the education of children with disabilities.

Over the next five years, two significant federal cases and their progeny eventually compelled Congress to sharply scrutinize the country’s system of educating students with special needs. In *PARC v. Pennsylvania*, the federal district court concluded, in the language of the day, that it is the state’s “obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child’s capacity” and that “*placement in a regular public school class is preferable to placement in a special public school class.*”<sup>5</sup> A year later, in *Mills v. Board of Education*, another federal court laid the groundwork for what would become a centerpiece of future special education legislation: the inability of schools to suspend, expel, or otherwise exclude students with disabilities without a hearing and periodic review.<sup>6</sup> In the two years following *PARC* and *Mills*, many other cases were decided in favor of disabled children.<sup>7</sup> This line of cases established for disabled children the right to a FAPE in their least restrictive environment (“LRE”) appropriate for the student and set the stage for the enactment of what we now know as the Individuals with Disabilities Education Act (“IDEA”).<sup>8</sup>

In response to this federal litigation, Congress began to investigate the matter in earnest and found that, among the 8 million children in the United States identified as disabled, 1.75 million were excluded from schools altogether and more than half received inappropriate educational services due

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<sup>2</sup> See *id.* (*Brown*’s ruling concerned school segregation by race. Black children had to attend separate schools which the Court held was inherently unequal. Parents of students with disabilities and disability advocates looked at this holding and noted the opening in the *Brown* decision to push for its application to students with disabilities).

<sup>3</sup> Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. §§ 6301-6578); Elementary and Secondary Education Amendments of 1966, 89 Pub. L. No. 750, 80 Stat. 1191 (1966).

<sup>4</sup> Elementary and Secondary Education Assistance Programs, Extension, Pub. L. 91-230, 84 Stat. 178 (1970).

<sup>5</sup> *Pa. Ass’n for Retarded Child v. Pennsylvania*, 334 F. Supp. 1257, 1260 (E.D. Pa. 1971) (emphasis added) (practitioners in the field refer to the Association simply as “PARC” to avoid the use of insulting language).

<sup>6</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.C. 1972).

<sup>7</sup> 120 CONG. REC. 15270 (1974) (statement of Sen. Randolph).

<sup>8</sup> 20 U.S.C. §§ 1400-1482; 34 C.F.R. § 300.114 (2024); 34 C.F.R. § 300.17 (2024); VA. CODE § 22.1-214 (2023); see also 34 C.F.R. § 300.1 (2024); see generally 8 VA. ADMIN. CODE § 20-81-10 (2024).

to a severe lack of resources, the failure to properly diagnose disabilities, and the segregation of students with disabilities in separate schools and classrooms away from their non-disabled peers.<sup>9</sup> In light of these findings, in 1975, Congress amended the Education of the Handicapped Act of 1970 to give children with disabilities the right to a FAPE, to substantially expand funding to schools, to mandate the exclusive use of those funds for “excess costs” in educating children with disabilities, and to provide procedural safeguards for holding schools accountable for providing educational services to children with disabilities.<sup>10</sup> The law was amended several more times and, by 1990, morphed into today’s IDEA.<sup>11</sup> The last major amendment to IDEA was in 2004.<sup>12</sup>

Essentially a funding statute, IDEA earmarks federal resources for students with disabilities. States accepting these funds must guarantee that their state educational authorities (“SEAs”)—like the Virginia Department of Education (“VDOE”)—promulgate rules and regulations ensuring the provision of special education and related services to eligible children with disabilities in their LRE.<sup>13</sup> Further, IDEA requires that schools—as directed by their SEAs—design programs of special education and related services to meet the unique needs of students with disabilities and prepare them for further education, employment, and independent living.<sup>14</sup>

## I. THE HEART OF IDEA: THE IEP

At the heart of IDEA is the Individualized Education Program (“IEP”)—the primary vehicle by which schools and parents decide how to deliver a FAPE in the LRE that is most appropriate for the student. The IEP is a written document developed by a team of school staff, parents, and, in some cases, the student who is the subject of the IEP.<sup>15</sup> The IEP is intended to meet the unique needs of the student eligible for special education and related services and includes a statement by the school of what the student needs to receive a FAPE.<sup>16</sup>

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<sup>9</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3, § 601, 89 Stat. 773, 774-775 (codified as amended at 20 U.S.C. § 1400(c)(2)).

<sup>10</sup> See generally Pub. L. No. 94-142, 89 Stat. 773, 773-95 (1975).

<sup>11</sup> Pub. L. No. 101-476, 104 Stat. 1142 (1990).

<sup>12</sup> Pub. L. 108-446, 118 Stat. 2647, 2804 (2004).

<sup>13</sup> 20 U.S.C. § 1412(a); 20 U.S.C. § 1400(d)(1)(A)-(B).

<sup>14</sup> 20 U.S.C. § 1400(d)(1)(A).

<sup>15</sup> 20 U.S.C. § 1414(d)(1)(A)(i); 20 U.S.C. § 1414(d)(1)(B).

<sup>16</sup> 34 C.F.R. § 300.323(c) (2024).

IEPs must be in effect at the beginning of each school year and must be reviewed at least annually.<sup>17</sup> Parents are entitled to copies of IEPs.<sup>18</sup>

- A statement of the student’s present levels of academic achievement and functional performance (“PLAAFPs”);
- measurable annual goals to address the student’s academic and nonacademic educational, behavioral, and functional needs and how the student’s progress toward those goals will be measured and reported to the parents;
- a statement of the special education, related services, and supplementary aids and services the student will receive as part of the IEP;
- a statement of the program modifications, accommodations, or supports for school personnel (like training or consultation) the student will receive;
- a statement of the extent to which the student will not participate with non-disabled peers in the general education setting and why;
- accommodations the student needs for state and districtwide assessments; if applicable, a statement of why the student will take an alternative assessment;
- the projected date for beginning IEP services and modifications, and the anticipated frequency, location, and duration of those services and modifications; and
- beginning no later than when the student turns sixteen, a transition plan with postsecondary school goals.<sup>19</sup>

IDEA also provides that parents must be part of any group making decisions about their student’s educational placement.<sup>20</sup>

In *Endrew F. v. Douglas County School District RE-1*, the United States Supreme Court held that an IEP must be “reasonably calculated to enable the student to make progress that is appropriate in light of the child’s circumstances.”<sup>21</sup> This requires a prospective judgment by a student’s IEP team, after examining the student’s present levels of achievement, disability, and potential for growth.<sup>22</sup> The Court also held that goals in the IEP should

<sup>17</sup> 20 U.S.C. § 1414(d)(2)(A); 20 U.S.C. § 1414 (d)(4)(A)(i); 34 C.F.R. § 300.324(b)(i) (2024).

<sup>18</sup> 34 C.F.R. § 300.322(f) (2024).

<sup>19</sup> 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2024); 8 VAC 20-81-110 (G)(10)(a)(1).

<sup>20</sup> 20 U.S.C. § 1414(e).

<sup>21</sup> *Endrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386, 340 (2017).

<sup>22</sup> *Id.* at 399-400.

be “appropriately ambitious,” giving the student the chance to meet “challenging objectives.”<sup>23</sup> A long-held principle of special education jurisprudence in Virginia is that achievement of passing grades and advancement from grade to grade in a regular classroom environment is not dispositive on the issue of whether a student is receiving a FAPE.<sup>24</sup> An evaluation of the totality of a student's circumstances has been a primary inquiry of reviewing courts.<sup>25</sup>

As the “centerpiece” of IDEA, an IEP “must target ‘all of a child's special needs,’ whether they be academic, physical, emotional, or social.”<sup>26</sup> This is accomplished through the development of specially designed instruction and an individualized plan of goals, accommodations, and services.<sup>27</sup>

As such, the centrality of the IEP to fulfilling the purpose of IDEA cannot be overstated, and the challenges faced by special education advocates and the parents of students with disabilities in Virginia must be understood within the context of recent critiques of the Commonwealth’s oversight of special education.<sup>28</sup>

<sup>23</sup> *Id.* at 402.

<sup>24</sup> *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009) (citing to *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 n. 28 (1982) (“[T]he achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.”)); *In re Conklin*, 946 F.2d 306, 313-16 (4th Cir. 1991); *S.H. v. Fairfax Cnty. Bd. of Educ.*, 875 F. Supp. 2d 633, 654-55 (E.D. Va. 2012) (looking at more than just grades and advancement to discern progress).

<sup>25</sup> *Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 635-36 (4th Cir. 1985).

<sup>26</sup> *Coventry Pub. Schs. v. Rachel J.*, 893 F. Supp. 2d 322, 332-33 (D. R.I. 2012) (quoting *Lenn v. Portland Sch. Comm.*, 998 F. 2d 1083, 1089 (1st Cir. 1993)).

<sup>27</sup> 20 U.S.C. §1414(d)(1)(A)(i)(V); 34 C.F.R. § 300.320(a)(4) (2007); *see also* Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,383, 46,540-1, 46,577 (Aug. 14, 2006) (“§ 300.39(b)(3) (proposed § 300.38(b)(3)) defines specially designed instruction as adapting the content, methodology, or delivery of instruction to address the unique needs of the child and to ensure access to the general curriculum ... § 300.320(a)(1) requires a child’s IEP to include a statement of how the child’s disability affects the child’s involvement and progress in the general education curriculum.”).

<sup>28</sup> The U.S. Supreme Court has made clear that, in order “[t]o meet its substantive obligation under the IDEA [to provide a FAPE], a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Endrew F.*, 580 U.S. at 399. In addition to this substantive requirement, the IDEA also requires that “each disabled student receive instruction in the ‘least restrictive environment’ (‘LRE’) possible.” *AW ex rel. Wilson v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674, 681 (4th Cir. 2004) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)). The Fourth Circuit has explained that the LRE requirement reflects the IDEA’s preference that “[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled.” *AW ex rel. Wilson*, 372 F.3d at 681; U.S. DEP’T OF EDUC., STATE PERFORMANCE PLAN/ANNUAL PERFORMANCE REPORT: PART B FOR STATE FORMULA GRANT PROGRAMS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 65, 166 (2022).



## II. THE STATE OF SPECIAL EDUCATION IN THE COMMONWEALTH: FEDERAL AND STATE AGENCIES FIND DEFICIENCIES IN VIRGINIA'S SYSTEM OF PROVIDING SPECIAL EDUCATION

As the Commonwealth emerges from the COVID-19 pandemic, K-12 students with disabilities in Virginia public schools continue to lag behind their non-disabled peers, particularly in secondary school.<sup>29</sup> At last count, around 178,000 students in Virginia receive special education and related services, and the population is on the rise in the aftermath of the pandemic, which continues to frustrate public education in Virginia.<sup>30</sup> In 2022, The Annie E. Casey Foundation reported data signaling a growing mental health crisis among America's youth; and according to Voices for Virginia's Children, one in five children in the Commonwealth present with mental health conditions, which could qualify them for special education under IDEA.<sup>31</sup> Yet, VDOE has not been up to the task of ensuring all of Virginia's children with disabilities are receiving the education they are entitled to by law.

