

# STUDY ON THE USE OF FEDERAL, STATE, AND LOCAL FUNDS FOR PRIVATE EDUCATIONAL PLACEMENTS OF STUDENTS WITH DISABILITIES – YEAR TWO

## *Discussion Points*

### **Background**

Special education, pursuant to the Individuals with Disabilities Education Act (IDEA), is specially designed instruction provided at no cost to the parents in order to meet the unique needs of a child with a disability. IDEA guarantees a free appropriate public education (FAPE) to all eligible children with disabilities and includes the following services:

- identification and referral,
- evaluation,
- determination of eligibility,
- development of an individualized education program (IEP),
- determination of services, and
- re-evaluation.

IDEA requires that students with disabilities be provided special education services in the least restrictive environment (LRE) and these students not be unnecessarily segregated from nondisabled students. However, for students with significant disabilities, a private day or residential program may be considered as an option for placement. If a private special education day school or private residential facility is determined to be the least restrictive environment in which the student can be served to receive FAPE, these services are authorized.<sup>1</sup> Pursuant to IDEA, this is to occur when the nature or severity of the disability of a child impedes education in the regular class setting, even with the use of supplementary aids and services.

According to the Virginia Department of Education (VDOE), during the 2013 – 2014 school year:

- 62.69% of students with an IEP were included in their regular classroom 80% or more of the day;
- 11.36% of students were included in their regular classroom less than 40% of the day; and
- 3.96% of students were educated in a separate public or private school, residential, home-based, or hospital facility.<sup>2</sup>

However, between 2009 and 2013, while the total number of students identified in need of special education services declined 3.5%, the number of students with the most extensive needs (children diagnosed with autism or other health impairment) skyrocketed by 23% to 46,865 students.<sup>3</sup>

Federal special education funds can only be used to pay the excess costs of providing special education and must be used to supplement not supplant state and local funds. State general funds support special education services in public school settings. Children placed in private special education schools are funded through an interagency pool which exists under the Comprehensive Services Act (CSA) in accordance with § 2.2-5211 of the *Code of Virginia*. CSA funds may also be utilized to fund non-residential services in the home and community for a student with an educational disability when the needs associated with his/her disability extend beyond the school setting and

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<sup>1</sup> Levels of service available to students typically follow a hierarchy from least to most restrictive, including general education classes, special classes, special schools, home instruction, and instruction in hospitals and institutions (8 VAC 20-81-130).

<sup>2</sup> Virginia Department of Education. (2015). *Special Education Performance Report*. Retrieved from general education classes, special classes, special schools, home instruction, and instruction in hospitals and institutions (8 VAC 20-81-130).[http://www.doe.virginia.gov/special\\_ed/reports\\_plans\\_stats/special\\_ed\\_performance/state/2013-2014.pdf](http://www.doe.virginia.gov/special_ed/reports_plans_stats/special_ed_performance/state/2013-2014.pdf).

<sup>3</sup> Virginia Department of Education. (2014). *2014 Annual Report on the Condition and Needs of Public Schools in Virginia*. Retrieved from [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4072014/\\$file/RD407.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4072014/$file/RD407.pdf).

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threaten the student's ability to be maintained in the home, community, or school setting (i.e., wrap-around services for students with disabilities). The IEP team is responsible for determining the specific services that are necessary for a student's educational program and delineates these services in the IEP; local interagency teams are responsible for managing CSA funds and also plan and oversee services to youth. School divisions may also seek federal Medicaid reimbursement for certain students and services by applying to the Virginia Department of Medical Assistance Services to become an approved provider. School divisions can submit reimbursement claims to Medicaid for some services provided to students. Medicaid funds may also be utilized to support private residential placements, but only for those youth with mental health treatment needs that qualify for residential services.

