

DMS REPORT

DIFFERENTIATED MONITORING AND SUPPORT OFFICE OF SPECIAL EDUCATION PROGRAMS U.S. DEPARTMENT OF EDUCATION

STATE VIRGINIA

DATE JUNE 23, 2020

IDEA PART B

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

June 23, 2020

Honorable James Lane
Superintendent
Virginia Department of Education
P.O. Box 2120
Richmond, Virginia 23218
james.lane@doe.virginia.gov

Dear Superintendent Lane:

This letter provides a summary of the results of the on-site monitoring visit conducted by the U.S. Department of Education's Office of Special Education Programs (OSEP) on May 28 and 29, 2019.¹ The purpose of this monitoring visit was to examine your State's compliance with the general supervision and dispute resolution requirements in Part B of the Individuals with Disabilities Education Act (IDEA).

Participants during the visit included staff from Virginia Department of Education's (VDOE), Office of Special Education, Office of Dispute Resolution and Administrative Services, and Office of Program Improvement.

OSEP selects States for on-site monitoring in two ways: 1) a risk assessment conducted of all States; and 2) emerging issues that come to our attention. As explained in OSEP's announcement letter dated May 6, 2019, this monitoring visit occurred due to an emerging issue. Specifically, OSEP received 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 related to the State's general supervisory process and the implementation of the IDEA dispute resolution requirements.

The enclosure describes the following: 1) Factual Background; 2) OSEP analysis; 3) OSEP conclusions; and 4) Required Actions/Next Steps. Specifically, details about the findings of noncompliance, along with the respective citation(s), and the corrective action required to address each finding of noncompliance are included in the enclosure.

¹ Monitoring is broadly defined as including activities examining both compliance and performance issues and encompasses traditional monitoring reviews and technical assistance activities.

We appreciate your efforts to improve results for children with disabilities. If you have any questions, please contact Koko Austin, your OSEP State Lead, at 202-245-6720.

Sincerely,

/s/

Laurie VanderPloeg

Director

Office of Special Education Programs

cc: Samantha Hollins
State Director of Special Education
samantha.hollins@doe.virginia.gov

Enclosure

ENCLOSURE

Background

The Office of Special Education Programs (OSEP) conducted this on-site visit to review the State's general supervision system, including its monitoring and dispute resolution systems, with a focus on the State's implementation of Individuals with Disabilities Education Act (IDEA) Part B requirements. This on-site visit occurred because OSEP had received communications from numerous parents and advocates alleging that the Virginia Department of Education (VDOE) was not fulfilling its general supervisory responsibilities under IDEA Part B.

In preparation for its monitoring visit, OSEP reviewed the following:

- The State's Federal fiscal year (FFY) 2018 and FFY 2019 applications for funds under IDEA Part B;
- Information on the State's website related to IDEA Part B;
- The State's policies and procedures in areas relevant to general supervision and dispute resolution;
- Emails and phone calls from parents and advocates; and
- Other pertinent information related to the State's efforts to improve results for children with disabilities utilizing its IDEA Part B systems.

Compliance

General Supervision

While on-site, OSEP conducted interviews with the State Director of Special Education and members of her staff responsible for general supervision and dispute resolution. Staff included Patricia Haymes, Arthur Stewart, and Jeff Phenicie. During the on-site visit, the State explained that there are three main components of VDOE's monitoring system:

- 1) *On-site comprehensive reviews*: VDOE conducts a risk assessment to select local educational agencies (LEAs) for on-site visits. The risk assessment is primarily based upon the LEAs' data for the State Performance Plan/Annual Performance Report (SPP/APR) and the LEAs' annual determinations under Section 616(d) of IDEA, with additional factors used to refine its list of LEAs selected for on-site monitoring. VDOE reported that it conducts on-site monitoring of four to six of its 132 LEAs annually.
- 2) *Desk audits*: Desk audits are conducted of all LEAs annually to collect SPP/APR compliance indicator data.
- 3) *Dispute Resolution*: State complaints, mediation, and due process hearings are used to address allegations of noncompliance.

