UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

Application of the

Virginia Department of Education,

Applicant

Proposed withholding Proceeding

Docket No. 94-76-O

HEARING OFFICER'S INITIAL DECISION

I. Background

This is a proceeding initiated by the United States Department of Education ("ED"), through the Assistant Secretary for Special Education and Rehabilitative Services ("Assistant Secretary") to withhold, pursuant to 20 U.S.C. § 1416, Fiscal Year 1995 ("FY 1995") funds made available to the Virginia Department of Education ("VaDOE" or "Applicant") under Part B of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA" or "IDEA-B"). ED has proposed to withhold such funds because of the Applicant's failure or refusal to mandate local educational agencies' provision of special education services to students with disabilities suspended long-term or expelled for conduct unrelated to their disabilities.

VaDOE has challenged the proposed withholding on several grounds. It argues that ED may not withhold FY 1995 IDEA-B funds for Virginia's conceded refusal to mandate special education services to the above students because to do so amounts to ED's imposition of a new grant condition subsequent to its conditional approval on October 29, 1992, (with conditions not herein relevant) of Virginia's 1993-1995 IDEA-B plan. Staton T. 206; VaDOE Ex. 12, Attachment 1-1. [1] Substantively, the Applicant contends that neither IDEA-B nor its regulations requires the provision of special education services to students with disabilities expelled or suspended long-term for conduct unrelated to their disabilities. Once appropriate professionals have determined that the student's misconduct is unrelated to his or her disability, and that the current educational placement is appropriate, the Applicant believes that local educational officials must have the option to treat the student in the same manner as they would students without disabilities.

VaDOE contends that ED's contrary view of the statute amounts to a legislative rule that must be promulgated pursuant to the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553 ("APA"). Finally, VaDOE argues that even if ED is correct in its statutory interpretation, the proposed remedy of withholding all unspent FY 1995 IDEA-B funds is draconian and disproportionate to the alleged failure to comply with the statute.

For its part, ED contends that IDEA-B, and especially its requirement that eligible school children be provided with a free appropriate public education ("FAPE"), 20 U.S.C. § 1412 (1), requires states to provide special education to children with disabilities suspended long-term or expelled, although such special education may be delivered in another setting. ED points to the recent passage of the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (enacted October 20, 1994), which amends the Gun-Free Schools Act of 1994, Pub. L. No. 103-227, 108 Stat. 270 (1994) (Title X, Part B of Goals 2000: Educate America Act, 108 Stat. 225), and IDEA itself, as supportive of its position. Relying on Metropolitan Sch. Dist. of Wayne Twp. v. Davila, 969 F. 2d 485 (7th Cir. 1992), cert. denied, 113 S. Ct. 1360 (1993), ED claims that its view of IDEA-B's requirements is an interpretive rather than a legislative rule and, hence, not subject to the APA's notice and comment requirements. Finally, ED asserts that, under 20 U.S.C. § 1416(a), withholding of remaining FY 1995 funds 2 is an appropriate remedy, and that the more limited withholding options identified therein are inapplicable.

By letter dated May 3, 1994, the Assistant Secretary informed Virginia's Superintendent of Public Instruction William C. Bosher, Jr., of ED's intention to institute a withholding action under 20 U.S.C. § 1416. On May 4, 1994, Secretary of Education Richard W. Riley ("Secretary") appointed the undersigned as the Hearing Officer in the above-captioned withholding action and directed that the procedures set out in 34 C.F.R. § § 300.584 - 300.586 be used herein. 3 In an order dated August 8, 1994, the Hearing Officer concluded that VaDOE would bear the burdens of production and persuasion at the hearing to be held in this matter, and further allowed the parties to conduct discovery. Thus, VaDOE must persuade the Secretary 4 not to withhold Virginia's FY 1995 IDEA-B funds as requested by the Assistant Secretary. Although the IDEA statute and applicable regulations are silent on these issues, the statute's structure made such burden allocations sensible.

The Hearing Officer's factual findings and conclusions of law in this proposed withholding action are set out below. They are based on the testimony, documentary evidence, and legal arguments adduced at the hearing, the various legal memoranda described above, and the Hearing Officer's own legal research.

As an additional preliminary matter, it may be useful to indicate what is not at issue in this proceeding. This action does not concern whether eligible school children with disabilities may be expelled or suspended long-term from their current school settings when their misconduct is not caused by their disability. The parties agree that neither the IDEA-B statute nor the regulations thereunder preclude such disciplinary action. 5 Rather, the sole substantive issue is whether IDEA-B or its regulations require the continued provision of special education services to such individuals. It is not the function of the Hearing Officer to consider the wisdom of providing such continued services, or whether providing these services is or is not good educational policy. As such, some of the testimony adduced by both parties -- see, e.g., the testimony of Lucille Brown, Edward Kelly, Robert Claric for VaDOE and the testimony of Kevin Dwyer for ED -- is somewhat beside the point. There are compelling policy arguments both for and against ED's policy of non-cessation of services, but such arguments are more appropriately directed to ED officials and Congress. With IDEA up for reauthorization this year, the time may be ripe for a fuller discussion of these issues. See H.R. Conf. Rep. No. 761, 103rd Cong., 2d Sess. 883 (1994).