### **Finding #1 – There are challenges with using CSA state pool funds to maintain LRE.**

The special education mandate cited in §2.2-5211 (B)(1) of the *Code of Virginia* may be utilized to fund non-residential services in the home and community for a student with an educational disability when the needs associated with his/her disability extend beyond the school setting and threaten the student's ability to be maintained in the home, community, or school setting. The State Executive Council (SEC) authorized the use of CSA funds for non-IEP services when a student with a disability exhibits needs that extend beyond the responsibility of the public schools. The policy recognizes that needs arising from significant disabilities are not contained within school walls and may provide significant challenges to families and communities. The use of mandated special education funds for "wrap-around" services may be used when the child's disability/behavior:

- interferes with family routines;
- creates safety concerns in community; and
- compromises student adjustment across settings.

However, CSA state pool funds for wrap-around services for students with disabilities may not be used to fund services in the school setting or for services provided by school employees. The term "school setting" means an environment in which school services are being provided. Thus, wrap-around services can only be provided by private providers outside of the school setting. While CSA funds are not to be used to supplant school division funds, this may be a barrier to LRE because some school divisions have created programs with highly qualified professionals that cannot provide these services outside of the school environment.

### **Recommendations for Discussion**

1. Request the SEC revisit the 2011 *Clarification on Use of CSA Funds Under the Special Education Mandate* to include services provided by public school employees outside of the public school setting that include highly qualified/licensed special education professionals with certain minimum licensing standards.
2. Request the SEC develop a policy for piloting the use of Intensive Care Coordination for the specific purpose of maintaining a child with an IEP in their home school when the child's disability impedes educating him/or her in the regular class setting, even with the use of supplementary aids and services.
3. Establish a policy ensuring active case management for all families and students using CSA funds, regardless of IEP status such as requiring families meet with the CSA family assessment and planning team (FAPT) at least annually.



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services.<sup>5</sup> All local school divisions are expected to meet the division and school student-teacher ratios specified in the SOQ, which are based on ratios of students in average daily memberships to full-time equivalent teaching positions. The special education staffing requirements are prescribed in Virginia's *Regulations Governing Special Education Programs for Children with Disabilities*.<sup>6</sup> The service level, Level I or II, is based on the amount of time the student receives special education. Students who receive less than 50 percent of their instruction from a special educator are considered to receive Level I services. Students receiving 50 percent or more of their instruction from a special educator are considered to receive Level II support according to state standards.<sup>7</sup> No more than 14 children are to be assigned to a single class period if there are similar achievement levels and one subject area and level are taught. No more than 10 students are to be assigned to a single class period when there are varying achievement levels.<sup>8</sup>

In 2014, the Virginia Department of Education outlined a variety of issues with SOQ funding.<sup>9</sup> Among the issues identified were the challenges in serving the increasing number of those special education students who are the most challenging to serve (i.e., children with Autism or Other Health Impairments), which has increased by 23% since 2009. As part of its recommendations in 2012, the Board of Education requested the Joint Legislative Audit and Review Commission (JLARC) to include the below-noted issues in its study on the efficiency and effectiveness of elementary and secondary school spending in Virginia. JLARC is to report its findings in November 2015 but it is unclear as to whether JLARC will address these issues. The items the Board of Education asked JLARC to consider were:

- assigning weights for students who may be at-risk or who may have disabilities and require additional support, including services to special education students; and
- mitigating the perverse incentive of reducing a school division's special education funding when it includes students with disabilities into general education classrooms or uses other instructional supports to meet students' needs without special education services.

### **Recommendations for Discussion**

1. Request JLARC/VDOE study Virginia's special education funding formula and make recommendations which include additional funding levels to address hard-to-serve students while encouraging school divisions to creatively educate students with disabilities in the LRE.
2. Take no action.
3. Other options?

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<sup>5</sup> Virginia Department of Education. (2014). *2014 Annual Report on the Condition and Needs of Public Schools in Virginia*. Retrieved from [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4072014/\\$file/RD407.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4072014/$file/RD407.pdf).

<sup>6</sup> 8 VAC 20-81-340.

<sup>7</sup> Virginia Department of Education. (2010). *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*. Retrieved from [http://www.doe.virginia.gov/special\\_ed/regulations/state/regs\\_speded\\_disability\\_va.pdf](http://www.doe.virginia.gov/special_ed/regulations/state/regs_speded_disability_va.pdf).