Legal Requirements

Pursuant to 20 U.S.C. § 1412(a)(11) and 34 C.F.R. § 300.600(a), each State must exercise general supervision over all educational programs administered in the State for children with disabilities to ensure that all such programs meet the educational standards of the State educational agency (SEA) and the requirements of Part B of IDEA. In order to effectively monitor implementation of Part B of IDEA, as required by 20 U.S.C. §§ 1412(a)(11) and 1416(a), 34 C.F.R. §§ 300.149(b) and 300.600(a) and (b), and 20 U.S.C. § 1232d(b)(3)(A), the State must conduct monitoring activities with a primary focus on improving educational results and functional outcomes for all children with disabilities, and must ensure that its public agencies are in compliance with program requirements. In addition, under 2 C.F.R. § 200.331(d)(1), all pass-through entities (here, the VDOE) must, among other requirements, monitor the activities of the subrecipient (here, LEAs) as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward. Pursuant to 20 U.S.C. § 1232d(b)(3)(E), the State must ensure the correction of deficiencies in program operations identified through monitoring. Under 34 C.F.R. § 300.600(e), the State must ensure that it identifies noncompliance and that the noncompliance is corrected as soon as possible and in no case later than one year from the State's identification of the noncompliance. Further, under 2 C.F.R. § 200.331(d)(2), pass-through entity monitoring of the subrecipient must include among other elements, following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and other means.

Factual Background

In light of the concerns expressed by parents, OSEP interviewed State officials regarding whether the State had procedures in place to address credible allegations of noncompliance that are brought to the State's attention outside of these three processes. During those interviews, State officials confirmed that VDOE does not have procedures in place, outside of formal dispute resolution procedures, to identify whether noncompliance has occurred, even in situations where it appears that the State was provided with credible information about potential noncompliance with IDEA Part B requirements by an LEA that the LEA failed to address. In response to OSEP's question as to whether the State could conduct targeted monitoring of those LEAs in situations where this type of credible information is brought to the State's attention, the State replied that it had no procedure in place to follow up on any allegations of noncompliance that are not the subject of a formal complaint. The following are two specific examples of situations where parents provided the State with credible information of alleged noncompliance with IDEA requirements by an LEA that the LEA failed to address.

Prior to the on-site visit, OSEP received a copy of a State complaint filed on behalf of a group of children alleging systemic noncompliance by an LEA. The alleged noncompliance included failure to conduct timely evaluations, insufficient access to the general education curriculum, and falsified documentation of provision of services required by the individualized education program (IEP). Once the complaint was filed, the State declined the parents' offer to provide additional information and dismissed the complaint because the allegations occurred more than

one year from the date that the complaint was filed. In this situation though, the parents informed OSEP that they had made numerous attempts to contact the State and requested that the State address the issues outside of the State complaint process. The complainants indicated that “[t]he reasons the issues were older than one year is that they “spent approximately one year exhausting all possible means of resolving their concerns at the local level, and mediation was neither mentioned nor offered when [they] reached out to the Ombudsman.”

In still another situation brought to OSEP’s attention, both the OSEP State Lead and VDOE staff were copied on emails between a parent and school staff indicating that over a period of several months, the parent alleged that staff from a high school were not providing the special education and related services required by a student’s IEP. The parent made numerous requests for the State to intervene with the LEA, but the State took no action, and redirected the parent to the LEA. Consistent with the information shared by the State during the on-site visit, the State acknowledged that it had informed the parent that it takes no further action to determine whether alleged noncompliance by the LEA has occurred unless the parent files a written State complaint. The State confirmed that this is its practice in its February 8, 2019 email to OSEP as well as in additional emails from parents copied to OSEP or directly provided to OSEP. In these emails the State advised parents that allegations of noncompliance must be raised through the formal dispute resolution process. The State’s emails to parents also redirect the parents to the LEA.²

OSEP Analysis

Regarding the situations described above, OSEP recognizes that the State complaint and due process complaint procedures are crucial dispute resolution mechanisms that address allegations of noncompliance raised by parents and, in the case of State complaints, also by other concerned organizations or individuals. However, the State’s general supervisory and monitoring responsibilities are broader than these dispute resolution mechanisms and must encompass some means of considering, and if appropriate, addressing, credible allegations of LEA noncompliance with IDEA requirements. Completely ignoring credible allegations of noncompliance is not a reasonable method of exercising the State’s general supervisory responsibilities. OSEP is aware that many States properly have a practice of responding proactively -- through investigation or other means -- outside of the formal dispute resolution mechanisms, when parents or other stakeholders provide credible information alleging noncompliance by an LEA. That is, a State’s procedures implementing its general supervisory responsibilities must be reasonably designed to enable the State to integrate and, as appropriate, consider and address credible allegations of LEA noncompliance with IDEA requirements in a timely manner.

