

DRAFT
RECOMMENDATIONS
EXTERNAL REVIEW OF
VIRGINIA'S DISPUTE RESOLUTION SYSTEM

Submitted by:

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Filed

July 1, 2025

I. INTRODUCTION

Virginia's special education dispute resolution system has been well-studied and monitored over the past five years and the General Assembly and the Virginia Department of Education (VDOE) responsively corrected inconsistencies with the Individuals with Disabilities Education Act (IDEA),¹ and enacted changes designed to improve the system options. The purposes of this study, in many ways, mirrored previous efforts in Virginia to identify impediments to compliant, effective, and efficient special education dispute resolution system options and provide recommendations for change. Rather than replicating these prior studies, this study design acknowledges and builds on these efforts with a focus primarily on the degree to which the system options meet standard and best practices, with actionable recommendations for improvement when the system options fall short.

As a result of the comprehensive review of Virginia's dispute resolution system to evaluate the compliance, effectiveness, and efficiency of its options, including public perception, Special Education Solutions, LLC concludes that the statutory and regulatory, and, generally, structural elements of compliant and effective system options are in place. It is the execution of these system options that prevents the dispute resolution system from attaining optimal effectiveness and efficiency – not only being fair and impartial but be perceived to be so.

As such, the recommendations in this study are fundamentally focused on: the integration of standard and best practices into the current system options; the implementation of each system option in accord with those practices, including enhanced minimum qualifications and not only pre-service and in-service training, but an ongoing neutral oversight of the system options to ensure effectiveness, efficiency and actual and perceived impartiality and fairness; grass-roots efforts in communities at the school level to enhance informal conflict resolution to avoid unnecessary impasse, including stakeholder training; promotion of the available, alternative system options; and partnerships to address head-on the persistent perception of bias in the systems.

¹ 20 U.S.C. § 1400 et seq.; 34 C.F.R. Part 300. In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'"). Implementing regulations followed in August 2006. *See* 34 C.F.R. Part 300 (August 14, 2006). In December 2008, the regulations were clarified and strengthened in the areas of parental consent for continued special education and related services and non-attorney representation in due process hearings. *See* 34 C.F.R. Part 300 (December 1, 2008). In June 2017, the regulations were further amended to conform to changes made to the IDEA by the Every Student Succeeds Act (ESSA).

This document provides a draft of the recommendations resulting from the external review of Virginia’s dispute resolution system completed by Special Education Solutions, LLC. A final report, incorporating the findings and any additional/final recommendations, will be published on or before October 15, 2025.

II. DRAFT RECOMMENDATIONS²

Special Education Due Process Hearings

- A. Regarding training and technical assistance to the due process hearings officers, it is recommended that:
 - 1. Given the authority in 8 VAC § 20-81-210(O)(5) for a hearing officer to hear Section 504 disputes, the hearing officers receive pre-service and in-service training on Section 504 of the Rehabilitation Act of 1973.
 - 2. For the pre-service training in IDEA, each candidate hearing officer must be determined by an independent, neutral trainer to have satisfactorily completed the training to be certified as a special education hearing officer; and
 - 3. A system of technical assistance from an independent, neutral individual with expertise in IDEA special education hearings be available to the hearing officers on an ongoing basis.
- B. With respect to prehearing conferences, it is recommended that the Virginia Administrative Code, 8 VAC §20-81-210(O), be revised³ to require the hearing officer to conduct a prehearing conference in every case and as early as possible at the commencement of the 45-day hearing timeline in non-expedited cases and, as soon as possible, in expedited cases. It is also recommended that the regulations be revised to include the minimum areas that must be addressed and determined at the prehearing conference, including the clarification of the issues to be heard and relief requested and determination of jurisdiction over the parties and the issues.
- C. Notwithstanding the pre-service and in-service training Virginia hearing officers receive and a system of peer-evaluation, the hearing officer’s implementation of the special education hearing system falls short of standard legal practices, as exemplified by the extreme variability in hearing officers’ adherence to clarification of the issues and decision writing practices. The answer is not more training, or another study given the persistence of the very same concerns

² These draft recommendations are subject to change.

³ Any revisions of the Virginia Administrative Code or the Code of Virginia will require the revision of associated policies and procedures, as necessary and appropriate.

expressed in prior studies.⁴ There must be a change to the infrastructure.