In response to "an unusually high number of customer service communications from parents, advocates, and other stakeholders in Virginia with concerns that appeared to raise potential compliance concerns," the United States Department of Education ("U.S. DOE") Office of Special Education Programs ("OSEP") investigated VDOE's "compliance with the general supervision and dispute resolution requirements" of the IDEA and found it lacking.<sup>32</sup> On June 23, 2020, OSEP issued its report concluding that VDOE does not have "procedures and practices reasonably designed to . . . effectively monitor the implementation" of IDEA.<sup>33</sup> The same report identified deficiencies in Virginia's state complaint procedures, due process complaint and hearing procedures, and mediation process.<sup>34</sup> The report also found issues surrounding when a parent can request an independent educational evaluation ("IEE") of their child if they disagree with school-

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<sup>29</sup> STATE PERFORMANCE PLAN/ANNUAL PERFORMANCE REPORT: PART B FOR STATE FORMULA GRANT PROGRAMS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, *supra* note 28 at 166.

<sup>30</sup> See generally *December 1st Build-A-Table*, VA. DEP'T OF EDUC. 8, [https://p1pe.doe.virginia.gov/apex\\_captcha/home.do?apexTypeId=307](https://p1pe.doe.virginia.gov/apex_captcha/home.do?apexTypeId=307) (calculating data around special education enrollment) (last visited Apr. 17, 2024).

<sup>31</sup> 2022 *Kids Count Data Book*, ANNIE E. CASEY FOUND. (2022); VOICES FOR VIRGINIA'S CHILDREN, THE STATE OF VIRGINIA'S CHILDREN: A DATA SNAPSHOT OF CHILDREN, YOUTH, AND FAMILIES 6-7 (2021).

<sup>32</sup> U.S. DEP'T OF EDUC., OFF. OF SPECIAL EDUC. PROGRAMS, DIFFERENTIATED MONITORING AND SUPPORT REPORT 1 (2020).

<sup>33</sup> *Id.* at 6.

<sup>34</sup> *Id.* at 5.

conducted special education evaluations.<sup>35</sup>

In a February 8, 2022 status letter to VDOE, OSEP “. . . determined that the State has not demonstrated correction of all the noncompliance identified in our June 23, 2020, Differentiated Monitoring and Support (DMS) monitoring letter (DMS letter).”<sup>36</sup> OSEP expressed concern about the multiple parents and stakeholders contacting the office about the state’s lack of general supervision over school districts, and identified seven additional areas of concern it would be monitoring.<sup>37</sup> A September 1, 2022 Status Letter noted that VDOE had still “. . . not satisfactorily corrected each of the areas of noncompliance identified in OSEP’s June 23, 2020, DMS Report.”<sup>38</sup>

Then, a January 17, 2023 Status Letter stated, “VDOE has corrected some, but not all of the findings.”<sup>39</sup> A month later, a February 17, 2023 Status Letter included a chart of the outstanding issues from the original 2020 DMS Report and indicated “significant new or continued areas of concern” including evidence that at least five school districts have practices for IEEs that are inconsistent with IDEA regulations.<sup>40</sup> OSEP informed VDOE it would “initiate additional monitoring activities.”<sup>41</sup> In a May 12, 2023 DMS Targeted Monitoring Letter to VDOE, OSEP identified seven areas of concern, including state complaints, due process hearings, IEEs, confidentiality of student information, and districts failing to provide a FAPE during remote learning.<sup>42</sup> While the issues in the original 2020 DMS Report were closed out, on March 13, 2024, OSEP released a new DMS Report with all new findings of noncompliance on the part of VDOE.<sup>43</sup> In short, OSEP has determined that Virginia “does not have procedures and practices that are reasonably designed to enable the State to exercise general supervision over all educational programs for children with disabilities administered within the State, to ensure that all such programs meet the requirements of [IDEA], and to effectively monitor the implementation of [IDEA]” in the Commonwealth’s K-12 schools.<sup>44</sup>

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<sup>35</sup> *Id.* at 14-15.

<sup>36</sup> U.S. DEP’T OF EDUC., OFF. OF SPECIAL EDUC. PROGRAMS, DMS Status Letter at 1 (Feb. 8, 2022).

<sup>37</sup> *Id.* at 1-2.

<sup>38</sup> U.S. DEP’T OF EDUC., OFF. OF SPECIAL EDUC. PROGRAMS, DMS Status Letter at 6 (Sept. 1, 2022).

<sup>39</sup> U.S. DEP’T OF EDUC., OFF. OF SPECIAL EDUC. PROGRAMS, DMS Status Letter at 1 (Jan. 17, 2023).

<sup>40</sup> U.S. DEP’T OF EDUC., OFF. OF SPECIAL EDUC. PROGRAMS, DMS Status Letter at 1, 7 (Feb. 17, 2023).

<sup>41</sup> *Id.* at 1.

<sup>42</sup> U.S. DEP’T OF EDUC., OFF. OF SPECIAL EDUC. PROGRAMS, DMS Status Letter, (May 12, 2023).

<sup>43</sup> U.S. DEP’T OF EDUC., OFF. OF SPECIAL EDUC. PROGRAMS, DMS Close-out Letter, (Mar. 13, 2024); OFF. OF SPECIAL EDUC. PROGRAMS, DIFFERENTIATED MONITORING AND SUPPORT REPORT, *supra* note 32, at 3-5.

<sup>44</sup> U.S. DEP’T OF EDUC., OFF. OF SPECIAL EDUC. PROGRAMS, OSEP’S RESPONSE TO THE VIRGINIA DEPARTMENT OF EDUCATION’S DIFFERENTIATED MONITORING SYSTEM DOCUMENT SUBMISSION (2023).

Reviews by the Virginia General Assembly during this same timeframe confirm long-standing issues with Virginia’s system of special education and related services. In its October 2020 report on the Operations and Performance of VDOE, the Commonwealth’s Joint Legislative Audit and Review Commission (“JLARC”) found VDOE could do more to effectively supervise local school divisions and called for funding so it can more comprehensively supervise school divisions.<sup>45</sup> The importance of VDOE properly exercising its general supervision responsibilities cannot be overstated. OSEP stated in its Dear Colleague Letter accompanying its 2023 Guidance to states that, “[b]y strengthening its system of general supervision to improve compliance, the State can help facilitate improved educational results and functional outcomes for all infants, toddlers, and children with disabilities.”<sup>46</sup>

In its December 2020 report on K-12 Special Education in Virginia, JLARC identified problematic special education evaluation processes as a significant systemic issue across the state’s K-12 public schools, impacting day-to-day eligibility determinations:

[I]nconsistent interpretation and application of the state’s eligibility criteria [for special education evaluations] are primary reasons for variation in special education enrollment. [Multiple sources] indicate that a student receiving special education in one division could be found ineligible for special education in another division because of these inconsistencies.<sup>47</sup>

JLARC’s recommendation—that Virginia disseminate more accurate and specific information regarding the special education eligibility process to school divisions across the Commonwealth—is consistent with recent federal guidance regarding the same.<sup>48</sup> In 2021, VDOE did in fact publish an updated guidance document for Special Education Evaluation and Eligibility.<sup>49</sup> In 2022, the federal Office of Special Education and Rehabilitative Services (“OSERS”) issued a reminder reiterating the responsibility of school divisions to guarantee that IEPs meet students’ individualized needs, including their behavioral needs, by conducting comprehensive evaluations

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<sup>45</sup> JOINT LEGIS. AUDIT & REV. COMM’N, OPERATIONS AND PERFORMANCE OF THE VIRGINIA DEPARTMENT OF EDUCATION at i, iv (Oct. 2020).

<sup>46</sup> U.S. DEP’T OF EDUC., Dear Colleague Letter from Valerie Williams, Dir. of the Off. of Special Educ. Programs, at 2 (July 24, 2023).

<sup>47</sup> JOINT LEGIS. AUDIT AND REV. COMM’N, K-12 SPECIAL EDUCATION IN VIRGINIA at 29 (Dec. 2020).

<sup>48</sup> *Id.*

<sup>49</sup> See VA. DEP’T OF EDUC., SUPPLEMENTAL GUIDANCE FOR EVALUATION AND ELIGIBILITY IN SPECIAL EDUCATION (2021).

and timely reevaluations.<sup>50</sup>

JLARC's 2020 special education report points out the result of Virginia's lack of appropriate eligibility and evaluation guidance, namely, deficient IEPs:

The quality of [IEPs] for students with disabilities varies across Virginia school divisions, and some IEPs do not contain required or key information. About one-third of the sample of IEPs reviewed by JLARC staff *lacked a description of the student's academic or functional needs*, and one-quarter did not describe the effect of the disability on the student's educational performance. JLARC's review of IEPs found that about half (48 percent) lacked academic or functional goals.<sup>51</sup>

As recently as October of 2023, independent educational consultants commissioned by VDOE have concluded that the agency's special education guidance is often "unclear" or "too vague," creating "ambiguity in the system, which then creates inconsistencies and varied practices from instructional and compliance perspectives."<sup>52</sup>

Similarly, another October 2023 report commissioned by VDOE states unequivocally that the agency "must improve its monitoring of compliance with state and federal laws to improve the confidence of the public and parents of students with disabilities and, ultimately, to improve outcomes and results for students with disabilities receiving special education in the Commonwealth."<sup>53</sup>

The cumulative impact of the flaws in Virginia's system of special education and related services contributes to the ongoing achievement gap for students with disabilities and the inequitable imposition of exclusionary forms of school discipline on students with disabilities. During the 2022-2023 school year, students with disabilities—roughly thirteen percent of Virginia's K-12 population—received almost a quarter of all in-school and out-of-school suspensions.<sup>54</sup> Data from the NAEP/Nation's Report Card, exhibited by the charts below, show the achievement gap widening for

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<sup>50</sup> See U.S. DEP'T OF EDUC., OFF. OF SPECIAL EDUC. & REHAB. SERVS., QUESTIONS AND ANSWERS: ADDRESSING THE NEEDS OF CHILDREN WITH DISABILITIES AND IDEA'S DISCIPLINE PROVISIONS 5-6 (2022).

<sup>51</sup> K-12 SPECIAL EDUCATION IN VIRGINIA, *supra* note 47 at ii (2020).

<sup>52</sup> NEW SOLUTIONS K12, OBSERVATIONS AND RECOMMENDATIONS 10 (2023).

<sup>53</sup> ROBERT PASTERNAK & SAM HOWARTH, ENSENER EDUC. SERVS., INC., REPORT TO THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF VIRGINIA 10 (2023).

<sup>54</sup> HANK BOSTWICK, LEGAL AID JUST. CTR., SUSPENDED PROGRESS 2024 2 (2024).