Between them, IDEA and its predecessor, the Education for All Handicapped Children Act, Pub. L. No. 94-142, have been in effect for almost twenty years and yet, somewhat remarkably, ED has indicated that the instant proceeding is the first withholding proceeding under either statute. T.689. As of the time of the hearing, the proposed withholding affected some $58 million of FY 1995 IDEA-B and § 1419 pre-school funds otherwise designated for Virginia. Staton T.221-24. At least 126 and possibly as many as 153 children are affected by Virginia's policy of not providing special education services to expelled/long-term suspended children who engage in misconduct unrelated to their disability. Kitchen T.126; D Affidavit E-A-1. That Virginia would jeopardize $58 million because of a requirement that might cost them $1.35 million to implement, and that the U.S. Department of Education would seek to cut off federal funding to 128,000 Virginia children in need of special education services, Kitchen T.69-70, because of the failure to serve at most 150 children, suggests strongly that more than funding is at stake here. But whatever issues of educational philosophy may divide the parties, the focus of this proceeding must be on the legal requirements of IDEA-B and whether ED and VaDOE have complied with them.

In the balance of this decision, the Hearing Officer will consider, in order, whether IDEA-B requires the provision of continued special education to students with disabilities expelled/suspended long-term for misconduct unrelated to their disabilities; if so, whether ED's policy announcing such a requirement must be issued pursuant to APA's notice and comment provisions; if not, whether ED could impose such a "new" condition on Virginia after having conditionally approved its 1993-1995 State Plan; and, finally, if so, whether withholding Virginia's IDEA-B grant is the appropriate remedy for the statutory violation.

II. IDEA-B Requires States to Assure that Eligible Students With Disabilities Suspended Long-Term or Expelled for Conduct Unrelated to Their Disabilities Continue to Recieve Special Education Services.

While there are not many cases on point, the weight of authority holds that, while eligible children with disabilities may be disciplined through expulsion or long-term suspension 6 if their misconduct is not causally related to their disability, school districts must continue to provide special education services to such children, though such services may be provided in another setting. The leading case is S-l v. Turlington, 63S F. 2d 342 (5th Cir. 1981) (Unit B), cert. denied, 454 U.S. 1030 (1981). In Turlington, the court concluded, inter alia, that an expulsion was a change in placement invoking the procedural requirements of IDEA-B. It went on to hold that, in proper cases, students with disabilities were subject to expulsion, but added, "We cannot, however, authorize the complete cessation of educational services during an expulsion period." 635 F. 2d at 348.

Several courts have specifically adopted S-1's reasoning. See Kaelin v. Grubbs, 682 F. 2d 595, 599-600, 602 (6th Cir. 1982) (describing 5-1 decision as "well-reasoned"); Doe v. Rockingham Cty. Sch. Bd., 658 F. Supp. 403, 408 (W.D. Va. 1987); Lamont X v. Quisenberry, 606 F. Supp. 809, 818 n.7 (S.D. Oh. 1985). Only one court has rejected the reasoning directly, Doe v. Maher, 793 F. 2d 1470, 1482 (9th Cir. 1986), aff'd in part, modified in part, on other grounds sub nom. Honig v. Doe, 484 U.S. 305 (1988). The U.S. Court of Appeals for the Fourth Circuit has specifically left the issue open. ch. Ed. of Cty. of Prince William v. Malone, 762 F. 2d 1210,

1218 (4th Cir. 1985). See BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 16:11-16:12 (1991) and 16:19 (Supp. 1993); THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 137-139 (1993). See generally, Mark C. Weber, The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes, 24 U.C. DAVIS L. REV. 349 (1990); Theresa Glennon, Disabling Ambiguities: confronting Barriers to the Education of Students with Emotional Disabilities, 60 TENN. L. REV. 295, 328-30 (1993).

Since 1989, as reflected in ED Exs. 14-17 and 21-23, OSERS consistently has taken the position, first outlined in the New Inquiry 213, EDUC. HANDICAPPED L. REP. (CRR) 258 (OSERS September 15, 1989), ED Ex. 14, that IDEA-B requires the provision of special education to children with disabilities suspended or expelled far unrelated misconduct. ED's Office of Civil Rights ("OCR") has taken a different position based on its obligation to enforce a different statute, §504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, that focuses specifically on discrimination on the basis of disability in federally-assisted programs. See OCR Staff Memorandum 307, EDUC. HANDICAPPED L. REP. (CRR) OS (October 28, 1988).