It is also important to note that the State’s current monitoring system does not appear sufficiently comprehensive to ameliorate the practice of ignoring credible allegations of LEA

² In an email to a parent who alleged noncompliance by an LEA, the State Director responded on August 6, 2019, in part, providing links to the State’s State Complaint and Due Process webpages and a statement “in the future, communications you share regarding concerns or allegations of noncompliance will need to be received by one of the formal processes detailed above in order for the Department to respond appropriately. We note that, for parents, meeting directly with the school division is vital, as this Department strongly believes that special education concerns are better resolved at the local level”. In another email addressed to a parent from the State’s Dispute Resolution Director dated June 7, 2019, the parent is referred to the LEA: “As always, we encourage parents to address issues first at the local level, or in a less adversarial avenue such as mediation.”

noncompliance. Currently, VDOE only conducts on-site monitoring of a very limited number of LEAs each year (between 3% and 4.5% of all LEAs)³ and given that the State does not appear to have any other mechanism for including, in its monitoring system, the ability to consider and address credible allegations of LEA noncompliance, the State is not reasonably exercising its general supervisory and monitoring responsibilities to ensure LEA compliance consistent with the requirements in IDEA, the General Education Provisions Act, and the Uniform Guidance cited above. Therefore, OSEP has determined that VDOE must revise its general supervision and monitoring system consistent with the required actions set forth below.

OSEP Conclusions

Based on the review of documents, analysis of data, and interviews with State personnel, OSEP concludes that the State 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 Part B of IDEA, and to effectively monitor the implementation of Part B of IDEA, as required by 20 U.S.C. §§ 1412(a)(11) and 1416(a), 34 C.F.R. §§ 300.149(a) and (b) and 300.600(a) and (b), 20 U.S.C. § 1232d(b)(3)(A) and (E), 34 C.F.R. § 300.600(e) and 2 C.F.R. § 200.331(d)(1)–(2).

Required Actions/Next Steps

Within 90 days of the date of this letter, consistent with the State's general supervisory and monitoring responsibilities described above, VDOE must provide a written plan to OSEP that describes how it will ensure that all of its LEAs meet the requirements of Part B of IDEA. The State's plan must include a description of the steps VDOE will take to ensure that:

1. The State establishes and will implement general supervision and monitoring procedures and practices that are reasonably designed to ensure that LEAs meet IDEA's program requirements. The State's procedures and practices must ensure that the State's systems for review of LEA compliance data and other information are sufficiently comprehensive to identify noncompliance in a timely manner and ensure timely correction of any identified noncompliance consistent with the requirements in 20 U.S.C. § 1232d(b)(3)(A) and (E) and 34 C.F.R. § 300.600(e) and OSEP Memorandum 09-02 (OSEP Memo 09-02), dated, October 15, 2008.
2. Specifically, the State must revise its general supervision and monitoring system to include procedures and practices that are reasonably designed, as appropriate, to consider and address credible allegations of LEA noncompliance in a timely manner.
3. The State must provide a copy of the notification to be issued to all LEAs, parent advocacy groups and other interested parties advising them that the State has revised its

³ Assuming no selections of the same LEAs from prior years during the monitoring cycle, this results in a 22-year to 33-year period for monitoring all LEAs. That is, more than three generations of students with disabilities could graduate from an LEA before the State conducts its on-site monitoring for compliance with IDEA requirements—even where the SEA is on notice of credible information alleging noncompliance.

policies, procedures, and practices for general supervision and monitoring to be consistent with the required actions described above.

Dispute Resolution Procedures

General Legal Requirements

The State must have reasonably designed dispute resolution procedures and practices if it is to effectively implement:

1. The State complaint procedures requirements in 34 C.F.R. §§ 300.151 through 300.153, and 20 U.S.C. § 1221e-3;
2. The mediation requirements in 20 U.S.C. § 1415(e) and 34 C.F.R. § 300.506; and
3. The due process complaint and impartial due process hearing and expedited due process hearing requirements in 20 U.S.C. §§ 1415(b)(6) – (8), (c)(2), (f) – (i), (k)(3) and (4), and (o) and 34 C.F.R. §§ 300.500, 300.507 through 300.518 and 300.532.