1. It is recommended that the VDOE reform the current hearing system to provide oversight by a knowledgeable and impartial individual/agency to:
 - a. Supervise the hearing officers' implementation of standard and best legal practices at all stages of the hearing process, including prehearing, hearing, and decision/order writing.
 - b. Conduct a comprehensive criterion referenced system of evaluation for measuring hearing officers' performance. The evaluation system will include a review of all stages of the hearing process (prehearing, hearing, and decision writing), case management, judicial temperament and professional behavior, and preparation and return of an administrative record. Incorporated into this review is an assessment of an individual hearing officer's knowledge and understanding of the IDEA, Virginia law and regulations, and legal interpretations of the IDEA by State and federal district courts. The results of this evaluation of the hearing officers will determine whether a hearing officer is retained/recertified. It is also recommended that in partnership with PEATC and school divisions, VDOE promote the submission by parents/school division personnel of post-hearing surveys of the hearing process to ensure the VDOE's oversight of the hearing system.
 - c. Provide the hearing officers access to technical assistance on an ongoing basis. (This technical assistance would augment the existing required pre-service and in-service training.)
2. It is further recommended that the VDOE consider, after obtaining input from stakeholders over a curtailed time period, whether the current system of utilizing hearing officers through the Supreme Court in accordance with 8 VAC § 20-81-210(H) is a viable system and should be maintained and augmented to include the above recommended changes in the infrastructure⁵ or an alternative hearing system should be developed.
3. In addition to the above recommendations that may require revision of the Virginia Administrative Code, it is recommended that 8 VAC § 20-81-210 and the VDOE's hearing procedures be reviewed for consistency with

⁴ It is particularly concerning that, for at least several years, the special education hearing process has been perceived as biased against parents.

⁵ One such recommendation is the Legal Aid Justice Center's September 18, 2024, recommendation to the Virginia Commission on Youth to establish "... an independent commission to select hearing officers in conjunction with the Supreme Court of Virginia. Reduce VDOE's responsibility in the selection and certification/recertification process for special education due process hearing officers."

IDEA including:

- a. 8 VAC § 20-81-210(H)(3), regarding the provision that the hearing may not be conducted until the Supreme Court of Virginia issues a decision on the request of an objection to the special education hearing officer. This provision may impact the timeliness of a non-expedited hearing and does not reconcile the stay of the conduct of the hearing with the requirement to conduct an expedited hearing within 20 school days of the date the complaint requesting the hearing is filed. *See* 34 C.F.R. § 300.532(c)(2); 8 VAC 20-81-210(P)(13)(a).
- b. 8 VAC §20-81-210(F)(6). The special education hearing officer has the discretionary authority to permit either party to raise issues at the hearing that were not raised in the notice by the party requesting the due process hearing in light of particular facts and circumstances of the case.

This provision is inconsistent with IDEA, 34 C.F.R. § 300.511(d), that prohibits the party requesting the due process hearing to raise issues at the due process hearing without the agreement of the other party. Without party consent, a hearing officer's exercise of the authority in 8 VAC § 20-81-210(F)(6) is particularly problematic given the impact on the parties' right to present evidence and runs afoul of the 5-business day rule and, when applicable, the resolution process. 34 C.F.R. §§ 300.510, 300.512. In the case of the non-filing party, this authority essentially allows for a cross appeal that circumvents the filing and hearing processes. (It would also not be a permissible exercise of the hearing officer's authority to allow a filing party to amend the due process complaint at hearing since a hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins. 34 C.F.R. § 300.508(d)(3)).

- c. 8 VAC 20-81-210(Q)(9). The automatic application of the 30-day resolution process for a local educational agency-initiated due process complaint if the parties elect to use mediation, is inconsistent with IDEA, 34 C.F.R. §§ 300.510(a) and 300.506(b)(1)(ii), by denying the right to a timely hearing.
- 4. Additional considerations regarding the review of the effectiveness and efficiency of the existing infrastructure:
 - a. 8 VAC § 20-81-210(P)(7), provides the special education hearing officer the authority to refer the matter in dispute to a conference between the parties when informal resolution and discussion appear to be desirable and constructive, with the protection that it

must not deprive the parties of their rights and must be exercised only when the special education hearing officer determines that the best interests of the child will be served. Given this authority is in addition to the required resolution process for parent-initiated due process complaints, it is recommended that consideration be given to the efficacy of this additional resolution mechanism.