To be sure, neither IDEA-B nor its regulations contains explicit language precluding cessation of special education services for the school population at issue here. Rather, the rationale for requiring continued special education services to long-term suspended/expelled children with disabilities is based on IDEA's requirement that all eligible children be provided with FAPE pursuant to 20 U.S.C. § 1412(1). This statutory provision, which is at the heart of IDEA, admits of no exceptions for dangerous students. Cf. Honig v. Doe, supra, 484 U.S. at 323 (construing stay-put provision of IDEA, 20 U.S.C. § 1415 (e) (3)). Moreover, as both Honig, 484 U.S. at 324, and Bd. of Educ. v. Rowley, 458 U.S. 176, 193 (1982), recognize, the predecessor of :DEA was based heavily on two court cases, Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972), and Mills v. Bd. of Educ. of District of Columbia, 348 F. Supp. 866 (D.D.C. 1972), "both of which involved the exclusion of hard-to-handle disabled students." Honig v. Doe, supra, at 324. As the Court in Honig noted, at id.:

Mills in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. There, school officials had labeled four of the seven minor plaintiffs behavioral problems,' and had excluded them from classes without providing any alternative education to them or any notice to their parents. 348 F. Supp. at 869-870.

(Emphasis added).

IDEA is a remedial statute whose provisions need to be read broadly to effectuate its purposes. See S-1 v. Turlington, supra, 635 F. 2d at 348. Special education services are critical to the ability of children with disabilities to benefit from an educational program and have at least some chance of life success. According to the National Longitudinal Transitional Study, see ED Ex. 41 (charts derived from the study), outcomes for students with disabilities are consistently worse that those for students without disabilities, and those students with disabilities who are suspended/expelled or drop out do even worse than students with disabilities who graduate. Hebbler T. 612. Research suggests that students with disabilities who are suspended long-term or expelled and receive special education services do better than those who do not receive these

services. Dwyer T. 528-29, 561. These consequences would be irrelevant if IDEA-B clearly precluded providing special education services to appropriately disciplined students, but, in the absence of such statutory clarity, they suggest that denial of services is not a step to be taken lightly.

Under the holding of Honig, local educational agencies ("LEAs") cannot unilaterally suspend long-term or expel students with disabilities if their misconduct is related to their disability. If an appropriate team of professionals concludes that the misconduct is disability-related, the LEA cannot expel or suspend long-term the student, but instead must re-examine the student's individualized educational program ("IEP") and attempt: to meet his or her needs in the existing educational setting. Services, including special education services, continue. But it seems clear that the line between disability-caused misconduct and unrelated misconduct will not always be easy to discern, see Dwyer T. 564-65, especially for students with emotional disturbance. 7 The complete denial of special education services is a severe and possibly long-term consequence for being "wrong" about the absence of a causal connection between the student's disability and his or her misconduct.

ED's position that special education services must continue to be provided to "non-causal" suspended and expelled students -- first articulated in the so-called New Inquiry of September 15, 1989, ED Ex. 14 -- is buttressed in part by recent congressional action. In the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (enacted October 20, 1994), Congress amended IDEA-B to allow local educational agencies to place children with disabilities who bring weapons to school in an interim alternative educational setting for up to 45 days. Pub. L. No. 103-382, § 314 (a) (1) (B) (i). This 45-day exclusion contrasts with the one- year expulsion that is required (with some exceptions) for weapon- bearing students without disabilities by the Gun-Free Schools "Act of 1994, Pub. L. No. 103-227, 108 Stat. 125, 270, 20 U.S.C.S. § 3351 (1994) (Title X, Part B of Goals 2000: Educate America Act). In § 314(b) of the Improving America's Schools Act Congress provided that IDEA-B could not supersede the provisions of the Gun-Free Schools Act:

if a child's behavior is unrelated to such child's disability, except that this section shall be interpreted in a manner that is consistent with the Department's final guidance concerning State and local responsibilities under the Gun-Free Schools Act of 1994.

That guidance, printed in the Congressional Record (and attached as an appendix to the Pre-Hearing Memorandum of the Assistant Secretary), restates OSERS's policy that students may be expelled/suspended for reasons unrelated to their disability so long as educational services 8 continue. Guidance Concerning State and Local Responsibilities Under the Gun-Free Schools Act of 1994, at 3.

Thus, at least with respect to students with disabilities who bring weapons to school, 9 the 103rd Congress expressed its view that students who engage in such conduct should continue to receive educational services. This subsequent legislative history would be of limited value if it conflicted with clear, inconsistent statutory language in the pre-existing statute, but, as noted above, there is no explicit discussion in IDEA-B of continuation of services to students expelled/suspended long-term for conduct unrelated to their disabilities.

VaDOE argues that once disability properly has been excluded as a basis for the student's misconduct, the student should be treated similarly to one who does not have a disability. 10 To do otherwise would be to convey to students with disabilities that they are not responsible for their actions. See Doe v. Maher, supra. The Kaelin court, 682 F. 2d at 601, rejected this reasoning, noting:

[D]efendants argue that Kentucky's expulsion statute. . . applies with equal force to handicapped and non-handicapped children. Specifically, they argue that the holdings in Turlington. . . create a double standard for student conduct. Handicapped children will be entitled to commit disruptive acts with impunity while a non-handicapped child would be punished for the same action. We disagree. We adopt the analysis contained in Turlington.