State Complaint Procedures

Legal Requirements

Under 34 C.F.R. § 300.151, each SEA must adopt written procedures for resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of 34 C.F.R. § 300.153. Under 34 C.F.R. § 300.153, the complaint, among other requirements, must be signed and written and contain a statement alleging that a public agency has violated a requirement of Part B of the Act or the Part B regulations including the facts on which the statement is based. Under 34 C.F.R. § 300.153(c), the complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received.

Under 34 C.F.R. § 300.152(a), the minimum State complaint procedures must include a time limit of 60 days after the complaint is filed to:

1. Carry out an on-site investigation, if the SEA determines that an investigation is necessary;
2. Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;
3. Provide the public agency with the opportunity to respond to the complaint, including, at a minimum—
 - a. At the discretion of the public agency, a proposal to resolve the complaint; and
 - b. An opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation consistent with 34 C.F.R. § 300.506;
4. Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and

5. Issue a written decision to the complainant that addresses each allegation in the complaint and contains—
 - a. Findings of fact and conclusions; and
 - b. The reasons for the SEA’s final decision.

Under 34 C.F.R. § 300.152(b)(1), the State’s procedures must permit an extension of the 60-day time limit only if:

1. Exceptional circumstances exist with respect to a particular complaint, or
2. The parent (or individual or organization, if mediation or other alternative means of dispute resolution is available to the individual or organization under State procedures) and the public agency involved agree to extend the time to engage in mediation under 34 C.F.R. § 300.152(a)(3)(ii), or to engage in other alternative means of dispute resolution, if available in the State.

Factual Background

OSEP received information that the State informed a parent that the State would not accept further complaints from that parent. According to the State staff, communications from this particular parent are handled through a process different from that used for other parents. For this parent, all communications are conducted through email. While the parent communicates very frequently with the SEA about matters that do not constitute a violation of IDEA, the OSEP State Lead reviewed emails dating back to 2018 that included copies of at least two written State complaints filed by this parent alleging violations of IDEA requirements. When the parent received no response, the parent refiled these same complaints alleging noncompliance with IDEA requirements several times. OSEP has no information indicating that in either of these situations a formal complaint resolution was conducted, or if a letter of inquiry was issued.⁴

OSEP Analysis

Regarding the situation discussed above, while it is not inconsistent with IDEA for a State to establish a communication plan with a parent, the State remains responsible for resolving any complaint that meets the requirements of 34 C.F.R. § 300.153. Therefore, a communication plan with an individual parent cannot deny or delay the right of a parent to file a State complaint alleging a violation of Part B of IDEA or the Part B regulations and to have that complaint resolved in accordance with 34 C.F.R. §§ 300.151 through 300.153.

⁴ In Virginia, a letter of inquiry is issued if a submitted complaint does not meet the minimum requirements for a State complaint under 34 C.F.R. § 300.153. This is consistent with VDOE’s *Complaint Resolution Procedures*, which state that “If ODRAS determines that the complaint is insufficient for any reason, the complainant and LEA are notified in writing. The complainant is given directions for resubmission of the complaint to ODRAS. Resubmitted complaints are treated as new complaints.” http://www.doe.virginia.gov/special_ed/resolving_disputes/complaints/complaint_resolution_procedures.pdf

OSEP Conclusions

Based on the review of documents, analysis of data, and interviews with State personnel, OSEP concludes that the State is not exercising its general supervisory and monitoring responsibilities to implement its State complaint resolution system in a manner consistent with all of the requirements in 20 U.S.C. § 1412(a)(11)(A) and 1416(a) and 34 C.F.R. §§ 300.149 and 300.600 and 34 C.F.R. §§ 300.151 through 300.153 for the following reason:

The State does not ensure that it resolves every complaint that meets the requirements of 34 C.F.R. § 300.153 in accordance with the minimum State complaint procedures in 34 C.F.R. § 300.152, specifically in the situation where the State has developed a communication plan with an individual parent-complainant.