- b. The desirability of different appeal timelines for bringing a civil action in the circuit court for the jurisdiction in which the school division is located or in federal district court be reconsidered. Va. Code Ann. § 22.1-214(D); 8 VAC § 20-81-210(T)(1).
 - c. If the assignment procedures currently implemented by Office of Executive Secretary (OES) of the Supreme Court of Virginia are maintained, in light of the evidentiary requirements for special education hearings, including that the decision must be based on the hearing record, reconsider the procedure that: “For hearing requests involving the same person who was the subject of a hearing request within 120 calendar days preceding the hearing request at issue; or if the facts and circumstances are substantially similar to those associated with a prior hearing request, OES may assign the same hearing officer assigned to the prior hearing request.”
- D. It is recommended that, prospectively, in addition to the current tracking and reporting of data, the VDOE annually analyze and report the data for fully adjudicated cases on the percentage of time parents or public agencies prevail in due process hearings and, separately, mixed/split decisions.
- E. While enacting a statutory change in the burden of proof is viewed by many as a panacea, given the prevalence of Virginia hearing officers’ reliance on the burden of proof as the rule, rather than the exception, when evidence is in “equipoise,” and the research on the impact of the burden of proof nationally, it is the conclusion of Special Education Solutions, LLC that merely changing the burden of proof will not significantly impact the effectiveness of the hearing system or address the perceived inaccessibility and partiality of the hearing process. While more difficult, it is recommended that more fundamental systemic changes discussed in this study need to be implemented to transform Virginia’s hearing system.
- F. With respect to non-attorney representation –
 - 1. for the protection of the parties and for the effectiveness and efficiency of the hearing system, it is recommended that Virginia consider an authorization/certification process for non-attorneys that includes qualifications of knowledge and experience and standards of professional responsibility/conduct. Any authorization process should be in regulation

to ensure uniform performance/knowledge standards and is best implemented by the hearing officer appointed to the case. If a certification process is preferable, it should be done by a neutral entity, such as the Supreme Court of Virginia. (Even if the certification is a voluntary process, parties will be able to make a more informed decision in the selection of a non-attorney representative.) It is also recommended that the development of a guide for parents similar to that available in the State of Florida⁶ be considered and, ideally, developed in cooperation with the Parent Educational Advocacy Training Center (PEATC).

2. in addition to the aforementioned guides and current Learning Library Resources on the VDOE website, including the videos prepared in partnership with Old Dominion University, and the toolkits available through PTA and PEATC,⁷ it is recommended that the VDOE provide access to additional resources to help a parent understand the hearing process in a tangible way, such as the videos available to parents and school personnel in Pennsylvania on preparing for the prehearing conference and hearing.⁸

G. It is recommended that along with other recommendations to reform the hearing system, the VDOE:

1. Consider whether the current hearing officer qualifications to serve as a special education hearing officer and to be recertified need to be augmented.
2. Review the rates hearing officers receive for conducting proceedings for other Virginia agencies/entities that require specialized knowledge and training and consider increasing the rate of compensation for hearing officers comparably.
3. If the current hearing system through the Supreme Court is maintained, all current and former applicant hearing officers be required to reapply for the position and, if selected, successfully complete the pre-service training.

⁶ This guide is designed to assist parents in asking interview questions that will help get an understanding of an advocate's approach to providing support and to connect with parent centers and additional sources of information on advocacy. See <https://www.fldoe.org/core/fileparse.php/7675/urlt/APG17.pdf>.

⁷ See, e.g., <https://cieesodu.org/office-of-dispute-resolution-learning-library/>; <https://peatc.org/wp-content/uploads/2023/06/Due-Process-Toolkit.pdf>; <https://www.pta.org/home/family-resources/Special-Education-Toolkit>

⁸ See <https://odr-pa.org/due-process/procedures/>.