Moreover, the implication of Honig's holding that school districts cannot unilaterally suspend long-term/expel students with disabilities whose misconduct is related to their disabilities is that students with disabilities are to be treated differently from students without disabilities. As two commentators have written:

The basic rationale for Honig relied on the premise that Congress intended to treat students with disabilities differently, and stressed that suspension was a change in placement subject to the same requirements of all change in placements. As such, to the extent possible, the change in placement should be treated as any other change in placement; that is, the placement may change, but the student still remains eligible for special education services.

GUERNSEY & KLARE, supra, at 139.

Finally, VaDOE's reliance in its briefs and during arguments on Pennhurst St. Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981), is misplaced. In Pennhurst, the Supreme Court concluded that the congressional findings section of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 ("DDABRA") was merely precatory, and that when Congress, acting pursuant to its spending power, imposes conditions on grantees it must do so unambiguously. Critical to the Court's holding was its view of DDABRA as "a mere federal-state funding statute," 451 U.S. at 18, the funding for which was "woefully inadequate to meet the enormous financial burden," id. at 24, that would be required to effectuate the "rights" in the findings section. Without fuller knowledge of the financial implications, the states would be unable to contract knowledgeably. In contrast, IDEA-B is much more that a funding statute. "[T] he face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education Systems of the States," Bd. of Educ. v. Rowley, supra, 458 U.S. at 189; "Congress sought primarily to make public education available to handicapped children" and to "open the door of public education to handicapped children on appropriate terms . . , " id. at 192.

Moreover, the financial implications of the instant policy, as noted above, are relatively minor in the context of the overall federal financial assistance provided to Virginia and other states under IDEA-B. Put differently, while it is reasonable to think that many states would have opted out of the modest funding under DDABRA if they had known it would require them to provide all of its citizens with developmental disabilities a right to habilitation in the least restrictive environment, it is much less reasonable to think the states would opt out of IDEA-B because of the

implications, financial or otherwise, of OSERS's continued services requirement for appropriately suspended/expelled students.11

It is uncontroverted that VaDOE does not mandate that local educational agencies provide continuing special education services to students with disabilities expelled/suspended long-term for misconduct unrelated to their disabilities. Indeed, the testimony was that neither in its regulations nor in practice had VaDOE ever required that such services be provided. See, e.g., Bosher T. 428-29.

At the hearing in the instant matter, several witnesses for VaDOE provided testimony on the number of students in its schools or school districts expelled/suspended without continuing services. The overall state-wide estimates ranged anywhere from 76 (the number apparently provided to the Fourth Circuit in Virginia Dep't of Educ. v. Riley, supra) to 153 ED Affidavit E-A-1). See also Kitchen T. 77 (estimating number of affected students as 126). The numbers for individual districts are quite small. See, e.g., Bunting T. 115 (no special education students expelled last year in Henrico County, and estimating 3-4 children with disabilities expelled over the last 4 years), Brown T.334-35 (of 14 students expelled last year in Richmond public schools, 2 had disabilities). Nevertheless, VaDOE officials and local officials strongly maintained their views that providing continuing services to the children in question was inappropriate. The Hearing Officer has no doubt that these views are heartfelt and based on the experience these educators have had in various levels of the school system. Unfortunately, in my judgment, IDEA-B does not permit the local option VaDOE seeks.

To conclude this section, and for the foregoing reasons, the Hearing Officer determines that (1) IDEA-B requires VaDOE to provide assurances to OSERS that students with disabilities expelled/suspended long-term for misconduct unrelated to their disabilities will be provided with special education services by the appropriate educational entities, and that (2) at present, such is not the policy of VaDOE.

III. Under the Reasoning of Metropolitan Sch. Dist., ED's Policy Interpretation of IDEA-B is an Interpretive Rule Not Subject to the Notice and Comment Provisions of the APA

Of all the issues in this proceeding, the least difficult to resolve may be whether OSERS was required to go through APA notice and comment rulemaking before promulgating its interpretation of IDEA-B as requiring states to provide it with assurances that students with disabilities suspended long-term or expelled for conduct unrelated to their disabilities receive continuing special education services. See ED Ex. 14 (New Inquiry, September 15, 1989. This precise issue was addressed in Metropolitan Sch. Dist. of Wayne Twp. v. Davila, supra, 969 F. 2d 485. In Metropolitan Sch. Dist., the Court of Appeals for the Seventh Circuit concluded, 969 F. 2d at 488, that the New Inquiry was an interpretive rule and, therefore, excepted from APA's notice and comment provisions under 5 U.S.C. § 553(b) (3) (A). The Hearing Officer sees no reason not to follow the well-reasoned opinion in that case.