Virginia’s students with disabilities in the areas of Reading and Math.<sup>55</sup>

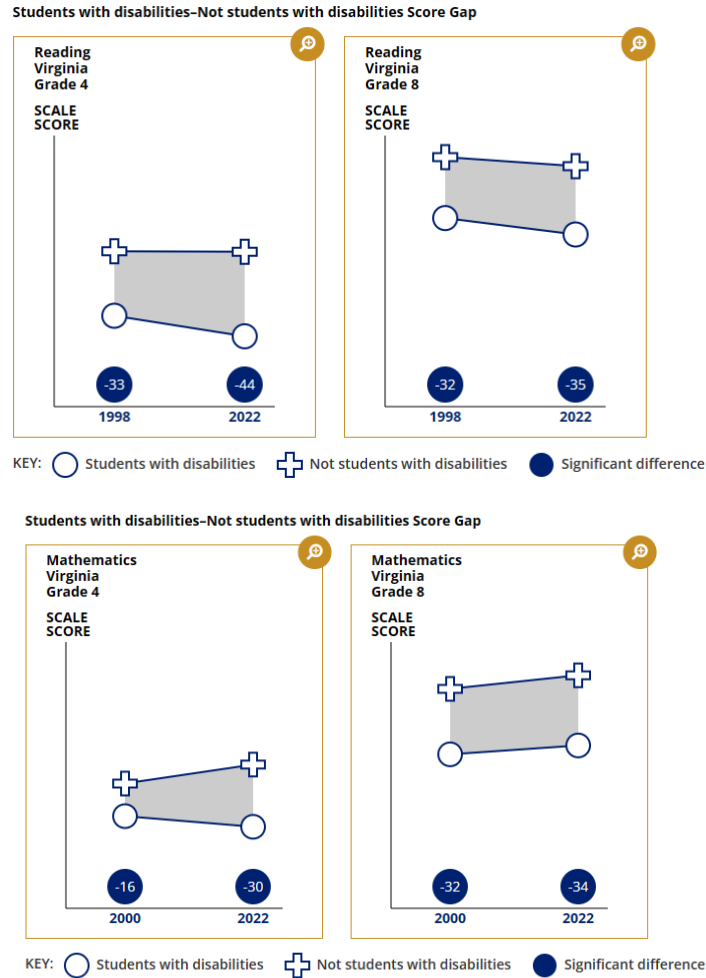


Figure 1: Data from the NAEP/Nation’s Report Card<sup>56</sup>

<sup>55</sup> *Achievement Gaps Dashboard*, THE NATION’S REP. CARD, [https://www.nationsreportcard.gov/dashboards/achievement\\_gaps.aspx](https://www.nationsreportcard.gov/dashboards/achievement_gaps.aspx) (last visited Apr. 18, 2024) (Under “Jurisdiction” choose “Virginia” from the dropdown; then under “Student Group 1” choose “Students with disabilities” from the dropdown; then under “Student Group 2” choose “Not students with disabilities” from the dropdown if it does not automatically populate; then click “Add Gap” and wait until the chart populates the information; then expand the subsections “Mathematics” and “Reading”).

<sup>56</sup> See *Individualized Education Program*, VA. DEP’T OF EDUC., <https://www.doe.virginia.gov/programs-services/special-education/iep-instruction/individualized-education-program-iep> (Statement of Present Level of Academic Achievement and Functional Performance) (data taken from the Summary of Recent Evaluation Results) (redacted).

This is also reflected in the JLARC report, *K-12 Special Education in Virginia*, which found an ongoing gap between SOL pass rates, graduation rates, and dropout rates for students with and without disabilities in Virginia.<sup>57</sup> In the absence of effective monitoring of local school divisions by VDOE, adequate processes for special education dispute resolution, and clear guidance regarding the contents of IEPs and special education eligibility criteria, the need to help special education advocates identify how the aforementioned issues impact the children and families they serve is perhaps more acute than ever.

### III. IMPROVING IEPs IN VIRGINIA

In 2024, Virginia's General Assembly passed legislation requiring VDOE to reform its approach to special education in the Commonwealth.<sup>58</sup> The new law compels VDOE to:

- Review and revise its evaluation and eligibility forms and guidance;
- tweak the role of the State Parent Ombudsman for Special Education;
- make a standardized electronic IEP writing system available to all Virginia school districts;
- create a data dashboard for annual public reporting;
- establish eight special education family support centers across the Commonwealth;
- create a parent/family liaison in each school district;
- implement new requirements for credit accommodations for meeting graduation requirements;
- provide professional development on the Virginia IEP, the revised evaluation and eligibility forms, and instructional practices to support specially designed instruction;
- include in teacher training programs coursework and field practice

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<sup>57</sup> See K-12 SPECIAL EDUCATION IN VIRGINIA, *supra* note 47.

<sup>58</sup> See generally S.B. 220, 2024 Gen. Assemb., Reg. Sess. (Va. 2024); H.B.1089, 2024 Gen. Assemb., Reg. Sess. (Va. 2024).

opportunities that build knowledge of instructional practices to support specially designed instruction; and

- retain records of students with disabilities for seven years after graduation or aging-out of school.<sup>59</sup>

While this new law is a big step forward, there is still much work to be done to fulfill the vision of Congress when it passed and amended IDEA. As VDOE continues to respond to federal oversight of its special education system, and begins to develop new model guidance in response to recent legislation, it is paramount for advocates to closely scrutinize three crucial areas of the IEP development process:

1. *Inappropriate Evaluations and Eligibility Determinations.* Data for the development and review of a student's IEP is gathered through the special education evaluation and re-evaluation process. We have identified several areas of concern impacting the development of IEPs in Virginia that stem from problems associated with inconsistent guidance regarding the special education evaluation and reevaluation process:

- The omission of relevant assessments in the initial special education evaluation process, including a lack of behavioral and functional data;
- a persistent failure to update IEPs with relevant, current evaluation data consistent with IDEA's reevaluation requirements; and
- a failure to assess students in all areas of suspected disability, including areas "not commonly linked to the disability category" for which the student may qualify.

2. *Inaccurate Present Levels of Academic and Functional Performance.* The consequence of a faulty or flawed special education evaluation is, of course, inaccurate data. Every IEP, as discussed *supra*, must include statements about a student's present levels of academic and functional performance ("PLAAFPs"). These statements guide the development of a student's annual IEP goals, accommodations, services, and, ultimately, placement. Often, there is a disconnect between a student's current performance profile and the contents of the IEP. This disjointedness can be directly traced to inadequate PLAAFPs due to failures in the evaluation process or in school-based team members providing inaccurate or incomplete data from the evaluation. Advocates can improve special education in Virginia by insisting that a student's IEP evidence a strong correlation between a student's present levels of functional and academic performance

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<sup>59</sup> S.B. 220, 2024 Gen. Assemb., Reg. Sess. (Va. 2023).

(both strengths and weaknesses) and the other components of the student's special education program.

3. *Obtaining Parental Consent and Documenting Disagreement.* While school staff may try to encourage a parent to sign consent to implement the IEP at the close of the meeting, there is nothing in IDEA or its federal or state implementing regulations requiring a parent to do so. It is standard practice of special education attorneys and advocates to encourage the parents to take a proposed IEP home and review it in more detail before giving the school consent to implement it (unless the child is in crisis and some new provision of the IEP can provide immediate relief). The ability to *partially consent* to an IEP is one of the most powerful tools in the toolbox of parents of students with disabilities in Virginia. Unfortunately, while the concept of partial consent to IEPs is expressly described in guidance from VDOE, discussed *infra*, Virginia's model IEP does not provide for a partial consent option. Given the problems with Virginia's special education dispute resolution process, discussed *supra*, accurately and comprehensively documenting a parent's disagreement with her child's IEP and promoting the use of partial consent and signing statements are fundamental for effective advocacy.

For each of these areas of concern, we offer a review of the substantive law and current administrative and judicial decisions, together with vignettes adapted from the actual experiences of the Virginia families and children we have served.<sup>60</sup>

#### IV. SPECIAL EDUCATION ADVOCACY TO IMPROVE IEPs IN VIRGINIA: SUBSTANTIVE LAW AND PRACTICAL STRATEGIES

##### *A. Inappropriate Evaluations and Eligibility Determinations*

All school divisions in Virginia are required to identify, evaluate, and serve eligible students with disabilities within their jurisdictions.<sup>61</sup> This obligation, called "Child Find," includes the full and individual evaluation of students suspected of having a disability for eligibility to receive special education and related services.<sup>62</sup>

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<sup>60</sup> The vignettes below in bold and italics are based on an amalgamation of client profiles representing the experiences of parents of students with disabilities across the Commonwealth. The names associated with each vignette are purely fictional.

<sup>61</sup> 34 C.F.R. § 300.111(a)(1)(i) (2024); 8 VA. ADMIN. CODE § 20-81-50 (2009).

<sup>62</sup> 8 VA. ADMIN. CODE § 20-81-50 (2009); 8 VA. ADMIN. CODE § 20-81-60 (2023).



As recently as April of 2023, the Fourth Circuit Court of Appeals in *Miller v. Charlotte-Mecklenburg Schools Board of Education* reaffirmed that “when a school district has convened an IEP team and *comprehensively evaluated a student's eligibility for services*, and where the State maintains and follows detailed policies to evaluate children needing such services, the child find obligation has been satisfied.”<sup>63</sup> As a corollary to this holding, the failure to conduct comprehensive, individualized evaluations could constitute a denial of FAPE.<sup>64</sup>

In Virginia, while anyone can request an initial special education evaluation, once a referral has been made to the school division’s “child study” team and the decision to evaluate a student has been approved, a team of qualified school professionals—often referred to as the school division’s “multidisciplinary evaluation team”—must conduct an evaluation to determine the student’s eligibility for special education consistent with criteria set out in state and federal regulations.<sup>65</sup> The purpose of the evaluation is to identify strengths and weaknesses in a student’s academic and functional performance and to assess whether the student has a disability that requires special education services.<sup>66</sup> Thus, the purpose of an initial evaluation for special education and related services under IDEA is two-fold: (1) identifying whether a student needs specialized instruction and related services due to an eligible disability and (2) assisting that student’s IEP team in determining the special education and related services the student requires.<sup>67</sup>

IDEA mandates that school divisions use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about a potentially eligible student, and evaluate the child in all areas related to the suspected disability, discussed *infra*, including, if appropriate, the student’s present social and emotional status.<sup>68</sup> Additionally, a school division must consider information about a child’s current

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<sup>63</sup> *Miller v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 64 F.4th 569, 575 (4th Cir. 2023) (citing *Durbrow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1196 (11th Cir. 2018)) (holding a school district fails to satisfy its child find obligation when it “overlook[s] clear signs of disability” or “negligently fail[s] to order testing” but satisfies the child find obligation “by initiating the IDEA-eligibility process”).

<sup>64</sup> *Id.* (finding that the defendant school district had not violated IDEA’s “child find obligation” because it had comprehensively evaluated the plaintiff student’s eligibility for services which leads to the logical inference that failing to comprehensively evaluate a student’s eligibility for services would have violated IDEA’s “child find obligation”).

<sup>65</sup> 34 C.F.R. § 300.301(b) (2007); 8 VA. ADMIN. CODE § 20-81-60(1) (2023); 34 C.F.R. § 300.301-.311 (2006) (amended in 2007 & 2017); 8 VA. ADMIN. CODE § 20-81-70(1) (2023); 8 VA. ADMIN. CODE § 20-81-80(A) (2010).

<sup>66</sup> See 8 VA. ADMIN. CODE § 20-81-70(B)(1)(b) (2023).

<sup>67</sup> 34 C.F.R. § 300.301(c)(2) (2007).

<sup>68</sup> 34 C.F.R. §§ 300.304(b), 300.304(c)(4) (2007).

functional, behavioral, and social performance provided by parents, classroom teachers, and other service providers.<sup>69</sup> Further, the school division's initial evaluation, as well as subsequent reevaluations, must include all existing evaluation data and classroom observations, together with information provided by the parent.<sup>70</sup>

*Nadia is a fourteen-year-old Latina student who is starting her first year of high school. Her parents migrated to the United States with work visas at the start of her sixth-grade year, which was conducted virtually in the aftermath of the COVID-19 pandemic. Spanish is almost exclusively spoken in the home, and Nadia's parents speak little to no English. She was designated as an English Language Learner (ELL) by her school division when she was enrolled. However, language assistance services have been sporadic and minimal. Consequently, Nadia's reading and writing skills have not significantly improved, though she has been promoted every year. Her inability to communicate as effectively as her peers and to keep up with the standard curriculum has caused Nadia significant frustration. During her eighth-grade year, her social anxiety and lack of self-esteem became so acute that she experienced severe depression. As the year wore on, Nadia began refusing to go to school or calling home routinely to be checked out midday, which the school division permitted. Nadia struggled to complete eighth grade. In the middle of her seventh-grade year, Nadia's parents reached out to one of her teachers about their concerns for her mental health and lack of meaningful progress.*

Nadia's situation is a typical one for immigrant students in the Commonwealth. It is crucial for special education advocates to be cognizant of the school division's duty to comprehensively evaluate Nadia for a range of potential academic and nonacademic educational needs. On a cautionary note, however, it is important that Nadia's school division use evaluation and assessment tools accessible to Nadia in her native language, so she is not misdiagnosed with a potential learning disability in reading based on her status as an ELL.<sup>71</sup>

The school division's "Child Find" obligation—the requirement that it identify and assess all students suspected of needing special education and related services—includes the responsibility to conduct an evaluation comprehensive enough to uncover all the student's special education and related services needs, "whether or not commonly linked to the disability category in which the child is classified."<sup>72</sup> This would arguably include a

<sup>69</sup> See 34 C.F.R. § 300.321 (2007); 34 C.F.R. § 300.324 (2017).