State Complaints

- A. As soon as possible after the issuance of the final external report, it is recommended that the VDOE engage a neutral independent professional with expertise regarding the IDEA state complaint system and standard decision writing practices, including issue specification and applicable standards of law, to conduct a mandatory training in these areas for all state complaint personnel involving in the investigation of a state complaint and writing of Letters of Finding, including VDOE contractors. The training must include the determination and statement of issues for a state complaint; the conduct of the investigation; and the writing of the Letters of Finding, including enforceable final corrective actions. It is recommended that the training be followed by the availability of a minimum of two months of technical assistance from the designated trainer to the VDOE state complaint personnel from case assignment of a sufficient state complaint to case closure. This post-training technical assistance will assist the assigned personnel in the application of the standard practices addressed in the training.
- B. In the absence of data otherwise regarding the VDOE's enforcement of state complaint orders, it was determined that the practice, to date, of returning decision-making on corrective actions to the involved public agency is likely the cause of stakeholders' perception that the VDOE fails to enforce Letters of Finding. It is recommended that, once enforceable final corrective actions are provided in Letters of Finding, the VDOE collect, track/monitor, analyze, and publicly report the data on the enforcement of all Letters of Finding with ordered remedies.
- C. VDOE examine the case load for each Office of Dispute Resolution and Administrative Services professional staff member responsible for the investigation of state complaints, including the development of Letters of Findings, relative to the most recent trend data, and determine whether one or more additional staff are necessary to correct the findings in the prior JLARC Report and implement the recommendations in this study, if adopted. If VDOE determines that an additional staff member(s) is required, budgetary resources, of course, will need to be allocated to effect that change.
- D. With respect to the right granted in 8 VAC § 20-81-200(E), permitting parties to the state complaint procedures to appeal the final decision to the VDOE within 30 calendar days of the issuance of its Letter of Findings in accordance with procedures established by the VDOE –
 - 1. While an administrative appeal process for State complaint decisions is not uniformly available among state education agencies, the VDOE's appeal process affords the parties additional rights and an opportunity to review the soundness of a Letter of Finding. As such, it is recommended an appeal process be maintained, even if the recommendations to improve the effectiveness of the current state complaint process are adopted.

However, given the previously discussed findings regarding the hearing officers' adherence to standard practices, along with the pervasive perception of partiality, it is recommended the VDOE consider whether the current system of review by a designated hearing officer is effective or whether it should be changed in some manner.

2. It is also recommended that VDOE consider the expansion of the basis of appeal set forth in the 2009 VDOE Special Education Complaint Appeal Procedures to include not just newly discovered information or an error in fact or law on which the findings were based, but to include an assertion of an error in the application of the law to the facts. (While the elimination of the appeal procedures would necessitate regulatory change, a change in the procedures and designated reviewers would not since these are only in policy.)

Special Education Mediation

- A. With respect to training of special education mediators, it is recommended that –
 1. The VDOE adopt the prior recommendation in *A Survey of K-12 Special Education in the Commonwealth of Virginia and Recommendations to Improve Special Education in the State* to enhance the training of mediators: “Special education mediators should receive professional learning from PEATC and/or the William and Mary Special Education Law Clinic. These opportunities would better ensure that the rights of parents and educator roles are better understood and supported by mediators.”
 2. The VDOE review the guidelines and certification processes and other available resources through Virginia’s Judicial System for the training and certification of court mediators for the purpose of augmenting the training and certification processes for special education mediators in a similar manner.
 3. The VDOE consider the engagement of an independent neutral expert knowledgeable in laws and regulations relating to the provision of special education and related services and effective mediation techniques to provide ongoing technical assistance to mediators, upon request.
- B. With respect to the appointment of special education mediators, it is recommended that 8 VAC § 20-81-190(D)(2) be revised to augment the current rotational mediator selection process to allow parties at the time of the mediation request to jointly request a specific mediator in the cadre and, if available, to appoint the mediator. The availability of this option may increase the willingness of the parties to access mediation and serves to encourage the parties to work together at the onset of the process.

- C. With respect to the evaluation of special education mediators, it is recommended that –
1. The annual evaluation for mediators be mandatory and conducted by an independent neutral expert knowledgeable in laws and regulations relating to the provision of special education and related service and effective mediation techniques.
 2. In partnership with PEATC, the VDOE promote the submission by parents of post-mediation consumer evaluations of the mediation system to increase participation and to assist in the VDOE's oversight of the system.
- D. It is recommended that the Virginia Administrative Code, 8 VAC § 20-81-190(E)(3) and 8 VAC § 20-81-210(Q)(4), be revised to provide the additional mechanism of the filing of a state complaint to enforce mediation (or resolution) agreements. The judicial enforcement of mediation (or resolution) agreements as the sole option, particularly for an unrepresented parent, may serve as a deterrent to using mediation.
- E. The VDOE has a significant amount of information on its website on mediation and the other alternative dispute resolution processes, apart from IEP facilitation, with links to outside resources. VDOE provides training annually on dispute resolution options to new special education directors, as well as other periodic administrator training programs. However, based on comments collected from parents and parent advocates during this study, the information has not reached the school/community level. It is time to try another way. With the involvement of local/regional parent support organizations, the dissemination of information should include multimedia approaches, including the use of social media, to ensure the information is visible in schools and communities.