Relying on cases such as General Motors Corp. v. Ruckleshaus, 742 F. 2d 1561 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1074 (1985), and United Technologies Corp. v. U.S. Environmental Protection Agency, 821 F. 2d 714 (D.C. Cir. 1987), the Metropolitan Sch. Dist.

court noted that an agency's characterization of a rule, while not dispositive, is the starting point for analysis, Metropolitan Sch. Dist., 969 F. 2d at 489; that an interpretive rule states what the agency thinks a statute means rather than creating new law, rights, or duties, id. at 490; that even if a rule creates a new obligation, it need not be construed as legislative (and, hence, subject to APA notice and comment requirements), id at 489; and that an "agency's change in its reading of a statute does not necessarily make the rule . . . legislative." Id. at 492. Applying these principles to OSERS's promulgation of the New Inquiry, the court concluded that it was an interpretive rule that did not need to be issued through the APA notice and comment procedure.

The court noted that the New Inquiry was issued in response to Honig, which had been decided earlier that year. Rather than represent inappropriate legislating, the New Inquiry bespoke a responsible effort by the agency to clarify the continued services requirement for students suspended long-term/expelled for conduct unrelated to their disabilities. The so-called causal connection had become considerably more salient after Honig, which definitively established that a finding of causality would preclude unilateral expulsion or long-term suspension of a student with a disability. OSERS could well have concluded that it needed to clarify any ambiguity regarding whether, in the absence of such a causal connection, continued special education services would be required.

In its consideration of the rulemaking issue, the Metropolitan Sch. Dist. court also had occasion to construe the meaning of OSEP Memorandum 87-21, dated June 29, 1987, (published in 202 EHLR 372 (June 29, 1987)), admitted as ED Ex. 42 in the instant proceeding, and the subject of considerable disagreement therein. The court quoted the following relevant language from the OSEP memorandum:

Some courts looking at the discipline issue under both EHA-B and Section 504 [of the Rehabilitation Act of 1973] have said that, when the misbehavior is unrelated to the handicapping condition, the child can be disciplined without regard to the fact that the child has a handicap. This is of interest because the basis for this under EHA-B is not entirely clear. While this may deserve further thought, QSEP will not apply a rule or guideline contrary to this in the absence of a generally applicable statement distributed in advance to the States.

Metropolitan Sch. Dist., 969 F. 2d at 491 (emphasis added). The court concluded, as I do, that the italicized language did not preclude later interpretive or informal rulemaking regarding educational services, but at most indicated the agency's intention to proceed formally on whether children with disabilities were subject to discipline at all. In no way does this language suggest that the policy articulated in the New Inquiry could not be issued informally. But see Atkinson T.265-66.

The Metropolitan Sch. Dist. court also concluded, 969 F. 24 at 494, and correctly in my view, that the requirement in 20 U.S.C. § 1417(b) that the Secretary implement provisions of IDEA (at that time, the Education for All Handicapped Children Act) through formal rulemaking applied to the initial promulgation of regulations and not to all later statutory interpretations. Moreover, as the court observes, § 1417's explicit grant of legislative rulemaking does not negate an agency's inherent power to issue interpretive rules.

In its Pre-Hearing Memorandum, at 17 n.6, VaDOE makes a somewhat halfhearted attempt to avoid the clear implication of Metropolitan Sch. Dist. The Applicant suggests that the Fourth Circuit would give the OSERS position less deference than the Seventh Circuit "because of the manner in which it was imposed upon the state." Apart from the fact that the Fourth Circuit never addressed this issue in Va. Dep't of Educ. v. Riley, supra, the "manner of imposition" would go to the issue discussed in the next section and not whether OSERS's position statement was legislative or interpretive.

Finally, an implicit challenge to the quality of ED's notice to states of its various policies is VaDOE's claim that publication of OSERS and OSEP policy memoranda and correspondence with state officials and others in the privately-published Individuals with Disabilities Education Law Report ("IDELR") and its predecessor Education for the Handicapped Law Report ("EHLR") provides insufficient notice to the states of relevant ED policies. At least one Virginia witness testified to her awareness of these reporters, though she disclaimed reliance on it because of its unofficial character. Staton T.240-41. Two VaDOE witnesses formerly worked at ED, see Staton T.196; Atkinson T.255-56, and presumably were aware of these reporters and their semi-official status within the special education community. While there might well be advantages to clearer promulgation and dissemination of OSERS and OSEP policies to state officials by more official means, it is my impression that those interested in special education issues are well aware of the existence of these reporters and the manner in which ED uses them. 12 In any event, whatever deficiencies exist in the use of these reporters do not sufficiently call into question the overall information dissemination to states in general or to Virginia in particular such that they give rise to any independent notice and comment problems.

In conclusion, the Hearing Officer determines that it was not necessary for the Assistant Secretary to promulgate her interpretation of IDEA-B's continued services requirement through the notice and comment procedures of the APA.