<sup>70</sup> See 34 C.F.R. § 300.305(a) (2007); *Haverford Twp. Sch. Dist.*, 123 LRP 17921 (SEA PA 05/05/23) (concluding that a school division's special education services were deficient and, therefore, inappropriate because the school psychologist did not review the student's past records, interview the student's teachers, and consider the student's receipt of intensive intervention).

<sup>71</sup> See 34 C.F.R. § 300.304(a)(ii) (2017); 8 VA. ADMIN. CODE 20-81-70(C)(1)(b) (2023).

<sup>72</sup> 34 C.F.R. § 300.304(c)(6) (2006); 8 VA. ADMIN. CODE 20-81-70(C)(9) (2023).

Functional Behavioral Assessment (“FBA”) for a student whose behavior, which in Nadia’s case would be school refusal, impedes their learning or has an adverse impact on the educational environment.<sup>73</sup>

Once eligibility has been established and an IEP developed, school divisions remain obligated to update a student’s evaluation data to inform ongoing modifications and amendments to the student’s plan for special education and related services.<sup>74</sup> Consequently, an IEP is not intended to be a *static* document. On the contrary, a school division must examine whether any additions or modifications to the student’s plan of special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP and to participate to the appropriate degree in the general education curriculum.<sup>75</sup>

*Kaila is a fifth-grade student and has long-standing needs in the areas of reading and executive functioning. She also has a chronic health condition which results in seizures and episodes of anxiety. At the beginning of the school year, Kaila’s reading skills were reassessed, and it was determined that Kaila’s reading skills continued to be about a year behind expectations. Nevertheless, the school members of her IEP team determined that Kaila no longer required specialized reading intervention because her reading deficits did not result in negative educational impact. Her parents requested an IEP meeting and presented the IEP team with a private neuropsychological evaluation report, private reading data collected by a reading specialist, and screenshots of her reading program data taken over time for the team’s consideration. The information reiterated Kaila’s diagnosis of dyslexia and dyslexia-related skill deficits, and the neuropsychological evaluation report recommendations included provision of an evidence-based reading intervention targeting phonological awareness, fluency, and comprehension. During the IEP meeting, the district proposed to discontinue her reading intervention using the rationale that Kaila achieved high grades, performed consistently in class and on homework, and did not “appear” to be struggling. Her special education teacher stated that removing Kaila from her general education language arts class to provide her with reading intervention was depriving her of access to general education opportunities.*

Kaila’s case raises a number of issues related to the IEP development process, including the need for strategies to preserve special education rights and remedies through the partial consent process discussed *infra*. Here, however, the primary concern for Kaila is continuing the specially designed instruction she needs to close the gaps in her reading skills. Often IEP teams

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<sup>73</sup> *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007) (the federal Office of Special Education Programs (OSEP) concluded that an FBA may constitute a special education evaluation if its purpose is to determine whether a student is a child with a disability and the nature and extent of needed special education and related services and may therefore require prior written notice).

<sup>74</sup> 34 C.F.R. § 300.303 (2006); 8 V.A. ADMIN. CODE 20-81-70(F) (2023).

<sup>75</sup> 34 C.F.R. § 300.305(a)(2)(iv) (2007).

will see progress by the student as justification to discontinue special education or related services. For example, when a student masters goals in the IEP. However, unless the student is achieving at grade level, the response to those mastered goals should be to set even more ambitious goals that move the student closer to grade-level mastery of those skills.

School teams often look at grades as the sole indicator that a student no longer needs special education services, but what they often ignore are the accommodations in the student's IEP that allow them to achieve those grades. Withdrawing the supports that are clearly working simply because they are working makes no sense at all—especially when objective data indicates that the student is not achieving grade-level standards. Grades can be a factor or data point for IEP teams to consider, but they are not determinative of whether a student needs specially designed instruction or whether sufficient progress has been made to justify removing a student's special education or related services.<sup>76</sup>

Practitioners need to be aware that in many districts in Virginia, teachers are given great flexibility in allowing students to retake tests/quizzes multiple times, turn work in late with no penalty, or drop/exclude grades on certain tests or assignments from the final grade. These flexible grading practices bring into question just how accurately report card grades reflect a student's true mastery of the material.

In Kaila's case, the parents provided the team with numerous data points to show Kaila is not yet performing on grade-level. The information from these reports should be included in Kaila's PLAAFP and used to draft new goals with specially designed instruction to help Kaila master these new goals.

The malleability of a student's IEP has become more apparent in the aftermath of *Andrew F.*, which held that school divisions must consistently monitor students to understand when a student needs to be reevaluated (even if a triennial evaluation is not pending or a parent has not requested a reevaluation) so the student's IEP remains reasonably calculated to enable the

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<sup>76</sup> See *Andrew F.*, 580 U.S. at 402 (“This guidance should not be interpreted as an inflexible rule. We declined to hold in *Rowley*, and do not hold today, that ‘every handicapped child who is advancing from grade to grade . . . is automatically receiving a [FAPE]’”); 34 C.F.R. § 300.101(c)(1) (2006) (“Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade”); *Hall*, 774 F.2d at 635-36 (found the school failed to provide a FAPE when “two independent evaluations and the results of several standardized tests” showed little to no progress despite being promoted year after year); *D.B. v. Bedford Cnty. Sch. Bd.*, 708 F. Supp. 2d 564, 584 (W.D. Va. 2010) (finding advancing a grade every year “a sad case of social promotion.”).

student to make progress appropriate in light of the student's circumstances.<sup>77</sup> If current goals have been mastered, the IEP team should be looking at current data to identify how the rigor of the goal can be increased, and/or which other areas of deficit need to be addressed in the student's IEP.

For example, a student may be experiencing a significant escalation in maladaptive behaviors in the student's general education classroom. Incidents may range from inappropriate comments to the use of threatening gestures or outright aggressive outbursts. Schools often respond by adjusting the student's schedule or discontinuing participation in general education classes such as art or physical education ("PE") and assigning the student to more restrictive placements.<sup>78</sup> In the majority of these cases, school divisions have prior notice of the student's need for a reevaluation but fail to conduct one to determine why the student's maladaptive behaviors are escalating.<sup>79</sup> Similarly, a student may be experiencing poor academic performance, which could be symptomatic of an underlying and undiagnosed disability that impedes the student's ability to access the general education curriculum to the same extent as his nondisabled peers. This student may be unable to attend to tasks, focus, or refrain from interrupting or speaking out of turn. Arguably, in both cases, the school would be obligated to conduct a reevaluation, which could include an FBA, in response to these behaviors to remain in compliance with the holding in *Andrew F.*

*Raymond is a nine-year-old Black male in the third grade. His mother provided the school division with medical diagnoses of developmental delay and asthma (Raymond uses an inhaler) when she enrolled him in first grade. Raymond received early childhood special education services for his developmental delay as part of a Head Start program, but his parents, who are in the military, were transferred during his kindergarten year. Raymond was enrolled in a private program to complete kindergarten. He was evaluated by his new school division shortly after the start of first grade. The school division declined to find him eligible as a student with a developmental delay and instead offered an IEP to address his asthma through eligibility in the disability category of Other Health Impairment ("OHI"). Wishing to avoid conflict, Raymond's parents agreed to the eligibility designation after the school division promised that the information regarding his developmental delays would be included in his IEP. Raymond eventually received a medical diagnosis of autism from his pediatrician, and his parents presented this information to the school*

<sup>77</sup> See *Andrew F.*, 580 U.S. at 399-403; QUESTIONS AND ANSWERS ON U.S. SUPREME COURT CASE DECISION *ANDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT RE-1*, U.S. DEP'T OF EDUC. 7-8 (2017).

<sup>78</sup> QUESTIONS AND ANSWERS ON U.S. SUPREME COURT CASE DECISION *ANDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT RE-1*, *supra* note 77 at 7; see SARAH ALLEN, VAND. PEABODY COLL.: IRIS CTR., INFORMATION BRIEF: LEAST RESTRICTIVE ENVIRONMENT 2 (last visited Apr. 18, 2024).

<sup>79</sup> See generally Cindy Long, *Disruptive Behavior in the Classroom? Identifying the Cause Could be the Cure*, NEATODAY (Mar. 15, 2023), <https://www.nea.org/nea-today/all-news-articles/disruptive-behavior-classroom-identifying-cause-could-be-cure>.

*counselor at the end of his second-grade year. No IEP meeting was called. At the start of third grade, Raymond was placed in a self-contained classroom due to his tendency to wander and become disoriented during transitions from class to lunch, recess, or "specials" with his non-disabled peers. Raymond's teaching assistant called his mother to report that Raymond had been "lost" at school (he was eventually found in the teacher's parking lot). When his mother called the principal, he was unaware of the incident as it was not formally reported to his office. Raymond's parents have requested an emergency IEP meeting.*

In many cases, like Raymond's case above, the student's initial special education evaluation does not include an evaluation in "all areas of suspected disability."<sup>80</sup> Arguably, Raymond's school division was aware (or would have been aware with a brief review of his preschool records) that he was suspected of having a developmental delay. Raymond's worsening behavioral concerns and placement in a self-contained classroom may be the result of a flawed evaluation process.

For example, while IDEA does not require an FBA as part of an initial special education evaluation, in the cases of students with behavioral and social challenges like Raymond, best practice would suggest that an FBA be included in the assessment process.<sup>81</sup> In other words, the special education evaluation process must engage the student in all areas of suspected need and must be understood in conjunction with the requirement that the assessment include areas "not commonly linked to the disability category" at issue.<sup>82</sup>

When conducting a reevaluation, a student's IEP team must first review all existing evaluation data, including "(i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments and classroom-based observations; and (iii) observations by teachers and related services providers."<sup>83</sup> This "review of existing evaluation data," sometimes referred to as the "REED" process, can be used by school divisions to avoid conducting robust reevaluations, as both state and federal regulations provide that a school division can forgo conducting

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<sup>80</sup> 20 U.S.C. § 1414(b)(3)(B) (2015); *see also D.B.*, 708 F.Supp.2d at 578 (concluding that the student's IEP was not reasonably calculated to confer educational benefit because there was "no indication that [the school division] used this testing to evaluate him for specific learning disability, or to make any eligibility determinations regarding specific learning disability, and the HO erred in determining that [the school division] had properly evaluated him as a child with a disability.").

<sup>81</sup> *See* VA. DEP'T OF EDUC., GUIDELINES FOR FUNCTIONAL BEHAVIORAL ASSESSMENT AND DEVELOPING POSITIVE BEHAVIOR INTERVENTION AND SUPPORT/STRATEGIES 3-4 (2015).