Required Actions/Next Steps

Within 90 days of the date of this letter, the State must submit to OSEP documentation demonstrating that the State has established and will implement procedures and practices to ensure that the State resolves every complaint that meets the requirements in 34 C.F.R. § 300.153 in accordance with the minimum State complaint procedures in 34 C.F.R. § 300.152, even in a circumstance where the State develops a communication plan with an individual complainant

Due Process Complaint and Hearing Procedures

Legal Requirements

Under 20 U.S.C. § 1415(f)(1)(B) and 34 C.F.R. § 300.510(a)(1), the LEA must convene a resolution meeting within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under 34 C.F.R. § 300.511. Under 34 C.F.R. § 300.510(a)(3), the resolution meeting need not be held if the parent and the LEA agree in writing to waive the meeting; or the parties agree to use the mediation process described in 34 C.F.R. § 300.506. Under 34 C.F.R. § 300.510(b)(1)–(2), if the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur. Under 34 C.F.R. § 300.510(c) the 30-day resolution period may be adjusted to be shorter or longer if one of the circumstances identified in that paragraph are present. Under 34 C.F.R. § 300.515(a), the public agency must ensure that not later than 45 days after the expiration of the 30-day resolution period under § 300.510(b), or the adjusted time periods described in 34 C.F.R. § 300.510(c), a final decision is reached in the hearing; and a copy of the decision is mailed to the parties, unless under 34 C.F.R. § 300.515(c), a hearing officer grants a specific extension of the 45-day timeline at the request of either party.

For due process complaints requesting expedited due process hearings filed under 34 C.F.R. § 300.532(a), the resolution meeting must occur within seven days of receiving notice of the due process complaint, unless the parents and the LEA agree in writing to waive the resolution meeting or the parties agree to use the mediation process described in 34 C.F.R. § 300.506. The expedited due process hearing must occur within 20 school days of the date the complaint requesting the hearing is filed, and the hearing officer must make a determination within 10 school days after the hearing, as required by 34 C.F.R. § 300.532(c)(2).

Factual Background

Virginia operates a one-tier due process hearing system and uses the list of hearing officers maintained by the Office of the Executive Secretary of the Supreme Court of Virginia and its Rules of Administration for the names of individuals to serve as special education hearing officers. 8VAC20-81-210(C).

During the on-site visit, the State informed OSEP that it does not have procedures in place to monitor its LEAs' compliance with the resolution period timelines. Specifically, VDOE acknowledged that it has no mechanism to track whether an LEA has convened a resolution meeting within 15 days of receiving notice of the parent's due process complaint filed under 34 C.F.R. § 300.507, or within seven days of receipt of the parent's due process complaint in the case of an expedited due process hearing requested under 34 C.F.R. § 300.532(a), unless the resolution meeting need not occur consistent with 34 C.F.R. § 300.510(a)(3) or 34 C.F.R. § 300.532(c)(3)(i) for an expedited due process complaints. Further, VDOE staff informed OSEP that VDOE assigns the hearing officer the responsibility for inquiring about the status of the resolution meeting and resolution period during the pre-hearing conference, and that the hearing officer does not report on whether a resolution meeting was held or whether the 30-day resolution period was adjusted to be shorter or longer until the complaint is dismissed or after the hearing officer has issued a decision. OSEP reviewed 26 hearing decisions posted on the State's website from 2016 to 2019. None of these decisions included a factual description of whether the LEA convened a resolution meeting or whether the resolution period was adjusted to be shorter or longer, consistent with 34 C.F.R. § 300.510(c). Further, the State did not indicate that this information was reported by the hearing officer through some other means.

OSEP Analysis

On July 16, 2019, the State provided OSEP with a copy of its Due Process Log used to track and monitor due process timelines. In the 20th column identified as "Res Meeting Conducted Y/N", there is a "yes" or "no" indicating whether a resolution meeting was held. The log does not contain tracking of the resolution meeting dates or whether the 30-day resolution period was adjusted to be longer or shorter, consistent with 34 C.F.R. §300.510(c).

Consistent with the finding above, VDOE also acknowledged that, unless the hearing officer specifically addresses it in the due process hearing decision:

1. It has no mechanism to track whether hearing officers initiate the 45-day timeline for a hearing decision at the conclusion of the 30-day resolution period or an adjusted resolution period; and
2. In the case of an expedited due process complaint, it has no mechanism for ensuring that the hearing occurs within 20 school days of receipt of the complaint requesting the expedited hearing, or that the hearing officer makes a determination within 10 school days after the hearing.

The State's tracking log calculates all hearing decision due dates as 75 days from the complaint "date filed" including those hearings identified as expedited.