IV. ED's Actions on December 17, 1993, and Thereafter in Raising Questions About VaDOE's 1993-1995 State Plan Compliance with IDEA-B Did Not Amount to Imposing an Impermissible New Condition on the Applicant

Even assuming that OSERS's interpretation of IDEA-B's requirements is correct, and that OSERS's announcement of that interpretation through the New Inquiry provided adequate notice in general, VaDOE argues that ED's conditional approval, on October 29, 1992, of the Virginia FY 1993-1995 state plan under IDEA-B (Va. Ex. 5) should have precluded its later efforts to add the "new condition" of compliance with the continuing special education requirement of the statute. The Applicant points out that VaDOE received funding under the first year of the three-year plan, FY 1993, and that, under the circumstances, it was inappropriate for ED to attempt to impose so late in the day this new condition on receipt of remaining funding for FY 1994 and FY 1995. While the process of negotiation over the Virginia state plan was undeniably protracted (and not just over the continuing special education requirement at issue in this proceeding), and, of course, ultimately unsuccessful, the Hearing Officer concludes that ED's actions were not improper.

It may be helpful to set out some of the relevant chronology regarding the submission and approval process for Va. Ex. 5. 13 VaDOE submitted its 1993-1995 plan to OSEP for approval in August 1992. On October 29, 1992, in a letter from then-Assistant Secretary of OSERS Robert Davila to then-Superintendent of Public Instruction Joseph Spagnolo, Jr., OSERS conditionally approved the Virginia plan, with conditions unrelated to the continuing special education issue identified in the instant proceeding. Va. Ex. 12, Attachment 1; Staton T. 206. On November 23, 1993, VaDOE received notification of the conditional release of FY 1994 funds. Va. Ex. 12, Attachment 3.

Meanwhile, on November 12, 1993, the Office of Special Education Programs ("OSEP") (an agency within OSERS) received a letter from Kathe Klare, Director of the University of Richmond School of Law's Mental Disabilities Law Project, ED Ex. 3, complaining that the proposed 1994 Regulations Governing Special Education Programs For Children With Disabilities in Virginia (due to become effective in January 1994) contained a provision that appeared to allow cessation of special education services for children whose misconduct was not causally related to their disabilities, in contravention of ED policy. 14

Thereafter, on December 17, 1993, OSEP's Claudia Brewster sent a memorandum (Attachment 2 to VaDOE Ex. 12; ED Ex. 4 15) to Austin Tuning, lead specialist for special education for VaDOE, and Sara Staton, an associate specialist, advising them that OSEP believed the referenced regulation was inconsistent with IDEA-B's FAPE requirement, and requesting that the regulations and the state plan be changed to reflect that expelled/long-term suspended students must continue to receive special education services. 16 This December 17, 1993, contact was the first time VaDOE was made aware -- at least through OSEP--that its regulations or state plan were problematic on this ground. Staton T.207-08.

Subsequent to the December 17, 1993, notification, officials from VaDOE and OSERS, OSEP, and ED, met in person and corresponded in an effort to settle the dispute. See Attachments to Va. Ex. 12. The process was somewhat complicated by the change in administrations within VaDOE. See Id., Attachment 3, Letter dated January 14, 1994, from Superintendent Spagnolo to the Assistant Secretary. Despite numerous contacts, the parties failed to achieve agreement. In a letter dated March 4, 1994, the Assistant Secretary notified Superintendent Bosher of OSERS's intention to disapprove the FY 1993-1995 state plan unless the regulations and plan were changed to require provision of continued FAPE to children with disabilities expelled/suspended long-term. Id., Attachment 6. The parties continued to meet and exchange proposals up through March 28, 1994, see id., Attachment 10. Thereafter, the parties turned to the courts and administrative hearing procedure that constitutes the instant proceeding.

In essence, the dispute regarding the state plan conditional approval boils down to this: VaDOE contends that its statutes and regulations (as well as its practice) always permitted its local educational agencies to refrain from providing special education services to students with disabilities expelled/suspended long-term for misconduct unrelated to their disabilities. As a result, the Applicant claims that ED knew or should have known that its policies conflicted with ED's interpretation of IDEA-B's requirements; ED's failure to raise these concerns while negotiating over other conditions should essentially estop it from raising the concerns once the other conditions have been met. ED counters by claiming that language in the State Plan (see Va.

Ex. 5, pp. 12-14) and in the regulations incorporated therein (§ 2.1 of the Special Education regulations) assuring the provision of FAPE led it to conclude that any inconsistent language in the plan would be construed so as to provide the continuing special education services in question.. Not until ED received the Kiare complaint on November 12, 1993, did ED have any reason to question the VaDOE's assurances.