<sup>81</sup> 34 CFR § 300.304(c)(6); 8VAC20-81-70(C)(9).

<sup>82</sup> 34 C.F.R. § 300.304(c)(6) (2007); 8 VA. ADMIN. CODE § 20-81-70(C)(9) (2023).

<sup>83</sup> 34 C.F.R. § 300.304(a)(1) (2007).

new assessments or testing of the student.<sup>84</sup> While the regulations say that when a school team decides not to conduct any additional testing it must notify the child's parents of this determination and of the parent's right to request additional assessments, the reality is that parents are not always adequately apprised of their right to request a full and comprehensive reevaluation of their child.<sup>85</sup> Parents rely on school staff to know what is best for their child, and can be misled about the importance of regular objective assessments of their child's progress. As advocates, we generally advise parents to request a comprehensive evaluation of their child, to include new objective assessments, at least once every three years.

*James is about to start his senior year in high school. At the end of his junior year, James was involved in an off-campus disciplinary incident that was reported to juvenile probation as well as school officials, resulting in a referral to an alternative school placement. During his junior year (and in years prior), James was written up and suspended on a number of occasions for what the school administration deemed persistent "disruptive behavior." James was initially determined eligible for special education in the third grade as Other Health Impaired (ADHD). The school division has used the REED process to "reevaluate" James and continue his eligibility since that time. The last REED was conducted a year and a half ago. His current IEP consists of one ADHD-related behavior goal and some boilerplate accommodations. James' mother made multiple verbal requests to school administrators that he receive additional testing and more services.*

Like many parents in Virginia, James' mother has arguably been denied a complete picture of her son's academic and nonacademic educational needs through his school division's repeated use of the REED process to avoid comprehensively reevaluating James to ensure his IEP addresses all of his current, unique needs. Our collective anecdotal experience suggests that James and his mother are not alone, and many parents are unaware of their right to request full and comprehensive evaluations every time their children's eligibility for special education and related services is reviewed. In James' case, the school violated the provision of the special education regulations that states a school must reevaluate a student if requested by a teacher or parent and it has been at least one year since the school last

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<sup>84</sup> See 34 C.F.R. § 300.305(d)(1) (2007) ("[I]f the IEP 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 public agency must notify the child's parents of—(i) That determination and the reasons for the determination; and (ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.").

<sup>85</sup> *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007) (In 2007, OSEP noted that school divisions may seek waivers of IDEA's reevaluation requirement when initiating the REED process; however, if a school division reviews a student's existing data and determines that additional assessments are not necessary, the division must notify the parents of that determination and inform the parents of their right to request an assessment).

evaluated the student.<sup>86</sup>

*B. Inaccurate Present Levels of Academic and Functional Performance*

The special education evaluation and reevaluation process envisioned by IDEA requires school divisions to develop responsive IEPs that change and adapt to meet a student's current circumstances. This is why the present levels of academic achievement and functional performance ("PLAAFP") section of the student's IEP is so important and must thoroughly and accurately reflect the student's current functioning.<sup>87</sup> An accurate recitation of a student's present academic and functional needs is foundational to an appropriately ambitious IEP.

*Fern's IEP team is preparing to meet for her annual IEP meeting to develop her IEP for her ninth-grade year. To prepare the PLAAFP section of Fern's IEP, the school members of the team review current classroom data. However, Fern's last comprehensive evaluation was completed when she was in sixth grade and relevant data from those assessments is missing from the PLAAFP. In addition, scores from Fern's speech and language assessments are described in misleading ways that suggest Fern has no deficits in expressive, receptive, or pragmatic language skills even though some of her scores are more than 2 standard deviations below the mean (indicating severe deficits in those skill areas).*

Special education advocates are abundantly aware of the issues raised by Fern's case. IEP teams often review recent classwork but fill the PLAAFP section of the IEP with outdated data from stale evaluations and assessments, missing out on any potential growth or signs of regression in academic and functional skills.<sup>88</sup> In some cases, IEP teams will misrepresent the data to make it appear a student's deficits are less than they are or do not exist at all.<sup>89</sup> Effective PLAAFP statements include accurate reflections of a student's *current* levels of academic performance, together with the effect or impact of the student's disability on the appropriate acquisition of both academic and nonacademic educational skills. PLAAFP statements—as the heart of the IEP—should be documented in clear, specific, brief, and accurate language with sufficient information to describe the student's present academic and nonacademic educational skills in objective, measurable

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<sup>86</sup> See 34 C.F.R. § 300.303(a)(2) (2006); 8 VA. ADMIN. CODE § 20-81-70(F) (2023).

<sup>87</sup> 34 C.F.R. § 300.320(A)(1) (2011); 8 VA. ADMIN. CODE § 20-81-110(G)(1).

<sup>88</sup> Based on collective author experiences.

<sup>89</sup> Based on collective author experiences.



terms.<sup>90</sup> Figure 1 below reflects a portion of a PLAAFP section in an IEP that describes the strengths and weaknesses a student exhibited in the assessments done as part of the student's most recent evaluation.

**PRESENT LEVEL OF ACADEMIC ACHIEVEMENT AND FUNCTIONAL PERFORMANCE**

*The Present Level of Academic Achievement and Functional Performance shall be written in language understandable by the general public and summarize the results of assessments that identify the student's interests, preferences, strengths and areas of need. This includes the student's performance and achievement in academic areas such as writing, reading, math, science, and history/social sciences. It also includes the student's performance in functional areas, such as self-determination, social competence, communication, behavior and personal management.*

**Describe the effect of the student's disability upon the student's involvement and progress in the general curriculum by completing the fields below. For preschool, include how the student's disability affects the participation in appropriate activities. Test scores, if appropriate, should be self-explanatory.**

Academic Areas

**1. List the student's strengths.**

Spelling and word reading are personal strengths for [REDACTED]. Her verbal comprehension is in the average range.

**2. Summarize the initial or recent evaluation results for the student.**

Audiological evaluation dated 06/15/2017 was completed at Longwood Speech, Hearing, and Learning Services. This evaluation showed that [REDACTED] sustains a slight bilateral hearing loss ranging from normal to mild/ borderline normal thresholds. Normal middle ear function bilaterally. The audiologist noted that at normal conversational level and in close proximity, [REDACTED] will hear most speech sounds, with the exception of soft, high frequency sounds such as, /f/, /s/, and /th/. The audiologist also noted the importance of speakers to communicate with [REDACTED] in a close range, with access to the speaker's face, and seating with her right ear towards the speaker. It was noted that hearing aids were not recommended due to [REDACTED] very mild loss and speech discrimination thresholds.

Educational Specialist (Achievement): (03/21/2018) [REDACTED] scores for these subtests varied from the very low range to the average range with personal strengths in spelling (SS 91), word reading (SS 83) and silent reading fluency (SS 82), and weaknesses in math computations (SS 65) and math concepts and applications (SS 69). Age based composite standard scores for this administration of the KTEA-3 were Reading 77, Math 66, Written Language 84, Academic Skills Battery 74.

Medical: (01/09/2018) Report from Dr Mumper: "[REDACTED] is being treated for PANDA's ADHD, and Anxiety." Note: from the internet, PANADAS is Pediatric Autoimmune Neuropsychiatric Disorders Associated with Streptococcal Infections.

Psychological: (03/28/2018) [REDACTED] presented as a polite and cooperative eighth grade student who was referred for a triennial evaluation at the request of her IEP team. [REDACTED] demonstrated a personal strength in her verbal comprehension skills with a Standard Score (SS) of 100. In contrast, [REDACTED] fluid reasoning skills fell within the Very Low range (SS=67) which was a significant processing deficit for [REDACTED]. [REDACTED] auditory working memory skills and processing speed both fell within the Low range (SS=74).

Figure 2: PLAAFP from a redacted Virginia IEP<sup>91</sup>

An IEP's PLAAFP statements should drive the development of annual goals, accommodations, modifications, and related services. All IEP goals must correspond to statements regarding a student's deficits identified in the

<sup>90</sup> Kirby v. Cabell Cnty. Bd. of Educ., Civil Action No. 3:05-0322, 2006 WL 2691435 \*8 (S.D. W. Va. Sept. 19, 2006). ("If the IEP fails to assess the 'child's present levels of academic achievement and functional performance,' the IEP does not comply with § 1414." The failure of the PLAAFP to include current, objective, and standardized tests is a deficiency that, "[g]oes to the heart of the IEP; the child's level of academic achievement and functional performance is the foundation on which the IEP must be built. Without a clear identification of Robert's present levels, the IEP cannot set measurable goals, evaluate the child's progress, and determine which educational and related services are needed.").

<sup>91</sup> See *Individualized Education Program*, supra note 56 (collected from Annual IEP Goals in Reading from a Virginia IEP) (redacted).

PLAAFP section of the IEP.<sup>92</sup> For example, the PLAAFP may identify a deficit in reading comprehension. There should be a corresponding goal(s) to address that deficit, and services—such as specially designed instruction in a special education setting—to support the student’s progress on those goals. If appropriate, there would be accommodations, such as having grade-level material read aloud to the student, to give the student equal access to the general education curriculum until that deficit can be remediated (e.g., the student is reading on grade-level).

Additionally, as a practical matter, accurate reporting of a student’s progress toward the annual goals in an IEP is contingent upon accurate PLAAFP statements. The PLAAFP should contain baseline data used to determine the amount of progress appropriate for the student to achieve in one year (as IEPs must be reviewed and revised at least once a year).<sup>93</sup> For example, a sixth-grade student identified in the PLAAFP as having reading comprehension on a third-grade level may have a goal to improve reading comprehension to a fifth-grade level by the end of the Annual IEP. Or, if that student’s reading fluency is noted in the PLAAFP as being fifty words per minute, there may be a goal of increasing that to 100 words per minute by the end of the Annual IEP. Data on the student’s reading comprehension and reading fluency would be collected throughout the year and reported to the parents in periodic Progress Reports. Without accurate baseline data in the PLAAFP, it would be impossible to track a student’s progress on goals over time.

At a minimum and consistent with federal rules, the PLAAFP statements should include each disability-related area in which the student exhibits a weakness or deficiency.<sup>94</sup> Because an IEP team must consider “all academic, developmental, and functional needs” of the student when developing the IEP, the evaluation or reevaluation process informing the PLAAFP statements must include assessments in all areas of perceived need, whether typical to a particular eligibility category or not.<sup>95</sup>

It is a longstanding principle in special education advocacy that IEPs, including their PLAAFP statements, must be individualized to the unique needs of the student at issue:

The hallmark of special education programs is the recognition that students with

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<sup>92</sup> 8 VA. ADMIN. CODE § 20-81-110(G)(1)(b) (2021); Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, *supra* note 27, at 46,662 (to be codified at 34 C.F.R. pts. 300, 301).

<sup>93</sup> 34 C.F.R. § 300.324(B)(1)(i) (2011); 8 VA. ADMIN. CODE § 20-811-110(B)(5) (2021).

<sup>94</sup> *What is Included in the IEP Document?*, VAND. PEABODY COLL.: IRIS CTR. (2024), <https://iris.peabody.vanderbilt.edu/module/iep01/cresource/q3/p06/>.