<sup>8</sup> Ibid.

<sup>9</sup> Virginia Department of Education. (2014). *2014 Annual Report on the Condition and Needs of Public Schools in Virginia*. Retrieved from [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4072014/\\$file/RD407.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4072014/$file/RD407.pdf).



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Once the child is placed in a private day or residential program, the cost of meeting the needs of the child is shifted from the local education agency (LEA) to the locality's budget because schools do not cover the cost of the placement. Although LEAs lose SOQ funding for the student, the loss of funds is minimal. The local CSA Office is bound by federal law to abide by provisions and placement determinations set forth in the IEP, even if they are willing to identify community based services and supports that will help the child remain in their home school. School budgets are not responsible for the costs of the private day placement, other than transportation costs, because the local CSA match typically comes from the general fund portion of the locality's budget. Several interviewees noted that this should be taken into account when calculating the school's annual funding level from local government.

Another factor is that once a child is placed in a private setting, CSA does not require localities to maintain active case management of referred students by the Family Assessment Planning Team (FAPT). While some localities remain actively involved in some cases, other localities rely upon the CSA coordinator to process purchase orders and ensure that the locality properly reimburses the private provider. One interviewee noted that, once the IEP team determines a private placement is necessary, CSA is merely a "caboose in the process." According to Best Practice Recommendations developed by VDOE, the FAPT can be brought into the planning for a student with a disability at the earliest indication that the student may be in need of supports that fall outside the purview of the public school.<sup>13</sup> The FAPT can work with school personnel to identify non-educational issues that may be negatively affecting the student's performance in school. Such issues might include difficulties in the family/home, mental health issues not related to the student's disability, behavioral issues not related to the student's disability, involvement with the juvenile justice system, etc. The FAPT/MDT can develop an Individual Family Services Plan to identify strategies for assisting the child and/or family.

Another complication is the difficulty of transitioning a child back from a private day placement to the public school setting. While transitioning the child back to the LRE is an expectation pursuant to IDEA, the process can be challenging. A child removed from his/her home school may experience varying degrees of difficulty in adjusting to a return to those environments. In addition, stringent parental consent provisions make it even more difficult to transition the child from a private placement to the public school setting, even if assessments and other documentation indicates that the student can be adequately served in their home school.

### **Recommendations for Discussion**

1. Establish a more formal process for involving CSA/FAPT in IEP meetings when the child's needs place them at-risk of out-of-school placement so that available services/supports can be identified.
2. Require school divisions' provide the local match for CSA for Educational Congregate Care and for Special Education Private Day Home Placement in lieu of the locality's General

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<sup>13</sup> Virginia Department of Education. (2009). *CSA and Schools Communication and Coordination Regarding Special Education. Best Practice Recommendations*. Retrieved from [http://www.doe.virginia.gov/support/comprehensive\\_services\\_act/csa\\_special\\_ed\\_best\\_practice.pdf](http://www.doe.virginia.gov/support/comprehensive_services_act/csa_special_ed_best_practice.pdf).



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achieve lower CSA educational costs because a lower percentage of the school divisions' special education students are placed in private special education services.

VDOE sets the tuition rates that regional special education programs may charge to the participating school divisions. At the end of each semester, school divisions may claim reimbursement for the state share of the tuition paid to the fiscal agent of the regional program. The composite index is applied to the tuition paid (not to exceed the approved rate) to determine the state share. School divisions are not allowed to count these students in ADM.<sup>15</sup> The Commonwealth's direct aid to public education includes funding designated for these programs. In the 2015 Appropriations Act, the appropriation for these programs was \$79,503,166 in FY 2015 and \$84,204,352 in FY 2016. In FY 2014, 21,074 students were served in a regional special education program.