OSEP Conclusions

Based on the review of documents, analysis of data, and interviews with State personnel, OSEP concludes that:

1. The State is not exercising its general supervisory and monitoring responsibilities in accordance with 20 U.S.C. §§ 1412(a)(11)(A) and 1416(a) and 20 U.S.C. § 1232d(b)(3)(A) and 34 C.F.R. §§ 300.149(a) and (b) and 300.600(a) and (d)(2) with regard to the following:
 - a. VDOE does not ensure and document that LEAs track the implementation of the timelines for the resolution process for due process complaints filed by parents in 34 C.F.R. § 300.510 and for calculating the beginning and expiration of the 45-day due process hearing decision timeline in 34 C.F.R. § 300.515(a), unless under 34 C.F.R. § 300.515(c), a hearing officer grants a specific extension of the 45-day timeline at the request of a party to the hearing; and
 - b. VDOE does not ensure that its LEAs track the implementation of the resolution timelines in 34 C.F.R. § 300.532(c)(3) and that hearing officers track the implementation of the expedited due process hearing timelines in 34 C.F.R. § 300.532(c)(2) in order to properly track due process hearing decision timelines.
2. Consequently, OSEP concludes that the State does not have procedures and practices that are reasonably designed to ensure a timely resolution process for due process complaints filed by parents or the timely adjudication of due process complaints that result in due process hearings, or a timely resolution process for expedited due process complaints, and the timely adjudication of expedited due process hearings.
3. Because the State does not have a mechanism to reliably determine the date on which the 45-day due process hearing timeline in 34 C.F.R. § 300.515(a) commences, the State is unable to report valid and reliable data on the adjudication of due process complaints as required under Section 618(a)(1)(F) of IDEA.
4. Because the State does not have a mechanism for reliably determining whether expedited hearing timelines are met, the State is unable to report valid and reliable data on expedited due process hearings in accordance with Section 618(a) of IDEA.

Required Actions/Next Steps

Within 90 days of the date of this letter, the State must:

1. Submit documentation demonstrating that the State has revised its dispute resolution procedures and practices and is implementing those revisions, to ensure that:
 - a. The State has a mechanism for tracking the timelines for the resolution process required under 34 C.F.R. § 300.510 to determine when: resolution meetings occur; the 30-day resolution period or the adjusted resolution period has concluded; and the 45-day hearing timeline commences;

- b. The State has a mechanism for tracking the timelines for resolution meetings and the resolution period for expedited due process complaints in 34 C.F.R. § 300.532(c)(3) and for determining whether expedited due process hearings and determinations in those hearings occur within the timelines required in 34 C.F.R. § 300.532(c)(2); and
 - c. Hearing officers are receiving appropriate training allowing them to apply and track the resolution period timelines for all due process hearings.
 2. Submit documentation demonstrating that the State has reviewed its due process hearing data collection processes and revised them, as necessary, to ensure that, consistent with the information set forth above, it will be able to provide accurate data on fully adjudicated hearings and hearing decisions with allowable extensions for the IDEA Section 618 dispute resolution data submission for due process hearings conducted pursuant to 34 C.F.R. §§ 300.511–300.515 and for expedited due process hearings conducted pursuant to 34 C.F.R. § 300.532 for the School Year 2020–2021 data collection. The reporting year for this data collection is July 1, 2020 through June 30, 2021.
 3. Submit a copy of the notification to be issued to all hearing officers, LEAs, parent advocacy groups, and other interested parties advising them that the State has revised and is implementing procedures for tracking the timeliness of the resolution process and fully adjudicated due process hearing decisions to be consistent with the required actions described above.

Mediation

Legal Requirements

Under 20 U.S.C. § 1415(e)(1) and 34 C.F.R. § 300.506(a), each SEA must ensure that procedures are established and implemented to allow parties to disputes involving any matter under this part, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process. Under 20 U.S.C. § 1415(e)(2)(A) and 34 C.F.R. § 300.506(b)(1), the State's procedures must ensure that the mediation process—

1. Is voluntary on the part of the parties;
2. Is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the IDEA; and
3. Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques. Under 34 C.F.R. § 300.506(c)(1)(i)–(ii), an individual who serves as a mediator may not be an employee of the SEA or the LEA that is involved in the education or care of the child and may not have a personal or professional interest that conflicts with the person's objectivity.

Factual Background

Communications from parents, written documentation provided by VDOE, and information provided by the State's mediation coordinator during the monitoring visit consistently describe the active participation of the State's mediation coordinator in the mediation sessions themselves, in addition to the mediator of record. In a memo dated January 2, 2008 provided to OSEP, the mediation coordinator outlined a process of co-mediating when the mediator is new and indicated that the mediator could "proceed with the ability to call me to discuss things during the course of the mediations." During the site visit, the mediation coordinator outlined a similar process but stated that he currently attends all mediations for "quality assurance" purposes.