<sup>95</sup> 8 VA. ADMIN. CODE § 20-81-110(F)(1)(d) (2021).

handicaps have unique educational needs and individual patterns of development over time and areas of need. The law accords the attribute of human individuality great homage and requires that each child in need of special education have an IEP developed that reflects what that child can be expected uniquely to accomplish in a fixed period of time . . . It is this requirement of “individuality” that serves as the linchpin for ensuring that children with any category of disability are provided FAPE.<sup>96</sup>

Again, at the heart of an IEP are the PLAAFP statements “describ[ing] the child’s unique needs and the state’s plan for meeting those needs.”<sup>97</sup> Moreover, a student’s IEP team is required to revise the student’s IEP “as appropriate,” at least once a year, to address “lack of expected progress,” and the revision contemplated by IDEA is wholly data driven through the reevaluation process.<sup>98</sup> Fundamentally, an IEP must “aim to enable the child to make progress . . . and the essential function of an IEP is to set out a plan for pursuing academic and functional advancement,” and “a focus on the particular child is at the core” of IDEA.<sup>99</sup>

A customized, individualized IEP serves as the “primary vehicle for ensuring the student receives a FAPE.”<sup>100</sup> As discussed *supra*, in light of *Andrew F.*, schools must offer “reasonably calculated IEPs” enabling a student to make progress appropriate in light of her circumstances.<sup>101</sup>

Annual Goal(s)
<p>Category: Academic Goals</p> <p>Description</p> <p>By February 2018 [REDACTED] will independently read and spell multi-syllabic words containing closed, vowel-consonant-e, open, and cle syllable; vowel digraphs, sound options, the r-controlled syllable, double vowel syllable, and suffixes with 95% accuracy for reading and 85% accuracy for spelling as measured by Charting and Dictation assessment.</p> <p><input checked="" type="checkbox"/> Applies To ESY</p>
<p>Description</p> <p>By February 2018 [REDACTED] when given one or multi-step word problems, will select the appropriate operation and solve the problem with 80% accuracy in 4 out of 5 opportunities as measured by student work samples.</p>
<p>Description</p> <p>By February 2018 [REDACTED] when presented with a passage at an ending 6th grade reading level will correctly read the prose words in the passage at a rate of 130 correct words per minute with 3 errors or less as measured by teacher observation and data collection.</p>

<sup>96</sup> Letter to G. Thomas Bellamy, Director, New Off. of Special Educ. Programs 3-4 (July 4, 1987).

<sup>97</sup> *R.F.*, a minor child, By and Through E.F. v. Cecil Cnty. Pub. Schools, 919 F.3d 237, 241 (4th Cir. 2019) (quoting *M.S. ex rel. Simchick*, 553 F.3d at 323).

<sup>98</sup> 20 U.S.C. § 1414(d)(4)(A) (2015).

<sup>99</sup> *T.B., Jr.*, a minor child, By and Through T.B., Sr. v. Prince George’s Cnty. Board of Education, 897 F.3d 566 (4th Cir. 2018), cert. denied sub nom. *T.B. v. Prince George’s Cnty. Bd. of Educ.*, 139 S. Ct. 1307 (2019).

<sup>100</sup> *K.I. v. Durham Pub. Schools Bd. of Educ.*, 54 F.4th 779, 785 (4th Cir. 2022).

<sup>101</sup> *Andrew F.*, 580 U.S. at 399.; see *supra* text accompanying notes 21-23.

Figure 3: Annual Academic IEP Goals from a redacted Virginia IEP<sup>102</sup>

To fulfill IDEA's purpose, every IEP must contain "a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and to meet *each of the child's other educational needs that result from the child's disability*."<sup>103</sup> To ensure accountability, IEPs must also include a description of "how the child's progress toward meeting the annual goals . . . will be measured" and when progress reports will be provided to the parent (see Figure 3).<sup>104</sup>

A special education due process hearing officer ("HO") decision in Virginia from the fall of 2023 deals directly with a fundamental concern in the IEP development process, namely, goals grounded in inadequate or incomplete evaluation data resulting in a lack of appropriately correlated instructional programming and related services.<sup>105</sup> As we have discussed, the annual goals in an IEP are inextricably linked to a student's present levels of academic and functional performance, and these PLAAFPs must be based on current data and up-to-date evaluations or reevaluations clearly documenting the student's *present* academic and nonacademic educational needs.

In the aforementioned decision, the HO concluded that a student's IEP was inappropriate and consequently did not provide FAPE because, as the HO observed:

The Child displays profound difficulties, academic and otherwise. [The student's special education] documents are out-of-date both in time and in reality; see, e.g. the inappropriate IDEA designation, the need for the tri-annual evaluation, the outdated goals, goals based on outdated data, goals based on outdated evaluations . . . the IEP . . . lacked the necessary current information, etc., to provide the Child FAPE.<sup>106</sup>

The need for current (and continually updated) PLAAFPs in an IEP cannot be overstated, as an IEP is intended to be a "customized model of the child's curriculum and academic goals . . . designed to meet the child's needs" through "realistic and attainable, yet more than trivial and de minimis"

<sup>102</sup> See *Individualized Education Program*, *supra* note 56 (Schedule of Special Education Services).

<sup>103</sup> 34 C.F.R. § 300.320 (2)(i)(a-b) (2007) (emphasis added).

<sup>104</sup> 34 C.F.R. § 300.320 (3)(i) (2007).

<sup>105</sup> In re: Student with a Disability, 123 LRP 29353, 1, 19-20 (SEA VA Sept. 8, 2023).

<sup>106</sup> *Id.* at 18-19.

goals.<sup>107</sup>

As advocates, we argue that when a student’s annual IEP goals are copied verbatim or phrased in a substantially similar manner from year-to-year, this constitutes *prima facie* evidence of a lack of adequate progress and, therefore, a denial of FAPE. If annual IEP goals are designed to be both appropriately ambitious *and* achievable within an IEP year, the conclusion to be drawn from a student’s failure to meet those goals is obvious—as more than one federal court has held, the child did not make sufficient progress.<sup>108</sup> Nevertheless, at least one federal court in Virginia has held that the repetition of annual goals was appropriate where the underlying and then-current evaluation and assessment data supported the IEP team’s decision to adopt goals from the previous year: “[a]lthough the goals in this IEP were mostly identical to the ones proposed in the [previous] IEP, [the local educational agency] had not had [the] student for a year, and it was reasonable after reviewing the *new testing* done both privately and by [the local educational agency] to conclude that the same goals were appropriate.”<sup>109</sup> Context is certainly the salient distinction in these federal cases, but it is clear that the courts’ emphasize the primacy of current, relevant evaluation data and recent assessments.

In the wake of *Andrew F.*, school divisions must be prepared to offer “a cogent and responsive explanation” for their programming decisions that will convince reviewing courts that an IEP was reasonably calculated to meet the progress-in-light-of-circumstances standard.<sup>110</sup> As such, IEP teams—and advocates assisting parents—should include specific details in a student’s IEP goals that correlate to the PLAAFP. For example, a student’s annual IEP goals should focus on the knowledge, skills, behaviors, and educational or instructional strategies derived from the student’s PLAAFP statements.<sup>111</sup> Further, IEP goals must directly correlate or correspond to the requisite specially designed instruction necessary to address the student’s disability-

<sup>107</sup> Bd. of Educ. of the Cnty. of Kanawha v. Michael M., 95 F. Supp.2d 600, 602 (S.D. W. Va. Apr. 26, 2000).

<sup>108</sup> See *Damarcus S. v. District of Columbia*, 190 F.Supp.3d 35, 52 (D.D.C. May 23, 2016) (stating “[t]he wholesale repetition of goals and objectives across multiple IEPs is of far greater concern . . . as it indicates an ongoing failure to respond to Damarcus’s difficulties . . . Here, an alarming number of goals and objectives were simply cut-and-pasted (typos and all) from one IEP to the next.”); see also *D.B.*, 708 F.Supp.2d at 586-87 (“Despite [student’s] lack of progress, Defendant insisted that D.B.’s goals essentially be repeated from year to year . . . The IEP of April 29, 2008, copied nearly verbatim most of D.B.’s goals and benchmarks from the previous IEP. Although he had made ‘insufficient progress’ on the reading annual goal set out for 2007-2008, there was no revision to that goal . . . The record documents that, for four years, Defendant to a large extent simply repeated D.B.’s IEP goals from year to year, and that the IEPs, and the inclusion classroom settings provided therein, were not successful.”).

<sup>109</sup> XXXXXX by Smith v. Arlington Cnty. Sch. Bd., 2021 WL 2324164 \*13 (E.D. Va. June 7, 2021).

<sup>110</sup> *Andrew F.*, 580 U.S. at 404.

<sup>111</sup> 8 VA. ADMIN CODE § 20-81-110(G)(1)(b) (2021).

related needs, as well as those needs that interfere with the student's participation and progress in the general curriculum.<sup>112</sup>

Federal guidance has long recommended that IEP goals align with state academic content standards, like the Virginia Standards of Learning, for the student's grade of enrollment.<sup>113</sup> However, a student's IEP goals are not mere restatements of Virginia's general education curriculum. The central inquiry of a student's IEP team should focus on acquisition of the skills necessary to master the curriculum, not just a list of the curriculum content the student must master, such as an enumeration of the student's grade-level content standards.

School divisions must guarantee that IEPs are customized documents specific to the unique disability profile and nonacademic and academic educational needs of a particular student. This analysis includes asking whether the IEP is individualized based on the student's assessment and performance, ensuring evaluations document how the student's disability impacts their rate of progress so that appropriately challenging goals may be developed, and providing for evaluations in all suspected areas of disability and need. When a school division suspects a student may have a particular disability or need, the school division must offer an evaluation in that area, if needed for IEP development. Whether the school division can demonstrate positive academic and nonacademic educational benefits from the IEP is the catchall question for IEP efficacy. Consequently, advocates must insist that school divisions use objective assessments to gauge progress, develop truly measurable goals and objectives, and reference objective data in IEP progress reports.<sup>114</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> OFF. OF SPECIAL EDUC. AND REHAB. SERVS., Dear Colleague Letter from Michael K. Yudin & Melody Musgrove at 2 (Nov. 16, 2015) (citing to the definition of specially designed instruction which is, "adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children."); 34 C.F.R. § 300.39(b)(3) (2015) ("... we expect annual IEP goals to be aligned with State academic content standards for the grade in which a child is enrolled.").

<sup>114</sup> *R.F., a minor child, By and Through E.F.*, 919 F.3d at 241 (Objective information should be collected, in addition to subjective information such as observations, to support any conclusion that the student made progress and to support the assigned level of progress. This information should provide the basis for IEP Progress Reports.)

SPECIAL EDUCATION SERVICES

Free Appropriate Public Education (FAPE)

When discussing FAPE for this student, it is important for the IEP team to remember that FAPE may include, as appropriate:

- Educational Programs and Services
- Proper Functioning of Hearing Aids
- Assistive Technology
- Transportation
- Nonacademic and Extracurricular Services/Activities
- Physical Education
- Extended School Year Services
- Length of School Day

Identify the service(s), including their frequency, duration, and location that the student will need to meet IEP goals and objectives. Please note inclusive, collaborative, resource, therapy room, departmentalized, or self-contained setting for the instructional setting of services.