While rules and regulations in the educational arena have changed significantly over the past several years, the regulations and policies applicable to Virginia's regional programs have not been revised since the 1970s. Under the federal No Child Left Behind Act of 2001 (NCLB), schools must report adequate yearly progress (AYP) to determine whether schools are successfully educating their students and whether students are making progress toward meeting state academic content standards. Virginia's public schools and school divisions are required to provide information about student achievement, accountability ratings, attendance, program completion, school safety, teacher quality, and other topics. School-specific and division-specific information can then be accessed on the VDOE website under the school report card. Because regional programs are not LEAs, student achievement data and other quality measures are not linked to the regional program but are instead attributed to the child's home school division. Therefore, it is difficult to ascertain the effectiveness of the regional programs as well as assess other critical factors linked to high-achieving special education programs such as attendance and disciplinary practices. Additionally, there is no requirement for regional programs to report on program expenditures as well as no requirement that a certain percentage of funding be dedicated to programmatic rather than administrative components.

### **Recommendations for Discussion**

1. Request the VDOE to conduct a study on Virginia's regional special education programs and report findings and recommendations to the Commission on Youth prior to the 2016 General Assembly Session.
2. Introduce legislation/budget language requiring Virginia's regional programs to annually report to the Virginia Department of Education information about student achievement, accountability ratings, attendance, disciplinary practices, program completion, and transition to LRE.
3. Take no action.
4. Other options?

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<sup>15</sup> Virginia Department of Education. (n.d.). *How Special Education Programs are Funded in Virginia's Schools*. Retrieved [http://www.doe.virginia.gov/special\\_ed/grants\\_funding/how\\_speced\\_funded.pdf](http://www.doe.virginia.gov/special_ed/grants_funding/how_speced_funded.pdf).





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#### **Finding #6 – Virginia’s parent consent provisions exceed federal regulations and may hinder serving students with disabilities in the least restrictive environment.**

The *Code of Virginia*, at § 22.1-16, authorizes the Board of Education to “promulgate such regulations as may be necessary to carry out its powers and duties...” Virginia must comply with the federal requirements outlined in IDEA 2004, and its federal implementing regulations, at 34 CFR Part 300, to continue to be eligible for federal special education funding. However, Virginia’s *Regulations Governing Special Education Programs for Children with Disabilities* exceed federal regulations in approximately 150 provisions. This includes IDEA parental consent provisions. IDEA requires parental consent under federal law when:

- the child undergoes initial assessment for eligibility for special education services;
- the child is initially determined to be eligible for special education services and is “staffed” into special education;
- the child is reassessed using formal tests or other measurement tools;
- the school division determines that the child is no longer eligible for special education services and terminates services; and
- an eligible child is between three and five years old and the school division proposes that an Individual Family Service Plan (IFSP) is used instead of an IEP.

In Virginia, parental consent also applies to any changes to a child's IEP. The right of consent to changes in a child's IEP were included promote a greater level of partnership between parents and schools. However, when a parent disagrees with an IEP and files for due process, the student is to continue receiving the placement and services in the last agreed upon and implemented IEP during the due process proceedings. This is commonly known as “stay put.” If the parent disagrees with any portion of the IEP, the school division may only implement the agreed upon portions of the IEP.

Case law delineates FAPE and LRE. In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement.<sup>19</sup> First, the state must have “complied with the procedures set forth in the Act,” including allowing parents of a disabled child to examine school records, participate in meetings, and present complaints. Parents must also be given notice of any proposals to change the educational placement of a child, and they are entitled to an independent educational evaluation. If the child is being educated in the general education classrooms of their home school division, the IEP must be designed to enable the child to achieve passing marks and advance from grade to grade.

Virginia’s parental consent provisions may prevent school divisions from modifying services when the child no longer requires them, even when the school division can show that the best interest of the child is being served pursuant to federal law. This can make it particularly challenging to transition students back to their home school even when the school can provide services which will enable the child to advance towards attaining their annual goals, be involved and make progress in the general education curriculum, participate in extracurricular and other nonacademic activities, and be educated and participate with other children with and without disabilities in those activities.<sup>20</sup> While case law may support the school’s desire to transition the child back to the home school, most schools do not

<sup>19</sup> Bd. Ed. Hendrick Hudson Sch. Dist. v. Amy Rowley (458 U.S. 176).

<sup>20</sup> 34 CFR §300.320(a)(4)(i)-(iii).

