



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF EDUCATION

P.O. BOX 2120

RICHMOND, VA 23218-2120

September 22, 2005

### MEMORANDUM

**TO:** Virginia Department of Education Special Education Hearing Officers

**FROM:** Ronald P. Geiersbach, Coordinator of Due Process Services  
Office of Dispute Resolution and Administrative Services

**RE:** U. S. Department of Education, Office of Special Education and Rehabilitative Services, OSEP Monitoring Report Dated May 1, 2005

During the week of March 7, 2005, the Office of Special Education Programs (OSEP) of the United States Department of Education (USDOE) conducted a verification visit to Virginia as part of their Continuous Improvement and Focused Monitoring System (CIFMS) for ensuring compliance with, and improving performance under, Parts B and C of the Individuals with Disabilities Education Act (IDEA). One focus area for this review was the State's supervision of "dispute resolution systems that insure the timely resolution of complaints and due process hearings." On May 1, 2005, OSEP issued findings that did not reflect positively on the timeliness of the due process system.

#### The Findings

"VDOE (Virginia Department of Education) must ensure that a decision is reached and mailed to the parties within 45 days from the date of receipt of a request for a hearing, unless the hearing officer grants a specific extension of the 45-day timeline at the request of either party (34 CFR §300.511(a) and (c)). VDOE provided OSEP with a hearing log for 65 hearing requests between June 24, 2004 and February 8, 2005." ". . . VDOE's log showed that the State met the requirements of 34 CFR §300.511 for 54 of the 65 requests, and did not meet those requirements for nine of the 65 requests. Two requests were still open at the time of OSEP's visit."

#### The Scope of the Problem

It is apparent that the 45-day timeline remains a significant problem in Virginia. In 14.2% of the cases OSEP reviewed, hearing officers did not properly manage the hearing process to meet the 45-day timeline. OSEP's analysis did not discount extensions properly granted for a

specific period of time that were properly documented in the VDOE file. Despite this lenient analysis by OSEP, this is a startling statistic since the timeline has not decreased or changed in any way for many years. There appears to be no basis for hearing officers to manage cases that exceed the timeline. This may help explain why OSEP is intolerant of this lack of compliance with the 45-day timeline by Virginia's hearing officers.

This concern has been addressed with you on several occasions prior to OSEP's March review. The issue was a major concern of the Virginia Code Commission and its Administrative Law Advisory Committee, in 2000-01. It has been a repeated component in all of Art Cernosia's trainings to you. The issue was included in this office's briefing to you on October 12, 2004, in which the court admonished our hearing officer for needlessly and egregiously exceeding the 45-day timeline.

OSEP stated that VDOE must bring Virginia's due process system into compliance with the 45-day timeline requirement. OSEP is requiring VDOE to ensure that the 45-day timeline is met as soon as possible. The State must submit data and analysis documenting such compliance, no later than 30 days following a one-year timeline.

#### VDOE's Response to OSEP's Findings

VDOE is committed to ensuring compliance with the 45-day timeline in all cases in the future. Please understand that the funding for all special education students could be placed in jeopardy if there is not compliance with the 45-day timeline as determined by OSEP. **VDOE must employ very stringent standards when reviewing hearing officer actions that allow a case to exceed the 45-day timeline in any case for any reason.** OSEP's analysis of this area does not allow for exceptions to the 45-day timeline; therefore, VDOE must employ the same stringent standards when managing due process cases. It is only through more stringent review of cases and hearing officer application of effective strategies to manage the timeline that this critical situation will be alleviated.

By providing this memorandum to the hearing officers, the VDOE expresses its unvarying commitment to resolve this area of non-compliance. The VDOE continues to employ resources and strategies to address this critical concern. The VDOE expects resolution of any and all failures to comply with the 45-day timeline immediately so that effective assurances can be provided to OSEP. If VDOE becomes aware of any situation where a hearing officer violates the 45-day timeline, it should be understood that VDOE is obligated to resolve such a situation immediately by any available means, including removal of the hearing officer from VDOE's special education hearing officer list.

#### Hearing Officer Participation

The list of special education hearing officers is made up of hearing officers who have been specially trained to manage special education cases under IDEA. VDOE believes that the

training provided has emphasized the critical nature of the 45-day timeline. It is expected that all hearing officers will review their training on the application of the 45-day timeline and resolve to more diligently apply this standard in assigned cases. In addition, it is expected that extensions will only rarely be granted and only for an extremely essential reason. Should an extension be granted at the request of a party in a case, the reason and basis must be carefully documented along with the finding that the extension is in the best interest of the child.

The length of an extension must be carefully limited so that it does not exceed a reasonable time. It may be assumed that a 60-day extension would be, per se, unreasonable. If there is a need for a lengthy delay, then the parties should be considered unprepared and the issue not ripe for hearing to proceed. The case should be dismissed (without prejudice) until the parties are ready to proceed.

Another strategy to be applied in cases that were initiated subsequent to July 1, 2005, is to manage the Resolution Period as part of the overall time provided for the due process hearing. Hearing officers are holding pre-trial conferences shortly after they are appointed and immediately setting a hearing date. The 45-day timeline is suspended when the parties proceed to the Resolution Session. The 45-day timeline is also suspended should the non-grieving party appeal to the hearing officer the sufficiency of the notice requesting due process. The 45-day timeline is **not** suspended if the parties waive the Resolution Session or enter mediation. This provides for the possibility of an extension within the 45 days and encourages parties to begin earlier preparations for the hearing.

VDOE will provide more strategies and supports for timely managing of the hearings as we continue to proceed with the implementation of IDEA 2004. One central essential item is documentation of VDOE's file so OSEP can determine that Virginia has come into compliance with the 45-day timeline requirement. Please resolve to be even more meticulous in your documentation of procedural rulings in cases, including the granting of an extension in a case.

VDOE will continue to expect and appreciate the cooperation of all special education hearing officers. Thank you for your attention to this essential message and feel free to discuss your concerns with me at (804) 225-2334, or [Ron.Geiersbach@doe.virginia.gov](mailto:Ron.Geiersbach@doe.virginia.gov), or Judy Douglas at (804) 225-2771 or [Judy.Douglas@doe.virginia.gov](mailto:Judy.Douglas@doe.virginia.gov). I look forward to resolution of this vital critical concern as soon as possible.

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