IEP Facilitation

- A. VDOE undertake a substantial restructuring of Virginia's IEP facilitation program.⁹
- B. The VDOE must ensure a sufficient number of trained and qualified IEP facilitators are available. Given that the current IEP facilitators (of which there are two) have a background in school administration and the process is perceived not to be impartial, it is also recommended that the VDOE consult with PEATC, the Parent Teacher Association (PTA), and other parent organizations on methods to recruit qualified IEP facilitators who have not been or are associated with the school divisions.
- C. The Center for Appropriate Dispute Resolution in Special Education (CADRE) offers extensive resources to state educational agencies either making improvements to an existing program or building a new IEP facilitation program, including a Facilitated IEP Program Initial Self-Assessment tool that focuses on the critical function areas of effective system design: system structure and organization, program access and delivery, practitioner standards and development, public awareness and outreach, evaluation and continuous quality improvement.¹⁰

If not already being done by the time this external study is completed, it is recommended the VDOE utilize the intensive technical assistance available from CADRE in the areas of IEP facilitation program design, including system structure and organization; program access and delivery; practitioner standards and professional development; public awareness and outreach; evaluation and continuous program improvement.¹¹

- D. The restructuring of Virginia's IEP facilitation program will be a substantial undertaking. However, if executed well with a sufficient number of qualified IEP facilitators and promoted on an ongoing basis, it will be a worthwhile investment that will likely reduce the escalation of disputes to the formal and more costly dispute resolution options of state complaints and due process hearings.

⁹ It is recognized that the VDOE does have a contract with the Jimmy and Roselyn Carter School for Peace and Conflict Resolution at George Mason University in Fairfax, Virginia. The duration and terms of the contract are unknown. Notwithstanding this recommendation to restructure the program, Special Education Solutions, LLC takes no position on the best infrastructure to provide IEP facilitation in Virginia – that is for Virginians to decide. That is, it could be a restructuring of the existing program through the School for Peace and Conflict Resolution, with support from the VDOE on matters such as public awareness and outreach access, or an entirely new IEP facilitation program.

¹⁰ See <https://cadreworks.org/facilitation-programs/getting-started>.

¹¹ *Id.*

To ensure the VDOE has the capacity and dedicated resources to undertake the restructuring of the IEP facilitation program, it is recommended that the VDOE's Office of Dispute Resolution and Administrative Services budget be augmented with sufficient resources, including additional staff.

- E. It is recommended that VDOE allow parties to jointly request a specific IEP facilitator from the cadre of available facilitators and to appoint the selected facilitator to the facilitated IEP team meeting. The availability of this option may increase the willingness of the parties to access IEP facilitation and encourages the parties to work together at the onset of the process.
- F. The VDOE must collect, track, analyze, and publicly report data on the number of IEP facilitations conducted and the outcomes of each IEP facilitation meeting.

State Parent Ombudsman for Special Education

- A. It is recommended that –
 - 1. The Office of Dispute Resolution and Administrative Services budget be augmented to provide a full-time VDOE staff member to assist the Ombudsman in the duties of the office and the implementation of the recommendations in the final external study report to enhance utilization of the resource and user satisfaction.
 - 2. The VDOE to provide formal targeted pre-service and in-service training by a neutral trainer for the Ombudsman and staff on, at least, the state and federal laws and regulations governing special education (including Section 504 of the Rehabilitation Act if that is retained as a resource area) and the dispute resolution options of mediation, state complaints, and due process hearings.
 - 3. The VDOE to develop and implement an initial promotional campaign at the school level, enlisting PEATC, PTA, and other parent organizations on effective strategies to get the information to the users of the resource and to maintain visibility.
 - 4. The Ombudsman regularly visit in person different regions of the state to engage with parents and educators to promote the resources of the office and to hear comments and recommendations to enhance the visibility and effectiveness of the office.
 - 5. The VDOE develop or adopt parent-friendly resources on the VDOE Ombudsman website, such as brochures and a video, to supplement the one-page summaries.
 - 6. The VDOE supplement the Office of Dispute Resolution and Administrative Services' library with additional parent and educator

friendly resources on the development and utilization of early conflict resolution skills for both school personnel and parents.

7. The VDOE consider the efficacy of conducting annual trainings to school personnel, parents, and advocates on early conflict resolution skills.¹²
8. The VDOE develop and implement an evaluation survey to be provided after an individual has contacted the Ombudsman. The survey must be brief, anonymous, satisfaction-based, and allow for comments.

¹² PEATC and the VDOE have been selected by CADRE to participate in a Collaborative State Technical Assistance Workgroup on Local-Level Capacity-Building. This effort can also support capacity building to implement a range of effective and equitable early dispute resolution options.