VaDOE presented several witnesses who testified that the Commonwealth's policy had always been to permit LEAs to withhold special education services from children expelled or suspended long-term for conduct unrelated to their disabilities. See, e.g., Bosher T.428-29; Atkinson T.261-63; McClendon T.166 (policy in effect at least since 1988). Witnesses also testified that prior state plans and regulations/statutes referenced therein allowed children with disabilities to be disciplined to the same extent as children without disabilities if there was no causal connection between their disabilities and their misconduct. Staton T.216, 227; see, e.g., Va. Ex. 4, 1990-1992 State Plan, Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia, § 3.4 B. 11. b, p.70. ED's response that the general language of the state plan and regulations could be read in harmony with the more specific regulations on long-term suspension and expulsion may have been wishful thinking. 17 But there was no evidence adduced by either party to suggest that ED had actual knowledge that VaDOE was not providing special education services to the relevant population until its receipt of the Klare complaint in November 1993. 18

There was a great deal of testimony from VaDOE's witnesses, and extensive documentary evidence submitted by both parties, regarding the events that occurred between the notification to VaDOE by Claudia Brewster of OSEP dated December 17, 1993, and the flurry of correspondence between Superintendent Bosher and the Assistant Secretary in March 1994. Not all of this evidence was of equal reliability, as several witnesses testified to hear say evidence or speculated about what other parties to the discussions might have been thinking. Nevertheless, several themes are prominent.

First, VaDOE was interested in challenging OSERS's policy interpretation of IDEA-B, but, naturally enough, wanted its State Plan approved while the challenge proceeded. In some sense, these officials appeared to be searching for an ambiguous solution that would allow them to continue doing exactly what they were and apparently had long been doing, but that would give ED "cover" in case anyone questioned its approval of a problematic State plan. Not surprisingly, such efforts at compromise proved fruitless in the end, as apparent verbal agreements evaporated when the parties exchanged follow-up letters.

In one of the more remarkable interactions, Joseph Spagnolo, the outgoing superintendent for public instruction, wrote a letter to the Assistant Secretary, dated December 21, 1993 (ED. Ex. 5), in which he stated, ED Ex. 5 at 5-3:

It is the position of VaDOE that our regulations address these requirements [in the New Letter, ED Ex. 14, and the Boggus Letter, ED Ex. 23]. . . . Second, the additional requirement pertaining to the continued provision of special education and related services to children with disabilities, regardless of whether the student's misconduct is determined to be a manifestation of the

student's disability, can be inferred in the FAPE provision found at § 2.1 of the aforementioned regulations.

(emphasis added). While Dr. Spagnolo did not testify, Dr. Bosher testified to his view that the outgoing superintendent did not mean by this statement that such an inference was correct, nor that it represented a change in Virginia's policy, only that, apparently, ED officials could choose to believe it if it was convenient for them to do so. Bosher T.433-38, 479-84. It is difficult to resist the conclusion that such an approach was extremely cynical.

Less problematic, but no more successful, were the efforts by Superintendent Bosher and his staff and the Assistant Secretary and her staff to agree on the nature of the services to be provided to the children in question. The superintendent testified that he was surprised to receive the letter dated March 25, 1994, from the Assistant Secretary that construed the "educational services" he referenced in his letter of March 23 to be equivalent to FAPE-based special education. Va. Ex. 12, Attachments 8-10; Bosher T.447-56. Again, whether through lack of clarity or for other reasons that do not appear in the record of this proceeding, the parties were unable to agree on language and, more importantly, on the substance of what IDEA-B required.

While no one from ED testified regarding the telephone and in-person conversations between representatives of both sides, the correspondence paints a clear enough picture. Having been alerted, however belatedly, to the discrepancies between VaDOE's policies with respect to expelled/suspended students with disabilities and OSERS's interpretation of IDEA-B's requirements in that area, ED sought to obtain assurances that Virginia would accept the federal agency's legal interpretation of IDEA-B's requirements. That acceptance was not--and has not been--forthcoming.

VaDOE makes much of ED's supposed inconsistencies in IDEA-B enforcement as indicative of the unfairness and arbitrariness of the federal agency's actions towards it. One witness testified she was not aware the state plan had to address the continuation of special education services issue. Staton T.242-42. Another witness, who formerly worked at OSEP, testified this area was not a priority in monitoring state plans or otherwise reviewing state efforts to comply with IDEA-B. Atkinson T.257-6l. As for specific compliance discussions between Virginia and OSERS, witnesses testified that OSERS officials either admitted to having "missed" the problems with the Commonwealth's plan regarding expelled/suspended students, Bosher T.4856, or told them the plan would have been approved if the plan simply had been silent on the issue. Atkinson T.292-93. Finally, one witness testified that in her review of state plans received by OSERS, there were several instances in which that agency's characterization of plans as silent on the continued services issue was incorrect. McClendon T. 167 et seq.

These concerns hardly reach the level a: arbitrariness that would justify preventing OSERS from seeking to enforce VaDOE's compliance with IDEA- B. Moreover, as the various letters submitted as ED exhibits reflect, see, e.g., ED Exs. 14-17, 21-23,

OSERS's post-1989 policy on non-cessation of special education services was consistent with the approach it took in the New Inquiry, ED Ex. 14.

The evidence presented at the hearing reflects that ED did not systematically pursue all states whose plans were silent on whether expelled/suspended long-term students with disabilities unrelated O their misconduct received continued special education services. OSERS explained Its enforcement approach in the Smith Letter, 18 IEDLR 685, dated January 31, 1992 (ED Ex. 17):

OSERS would not require a specific assurance concerning the provision of services to a child with a disability who has been expelled under these conditions, unless it had reason to believe, as occurred in OSERS's review of South Carolina's State Plan, that a State did not plan to provide these services. This may account for the different responses you have received when discussing this requirement with other superintendents.