Special Education	Frequency	Projected Initiation/Duration of Services	Location	Instructional Setting
Special Education Instruction - Reading	1 period(s) per day	08/15/2018 to 05/31/2019	Assigned School	Special Education Setting
Special Education Instruction - Resource	1 period(s) per day	08/15/2018 to 05/31/2019	Assigned School	Special Education Instructional Setting
Special education teacher or special education instructional assistant support - English	1 period(s) per day	08/15/2018 to 05/31/2019	Assigned School	General Education Classroom

Figure 4: Table of Special Education Services from a Virginia IEP<sup>115</sup>

Each IEP goal should have corresponding specially designed instruction or services. Having goals without related programming indicates that the school division is not providing FAPE.<sup>116</sup> As Figure 4 demonstrates, IDEA requires an IEP to include a statement of the special education and related services that will be provided to the student.<sup>117</sup> “Special education” is defined as “specially designed instruction . . . to meet the unique needs of a child with a disability.”<sup>118</sup> An IEP must include the projected date for the beginning of the services, accommodations, and modifications, as well as their anticipated frequency, location, and duration (*see* Figure 4).<sup>119</sup> An IEP must include sufficient information about the services that will be provided so that the

<sup>115</sup> See *Individualized Education Program*, *supra* note 56 (Schedule of Related Services).

<sup>116</sup> In re: Student with a Disability, 123 LRP 24116, 1 (SEA VA Aug. 9, 2023) (finding a district denied FAPE to a 12th-grader with anxiety, depression, ADHD, and diabetes when it failed to offer any IEP services relating to his behavioral and postsecondary transition goals).

<sup>117</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2024); 8 VA. ADMIN. CODE § 20-81-110(G)(4) (2024).

<sup>118</sup> 20 U.S.C. § 1401(29) (2024); 4 C.F.R. § 300.39(a)(1) (2024).

<sup>119</sup> 34 C.F.R. § 300.320(a)(7) (2024); *Letter to Ackerhalt*, 60 IDELR 21 (OSEP Sept. 6, 2012) (the Office of Special Education Programs informed a parent’s attorney that it would not be proper for a school division to require related services for all its students with disabilities to start at a specific time after the school year has already commenced. The starting date for a student’s related services must be determined on an individual basis by the student’s IEP team: “On a case-by-case basis, the IEP Team may determine that the individual needs of the child require that the start date of a related service should occur the first week of school or after the beginning of the school year.”).

school division's level of commitment to the student will be clear.<sup>120</sup> Courts have held that vagueness in describing specially designed instruction in the IEP is a procedural violation of IDEA and denies FAPE because it significantly impedes parental participation in the IEP process.<sup>121</sup> Parents need to know exactly what the school is committing to do for the child in order to decide whether to provide consent to the implementation of those services and to monitor whether or not the school is actually providing those services to their child. Moreover, the services provided to a student in an IEP must be based on the student's individual needs and not availability of the services alone.<sup>122</sup>

A student's program of related services, as well as supplementary aids and services, must be grounded in "peer-reviewed research" that is "reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published."<sup>123</sup> Typically, designating a specific educational program or methodology is not an IEP requirement.<sup>124</sup>

However, in *L.C. v. Arlington County School Board*, a Virginia district court left open the possibility that a parent may be able to demonstrate that a particular intervention method—in that case, Orton-Gillingham instruction—is necessary for FAPE, hinting in the negative that a parent may be able to present "sufficient evidence to indicate that an education via a different intervention method is not 'reasonably calculated to enable [a student] to

<sup>120</sup> Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, *supra* note 27, at 46,667 (to be codified at 34 C.F.R. pts. 300, 301).

<sup>121</sup> See *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (9th Cir. 2017) ("[I]n enacting the IDEA, Congress was as concerned with parental participation in the enforcement of the IEP as it was in its formation. . . Under the IDEA, parental participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive."); *Tamalpais Union High Sch. Dist. v. D.W.*, 271 F. Supp. 1152, 1162 (N.D. Cal. Sept. 21, 2017) (finding the IEP denied a FAPE because ". . . the May 2015 offer was too vague to permit Parents to make an intelligent decision about whether to accept the offer . . . Because the IEP did not sufficiently give notice of the specific services Tamalpais was committing to provide, it was useless as a blueprint for enforcement."); *Bend-Lapine Sch. Dist. v. K.H.*, Civ. No. 04-1468-AA, 2005 U.S. Dist. LEXIS 48076, at 25 (D. Or. June 2, 2005) (finding that the provision in the statement of special education services "throughout the day" is ". . . vague and indefinite and fails to make clear to parents or other IEP team members the District's specific commitment of resources and fails to satisfy 20 U.S.C. §§ 1414(d)(A)(iii) and (iv).").

<sup>122</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2024); see *Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 150 (4th Cir. 1991); see 34 C.F.R. § 300.320(a) (2024).

<sup>123</sup> Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, *supra* note 27, at 46,664.

<sup>124</sup> See *Fairfax Cnty. Sch. Dist. v. Knight*, 261 F. App'x 606, 607-08 (4th Cir. 2008) (finding that a student with learning disabilities did not require a specific program to obtain a meaningful educational benefit) (this case was decided prior to the Supreme Court's holding in, *Endrew F.*, 580 U.S. 386 (2017)).



make progress appropriate in light of [his] circumstances.”<sup>125</sup> Federal guidance notes that an IEP team is not prohibited from specifying a particular instructional program or methodology if it is necessary for the student to receive FAPE.<sup>126</sup> Other components of the IEP, like supplementary aids and services, including accommodations (*see* Figure 6) and related services (*see* Figure 5), must be *individualized* (rather than simply boilerplate *one-size-fits-all*) and may include “consultation with a professional with expertise in behavioral interventions to create a positive behavioral support plan, access to counselors, and access to targeted strategies supported by peer-reviewed research to support social, emotional, behavioral, or mental health needs.”<sup>127</sup> Supplementary aids and services may also take the form of one-to-one behavioral or academic aides; access to assistive technology, like Chromebooks or iPads; and staff training by professional consultants.<sup>128</sup>

#### RELATED SERVICES

Justification for the services should be included in the PLOP.

Special Education	Frequency	Projected Initiation/Duration of Services	Location	Instructional Setting
Occupational Therapy	240 minute(s) per marking period	05/13/2014 to 05/12/2015	Assigned School	Regular Education Environment
Occupational Therapy (Consult)	90 minute(s) per marking period	05/13/2014 to 05/12/2015	Assigned School	Regular Education Environment
Speech and Language (Consult)	30 minute(s) per month	05/13/2014 to 05/12/2015	Assigned School	Regular Education Environment
Speech/Language	420 minute(s) per marking period	05/13/2014 to 05/12/2015	Assigned School	Therapy Room (Pull-out)

Figure 5: Table of Related Services from a Virginia IEP<sup>129</sup>

<sup>125</sup> See *L.C. v. Arlington Cnty. Sch. Bd.*, 2022 WL 2293902 \*10 (E.D. Va. June 24, 2022) (for more information regarding Orton-Gillingham instruction, see Kristin L. Sayeski, et al., *Orton Gillingham: Who, What, and How*, 51 TEACHING EXCEPTIONAL CHILD. 170 (2019)).

<sup>126</sup> Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, *supra* note 27, at 46,665.

<sup>127</sup> See *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Act*, 79 IDELR 232, at 10 (OSERS Sept. 30, 2021).

<sup>128</sup> See *Bethel Local Sch. Dist. Ohio State Educ. Agency*, 116 LRP 26503, at 3, 5 (June 7, 2016).

<sup>129</sup> See *Individualized Education Program*, *supra* note 56 (Special Education Accommodations).

Accommodation/Modification (What modification is required to create an equal opportunity, based on the student's disability?)	Frequency (How often is the accommodation required?)	Location (name of school*)	Instructional Setting (Where is it used?)	Duration (How long should the accommodation be done?)
A copy of class notes provided either on paper or electronically.	Daily for all classes where notes are expected.	Assigned School	General Education Classroom	From: 08/15/2018 To: 05/31/2019
Access to software - word prediction	For all writing assignments	Assigned School	General Education Classroom	From: 08/15/2018 To: 05/31/2019
Allow dictation-to-scribe or dictation software for writing assignments	all writing assignments longer than one paragraph	Assigned School	General Education Classroom	From: 08/15/2018 To: 05/31/2019
Allow extended time for written assignments.	Daily	Assigned School	General Education Classroom	From: 08/15/2018 To: 05/31/2019
Allow extra time for testing, up to time and a half	For teacher made and standardized testing.	Assigned School	General Education Classroom	From: 08/15/2018 To: 05/31/2019
Allow the use of a formula sheet or checklist when solving math problems	Math classwork and tests and quizzes	Assigned School	General Education Classroom	From: 08/15/2018 To: 05/31/2019
Allow typing for lengthy assignments that are more than 1 paragraph.	Daily	Assigned School	General Education Classroom	From: 08/15/2018 To: 05/31/2019
Audio testing	Standardized tests	Assigned School	General Education Classroom	From: 08/15/2018 To: 05/31/2019

Figure 6: List of Accommodations from a Virginia IEP<sup>130</sup>

*Gabby is a fourth grader with severe school avoidance issues that have recently manifested in response to unresolved bullying and self-esteem issues. Gabby was diagnosed with social anxiety disorder at the end of her third-grade year. Gabby's parent sent a screenshot of the diagnosis to her IEP case manager right after the diagnosis, and it was briefly referenced in her annual IEP team meeting. She has an IEP for speech impairment and receives consultative services from a speech therapist. Gabby's mother asked for updated eligibility assessments, but the school members of Gabby's IEP team declined asking for more time to observe Gabby. The team offered a couple of anxiety-related accommodations, like frequent breaks.*

Students like Gabby are often offered inappropriate IEPs that rely on accommodations alone to address established or emerging areas of nonacademic educational need—such as school avoidance behaviors. Moreover, in these cases, as in Gabby's, there is little evidence that accommodations are individualized and correlated to *current* re-evaluation data. Gabby could benefit from counseling services and specially designed instruction to teach her coping mechanisms to deal with her anxiety, and techniques to deal with bullying and her low self-esteem. Gabby's advocates

<sup>130</sup> See *Prior Notice and Parent (or Guardian) Consent*, LOUDOUN CNTY. PUB. SCHOOLS (Oct. 15, 2020), <https://www.lcps.org/Page/234799>.

may want to consider calling for an IEP meeting to request an updated evaluation and interim goals and services to address Gabby's emerging emotional needs while the assessment process is completed.

### *C. Obtaining Parental Consent and Documenting Disagreement*

Each local educational agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting and are afforded the opportunity to meaningfully participate in the development of their child's IEP.<sup>131</sup> At the "core of [IDEA]," according to the United States Supreme Court in *Schaffer v. Weast*, is the "cooperative process that it establishes between parents and schools."<sup>132</sup> Thus, the goal of meaningful parental participation is central to IDEA, which encourages "parental input and involvement in all aspects of a child's educational program and provide[s] many opportunities for parents to provide information that becomes part of the child's educational record."<sup>133</sup> Furthermore, IDEA mandates that parents be "fully informed of all information relevant to the activity for which consent is sought" and document their understanding in writing.<sup>134</sup>

Special education advocates and parents of students with disabilities in Virginia have two ways to ensure that IEPs accurately document their concerns and consent.

#### *i. Partial Consent*

Virginia regulations require parental consent for "[a]ny revision to the child's IEP services," including partial or complete termination of special education or related services. IDEA states that "[a] public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a) [initial evaluation], (b) [initial provision of services], (c) [reevaluation], or (d)(2) [state specific consent requirements] of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part."<sup>135</sup> Therefore, Virginia parents can consent to parts of a proposed IEP and withhold consent to other parts.

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<sup>131</sup> 34 C.F.R. § 300.322(a) (2024); 8 VA. ADMIN. CODE § 20-81-110(E) (2024).

<sup>132</sup> *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty.*, 458 U.S. at 205-06).