OSEP Analysis

The State's practice of using the State's mediation coordinator, an employee of the SEA, to co-mediate when a mediator is new, is inconsistent with the requirement that the mediator not be an employee of the SEA, be impartial, and have no personal or professional interest that would conflict with the person's objectivity. Further, the routine and apparently proactive presence of the SEA's mediation coordinator at mediation sessions could potentially operate to impede the impartiality and objectivity of the mediator of record, because in general, the mediator of record could be improperly influenced by the presence of, and direct oversight by, the person who coordinates and oversees the entire mediation program. That is, the role of the State's mediation coordinator, by virtue of his or her affiliation with the SEA, is a professional interest that could operate to conflict with the mediator's objectivity and impartiality. The use of a single mediator is important to ensure clear communication and accountability.⁵

It also is important to note that while quality assurance and training are valid objectives, there are other methods of evaluating or improving the quality and effectiveness of the mediator that do not require direct oversight in the mediation sessions. For example, some States utilize review forms where the parties to the mediation are able to provide feedback on various measures. Self-assessments and mock mediations also can provide valuable feedback and training opportunities.

OSEP Conclusions

Based on the review of documents and interviews with State personnel, OSEP concludes that the State does not have procedures and practices that are reasonably designed to implement a mediation process that is consistent with the requirements of 20 U.S.C. § 1415(e) and 34 C.F.R. § 300.506. Specifically, the State's practice of having its mediation coordinator co-mediate when the mediator is new, and permitting its mediation coordinator to be present at the mediation sessions is inconsistent with the requirement in 34 C.F.R. § 300.506(c)(1) that the State's procedures ensure that a mediator is not an employee of the SEA and has no personal or professional interest that would conflict with the mediator's objectivity.

⁵ See Question A-18 in OSEP's Dispute Resolution Q's & A's, citing 64 FR 12611-12612 (Mar. 12, 1999).

Required Actions/Next Steps

Within 90 days of the date of this letter, the State must provide:

1. Documentation demonstrating that the State has established revised procedures and practices, and is implementing those revisions, to ensure that the State's mediation coordinator, an employee of the SEA, does not co-mediate and is not present during mediation sessions.
2. A copy of the notification to be issued to all LEAs, parent advocacy groups, and other interested parties advising them that the State has implemented revised procedures and practices that prohibit the attendance of any employee of VDOE at a mediation session.

Independent Educational Evaluations

Legal Requirements

A parent has the right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to certain conditions. If a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either:

1. Initiate due process procedures under 34 C.F.R. §§ 300.507 through 300.513 to show that its evaluation is appropriate; or
2. Ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing under 34 C.F.R. §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502.

Once parental consent is obtained, each public agency must conduct a full and individual initial evaluation in accordance with 34 C.F.R. §§ 300.304 through 300.306 before the initial provision of special education and related services to a child with a disability under this part. 34 C.F.R. §§ 300.300(a) and 300.301(a). The public agency must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4); see also 20 U.S.C. § 1414(b)(3)(B). In addition, in conducting an initial evaluation (or reevaluation) of a child, the public agency must ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6).

Factual Background

Under Virginia Administrative Code 8 VAC20-81-170(B)(2)(a) and (e), “[t]he parent(s) has the right to an independent educational evaluation at public expense if the parent(s) disagrees with an evaluation component obtained by the local educational agency,” and “[a] parent is entitled to only one independent educational evaluation at public expense each time the public educational agency conducts an evaluation component with which the parent disagrees.” In communications

with OSEP, the State has maintained that a parent is not entitled to an IEE if the parent is requesting a specific assessment that had not been previously conducted by the LEA because that assessment cannot be “an evaluation component with which the parent disagrees”, 8VAC20-81-170(B)(2)(a). For example, if the LEA did not conduct an evaluation of the need for Occupational Therapy as part of its evaluation of the student, then the State interprets its Code to prohibit an IEE that addresses Occupational Therapy. The State asserts that because its regulations refer to “evaluation component,” a parent can only request an IEE for a specific assessment that was conducted by the LEA as part of the original evaluation. Under the State’s interpretation, the parent cannot request an IEE for an assessment in a specific area of need that was not included in the original evaluation.