<sup>133</sup> Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, *supra* note 27, at 46,688.

<sup>134</sup> 34 C.F.R. § 300.9 (2024); *see e.g.*, 20 U.S.C. § 141(a)(1)(D) (2024).

<sup>135</sup> 8 VA. ADMIN. CODE § 20-81-170(E)(1)(d)-(e) (2024); 34 C.F.R. § 300.300(d)(3) (2024); 8 VA. ADMIN. CODE § 20-81-170(E)(4)(d) (2024).

Loudoun County Public Schools  
21000 Education Court, Ashburn, VA, 20148-5526  
INDIVIDUALIZED EDUCATION PROGRAM (IEP)  
PRIOR NOTICE AND PARENT CONSENT

Student Name: [REDACTED] Page 22 of 25  
Student ID: [REDACTED] Student Testing ID: [REDACTED] Grade: Junior

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**PRIOR NOTICE**

The school division proposes to implement this IEP. This proposed IEP will allow the student to receive a free appropriate public education in the least restrictive environment. This decision is based upon a review of current records, current assessments and the student's performance as documented in the Present Level of Academic Achievement and Functional Performance. Other options considered, if any, and the reason(s) for rejection are attached, or can be found in the Placement Decision section of this IEP. Additionally, other factors, if any that are relevant to this proposal are attached. Parent and adult student rights are explained in the Procedural Safeguards. If you, the parent(s) and adult student, need another copy of the Procedural Safeguards or need assistance in understanding this information please contact Kelley Hines at 571-252-2300 or e-mail [kelly.hines@lcps.org](mailto:kelly.hines@lcps.org) or Chad Runfola at 571-252-2300 or e-mail [chad.runfola@lcps.org](mailto:chad.runfola@lcps.org)

\_\_\_\_ Parent(s) initials here indicate that the parent(s) has read the above prior notice and attachments, if any, before giving consent to implement this IEP.

**PARENT/GUARDIAN/ADULT STUDENT CONSENT: Indicate your response by checking the appropriate space and sign below.**

I give consent to implement this IEP.  I do not give consent to implement this IEP.

I PARTIALLY CONSENT to the contents of this IEP. I consent to the implementation of the proposed goals, accommodations, and placement. I agree with the proposed service hours for Reading Instruction and Occupational Therapy. **I do not consent to the dismissal of Speech Language Therapy services.** I do not agree that the IEP as proposed will provide my child with a FAPE in the LRE. The school staff have not provided a cogent explanation for removing my son's speech services. I reserve the right to challenge the appropriateness of this IEP at any point, to include but not be limited to the issues raised in this partial consent.

\_\_\_\_ Parent/Guardian or Adult Student Signature      \_\_\_\_ Date

Figure 7: Example of a Partial Consent to a redacted Virginia IEP

The Virginia Department of Education “has held historically and consistently that in such instances, the school division must implement those provisions on which the parties clearly agree.”<sup>136</sup> Partial consent is a tool to maintain the status quo for a student’s IEP. While partial consent will not improve an IEP, it may prevent a school district from removing services or changing placement without parental consent. While a parent cannot use partial consent to add services to an IEP, the withholding of consent to a school-proposed change to an IEP allows the parent to preserve elements of the student’s current IEP. In Virginia, this would extend to proposed changes to goals, accommodations, and placement decisions.<sup>137</sup>

*A school proposes to reduce a student’s speech/language service minutes from sixty minutes a week to thirty minutes a week. Her parents disagree. An advocate advises the parents to withhold their consent to that reduction in service minutes but agree for the school to implement the rest of the proposed*

<sup>136</sup> VA. DEPT OF EDUC., REGULATIONS GOVERNING SPECIAL EDUCATION PROGRAMS FOR CHILDREN WITH DISABILITIES IN VIRGINIA – FREQUENTLY ASKED QUESTIONS, 20-21 (see appendix for an excerpted PDF of this source).

<sup>137</sup> 8 VA. ADMIN CODE § 20-81-170(E)(1)-(2) (2024); 8 VA. ADMIN CODE § 20-81-170 *et seq.* (2024).

*IEP. See Figure 7 above.*

It is important for parents and advocates to be very clear about exactly which provisions in the IEP parents are consenting to and which ones they are not. At least one hearing officer in Virginia has held that a school division “did not violate the Parent’s rights to have a partial consent implemented where they failed to provide a clear and understandable partial consent.”<sup>138</sup> It is also important to note that if a school division determines that a parent’s refusal to consent to a change in the student’s IEP or placement will result in a denial of FAPE, the school division may file a due process complaint against the parent to seek an override of the withholding of parental consent.<sup>139</sup> Under IDEA, a school division may file a due process complaint in “situations where a parent refuses to consent to the [school division’s] proposed change in educational placement and the [division] determines that FAPE will be denied absent such consent.”<sup>140</sup>

*ii. Documenting Parental Concerns in IEP Signing Statements*

Another method for documenting parental disagreements with a proposed IEP is the use of a Parental Concerns Letter or Addendum (or “Statement of Parental Concerns”). While many Virginia IEPs leave little room for the addition of parental concerns or objections to an IEP, advocates can direct parents to mark on the consent page, or in the parental concerns section of the IEP that additional parental concerns are included in a Parental Concerns Letter or Addendum attached to the IEP.<sup>141</sup>

Some school divisions may balk at attaching the letter or addendum to the IEP, but writing a reference to the document on the IEP itself alerts anyone reading the IEP later that there is an additional document outlining the parents’ concerns, unaddressed requests, and objections. The letter or addendum serves to explain the parent’s disagreement in detail.

*TJ is a seventh-grade student. Last school year, there were problems with the implementation of his IEP, and he began to fall further behind his peers. A reevaluation revealed that TJ’s reading and math skills were between the first and third-grade range. Since he had difficulty understanding things at school, TJ struggled to find value in staying in his classes at all. He eventually started skipping class, wandering the halls, and refusing to follow staff requests, resulting in a cycle of in-school and out-of-school suspensions. His parents requested an IEP team meeting. When his IEP team met, the school members of his IEP team proposed a change of placement to a private special education*

<sup>138</sup> In re: Student with a Disability, 122 LRP 4089, 6 (VA SEA Sept. 16, 2021) (where parent submitted to the school a 113-page document parent described as a Partial Consent to an IEP).

<sup>139</sup> *Letter to Anonymous*, 80 IDELR 23 (OSEP Nov. 17, 2021).

<sup>140</sup> *Id.*

<sup>141</sup> See Figure 7 (demonstrating that an IEP consent page provides very little space for parents to express additional concerns).

*day school that primarily serves students who exhibit high-level behaviors which cannot be managed in typical school settings. According to the Prior Written Notice (“PWN”) from the IEP meeting, a change in placement was proposed by the division because TJ was not making progress in any areas. The IEP notes from the meeting also state TJ was not making expected progress towards his IEP due to his inconsistent attendance and his mood while at school. TJ’s parents verbally disagreed that TJ needed a more restrictive environment and believed that if the school was faithfully implementing his current IEP, TJ would be able to make appropriate progress towards meeting the annual goals in his IEP. The school division responded to the parents’ disagreement by referring the parents to the PWN from the meeting, which included language regarding parents’ rights to file a request for mediation or a due process complaint if they disagree with a change in placement.*

TJ’s parents have followed the special education process and are now poised to consider availing themselves of the special education complaint process to resolve their impasse with the school division regarding TJ’s proposed placement. Providing partial consent by accepting annual goals and services but rejecting the change in placement, combined with a Statement of Parental Concerns referenced on the IEP’s signature (consent) page, will help TJ’s parents frame a special education due process complaint, request for mediation, or complaint to the VDOE by narrowing the issues and putting the school division on notice of why they believe TJ’s proposed IEP does not provide him with a FAPE.

Exercising the opportunity to provide partial consent or a written Statement of Parental Concerns is crucial to preserving parents’ rights in light of the confusion created by current case law. Recently, a Virginia federal district court held that a parent cannot assert claims under an agreed-to IEP, an agreed-to eligibility determination, or an agreed-to decision that no additional testing is necessary for a student’s reevaluation, even if those claims arise within IDEA’s two-year statute of limitations period.<sup>142</sup> The court based this decision on the fact that the plaintiff-parents were repeatedly given a Notice of Procedural Safeguards and should have more promptly utilized the administrative remedies for which they received notice.<sup>143</sup> However, the Notice of Procedural Safeguards given to the parents clearly states that parents have two years from the time they knew or should have known about the alleged action forming the basis of their complaint to file for a due process hearing.<sup>144</sup> The notice does not warn parents that they will waive their right to later contest an IEP if they fully consent to its

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<sup>142</sup> See XXXXXX, 2021 WL 2324164 at 11-12.

<sup>143</sup> *Id.*

<sup>144</sup> See 20 U.S.C. §§ (b)(6)(B), (f)(3)(C) (2024) (including language that presumes a party may not know of a violation at the time it occurs).

implementation.<sup>145</sup>

*In an IEP meeting, Joan’s parents make requests for additions or subtractions from the PLAAFP section, propose multiple new goals and amendments to old goals, request additional accommodations, and express their belief that Joan needs Extended School Year services to prevent regression of skills over the summer. The school rejects most, if not all, of Joan’s parents’ suggestions. In the PWN provided after the IEP meeting, the school district misstates certain items discussed in the meeting, and completely omits other things the parents thought important. The parents submit a Parental Concerns Letter or Addendum that specifies in detail these disagreements and identifies the deficiencies in the IEP and the PWN, so this information is accurately reflected in the record if ever needed in the future. The parents also use this information when preparing for the next IEP meeting.*

Joan’s parents have taken steps to create a “paper trail” of their concerns, requests, and objections. Nothing in IDEA suggests that parents waive their right to later dispute an IEP when a parent provides consent for the school to implement that IEP, nor do IDEA or its implementing regulations state that providing consent to implement an IEP means the parent agrees that the IEP confers FAPE—only that the school has the parent’s permission to carry out the activities described in the IEP.<sup>146</sup> A parent may not agree that a proposed IEP confers FAPE but nonetheless consent to implement the IEP because something, even if deficient, is better for the child than nothing. Consequently, it is best practice for parental disagreement with an IEP to be documented via partial consent and a Parental Concerns Letter or Addendum so that a parent in Virginia does not unknowingly waive their right to later raise claims related to that IEP.<sup>147</sup>

## CONCLUSION

Virginia’s system for the delivery of special education and related services to eligible K-12 public school students is in serious disarray and has been roundly criticized by both state and federal authorities. Detractors rightly pin the problems on a lack of clear, consistent, robust guidance from VDOE about special education eligibility and the IEP development process, as well as VDOE’s lack of enforcement of the law when school districts are found in noncompliance. While numerous problems plague Virginia IEPs, special education advocates must focus on addressing the foundational components of the IEP development process that undergird an appropriately ambitious

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<sup>145</sup> There is at least one case pending in the Eastern District of Virginia as of the writing of this article encouraging the court to revisit its decision in XXXXXX. See Complaint at 23-24, 41, C.D. v. Arlington Sch. Bd., No. 1:23-cv-1627 (E.D. Va. Nov. 29, 2023).

<sup>146</sup> 34 C.F.R. § 300.9(b) (2024).

<sup>147</sup> See XXXXXX, 2021 WL 2324164, at 11-12.

program of special education and related services, namely, an attention to the breadth and depth of initial special education evaluations and periodic reevaluations; a focus on ensuring accurate, relevant, current statements of academic achievement and functional performance; and a preservation of parental rights through use of partial consent and Statements of Parental Concern.