OSEP has received several communications from stakeholders alleging that VDOE’s policy related to IEEs at public expense is inconsistent with IDEA. Specifically, OSEP has received copies of communications between Virginia LEAs and parents documenting that LEAs have denied parent requests for IEEs because the parent requested an assessment of their child in an area that was not previously conducted during the initial evaluation or reevaluation. In those situations, the LEA issued a “denial letter” in lieu of initiating a hearing to show that its evaluation is appropriate. However, in one of the communications with a parent that was provided to OSEP, the LEA agreed to grant the parent’s request for an IEE only in those areas in which the child was previously evaluated by the public agency.

OSEP Analysis

The provisions in Virginia Administrative Code 8VAC20-81-170(B)(2)(a) and (e), as interpreted by the State and implemented by its LEAs, are inconsistent with the language and intent of 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502(b), which do not limit a parent’s right to an IEE at public expense to circumstances where the parents disagree with the results of a specific evaluation component already conducted by the public agency.

When presented with inquiries from individuals about the scope of a parent’s right to an IEE at public expense, since 1995, OSEP has consistently taken the position that a parent’s right to an IEE at public expense is not limited to those assessments that were part of the public agency’s evaluation. OSEP’s interpretation is supported by the plain language of the statute and regulation, which do not restrict a parent’s right to an IEE at public expense to those assessments previously conducted by the public agency. See OSEP Letter to Fisher (1995); OSEP Letter to Baus (2015), available at: <https://sites.ed.gov/idea/idea-files/policy-letter-february-23-2015-to-debbie-baus/>; and OSEP Letter to Carroll (2016), available at: <https://sites.ed.gov/idea/idea-files/policy-letter-october-22-2016-to-jennifer-carroll/>. That is, disagreement over the evaluation conducted by an LEA includes a disagreement about the appropriate scope of the assessment, such as when an LEA fails to assess suspected areas of a child’s educational needs simply because of shortages of evaluation personnel. In addition, OSEP has explained that a parent’s right to an IEE is not contingent upon the public agency being first afforded an opportunity to conduct an assessment in an area that was not part of the initial evaluation or reevaluation. See OSEP Letter to Thorne (1990) and OSEP letter to Carroll (2016).

OSEP Conclusions

Based on a review of documents and interviews with State personnel, for the reasons set forth above, OSEP concludes that the provision of Virginia's regulation, 8VAC20-81-170(B)(2)(a) and (e), are inconsistent with 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502, because the State's regulation restricts a parent's right to an IEE at public expense to only those areas in which the public agency had previously evaluated the child.

Required Actions/Next Steps

Within 90 days of the date of this letter, the State must:

1. Submit a written assurance to OSEP specifying that as soon as possible but in no case later than one year from the date of this report, in accordance with 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502, the State will revise Virginia Administrative Code 8VAC20-81-170(B)(2)(a) and (e) to, at a minimum, remove the word "component" following the word "evaluation."
2. Submit to OSEP a copy of a memorandum that the State has issued to all LEAs, parent advocacy groups, and other interested parties instructing LEAs to comply with 20 U.S.C. 1415(b)(1) and 34 C.F.R. § 300.502(b) by also providing an IEE at public expense in areas where the LEA previously has not conducted its own evaluation, unless the LEA has demonstrated, through a due process hearing decision, that its evaluation is appropriate; and advising that the State will be revising Virginia Administrative Code 8VAC20-81-170(B)(2)(a) and (e), to, at a minimum, remove the word "component" following the word "evaluation" in accordance with 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502(b).
3. Upon completion of the changes to the Administrative Code, submit to OSEP documentation of the revisions.
4. Review and revise its policies, procedures and practices regarding the IEE process, and require its LEAs to conduct a similar review of their policies, procedures, and practices, to ensure that pending revision of Virginia Administrative Code 8VAC20-81-170(B)(2)(a) and (e):
 - a. VDOE and its LEAs do not limit a parent's right to obtain an IEE at public expense to the areas of assessment or evaluation components that were previously conducted by the public agency; and
 - b. In a circumstance where a parent requests an IEE at public expense of their child in an area not previously assessed by the public agency, the public agency, without unnecessary delay, either:
 - i. Initiates a hearing under 34 C.F.R. § 300.507 to show that its evaluation is appropriate; or
 - ii. The public agency must ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing under 34 C.F.R. § 300.507 that the evaluation obtained by the parent did not meet agency criteria.