(emphasis added). See ED Ex. 29. This approach is eminently sensible. In enforcing their statutory responsibilities, agencies are not required to pursue all potential violators at once. There is nothing in the statute or regulations that suggests OSERS must question all states whose plans are silent on the continued services issue. A rational deployment of limited enforcement resources might well focus on states whose plans have explicit language inconsistent with OSERS's interpretations of IDEA-B's requirements.

It is significant that no evidence was presented to suggest that OSERS failed to pursue a state plan's non-compliance with IDEA-B's continued services requirement once confronted with evidence of non-compliance. Cf. McClendon T.178-79 (only reviewed state plans ED identified as not having provisions for continued services when they in fact did; did not review plans identified as having provisions when they in fact did not). See Va. Ex. 22 (ED interrogatory answer indicating ED's rationale in construing possible ambiguity in Maryland' s state plan).

There is no doubt that enforcement in this matter would have proceeded more smoothly if OSERS had identified the continued services problem in its initial review of the 1993-1995 state plan. There is, however, no suggestion that its failure to do so was purposeful or otherwise designed to frustrate Virginia's efforts to provide special education services to its school children. Nor does the fact that the plan had already been conditionally approved (for satisfaction of other conditions) affect the result here. ED has a continuing obligation to assure that the state agency is complying with IDEA-B. If subsequent to approval of the plan OSERS became aware of a problem in the plan's compliance with the statute, OSERS would be obligated to inquire and, if it could not resolve the problem, pursue enforcement efforts. Such a requirement can be inferred from IDEA-B itself even if OSERS did not also inform VaDOE that "this Office may, from time to time, require clarification of information within your State plan. These inquiries are necessary to allow us to appropriately carry out our responsibilities related to Part B." Va. Ex. 12, Attachment 1, p. 1-4.

Obviously, at some point, the grantor agency must determine whether the state's plan is acceptable or, if conditionally acceptable, sufficiently in compliance with statutory requirements to justify making the grant award. Significantly, FY 1994 was already well under way by December 17, 1993, when the continued services problem became a specific bone of contention between the parties. The pre-December 17, 1993, delay may already have contributed to some of the local educational agency panic to which VaDOE witnesses testified. But, in the context of

this withholding proceeding (influenced, to be sure, by the intervention of the Fourth Circuit), the uncertainty caused by the murky status of conditional approval does not rise to a level of arbitrariness that would preclude OSERS's enforcement actions.

In summary, the issue is not whether OSERS should have caught the State plan problem earlier in the review process, or whether its national enforcement efforts regarding IDEA-B should be made more uniform. Once apprised of a potential problem with VaDOE's compliance with IDEA-B, as it was through receipt of ED Ex. 3, the agency had no choice but to investigate the issue. It acted responsibly to try to resolve the dispute with VaDOE. Under the circumstances, it is not dispositive whether the continued services requirement was a "new condition" added after conditional approval had all but been communicated to VaDOE. The grantee's obligation to provide FAPE to its eligible children with disabilities and to meet other IDEA-B requirements--and ED's corresponding obligation to enforce compliance with the relevant statutory and regulatory requirements--necessarily establishes a continuing enforcement relationship that may call for interaction throughout the life of a state plan. The Hearing Officer concludes that VaDOE has not met its burden of persuasion on this issue.

V. Withholding All of the Remaining FY 1995 IDEA-B Funds Is Within the Secretary's Discretion Under the Statute

Having concluded that IDEA-B requires VaDOE to give assurances to ED and the Assistant Secretary that children with disabilities expelled or suspended long-term for conduct unrelated to their disabilities continue to receive special education services, and that imposition of this condition on VaDOE after conditional approval of the 1993-1995 State Plan was permissible, the Hearing Officer turns to the crucial issue of remedy. ED has proposed, pursuant to 20 U.S.C. § 1416 (a), to withhold all remaining unobligated FY 1995 IDEA-B funds and further payments under IDEA-B. While the legal issues involved are fairly straightforward (though of first impression under IDEA-B, T.689), the competing equities are significant and any resolution inevitably imperfect.

During the hearing in this matter, the Hearing Officer pressed the witnesses and counsel for alternatives to the all-or-nothing approach of withholding. In response to questions from counsel, VaDOE witness Kathryn Kitchen, division chief of finance for VaDOE, offered a variety of possibilities in lieu of a complete withholding of IDEA-B funds. These included: withholding of the pro rata share of federal funding attributable to the children at issue in this proceeding--figured at $413 per child x 126 affected children or $52,038, Kitchen T.73; withholding of some portion of VaDOE's administrative portion of IDEA-B funds VaDOE keeps 5% of its IDEA-B funding for administration, amounting to approximately $2.5 million per year), id. at 73-74; withholding an amount equal to Virginia's education cost per special education child from all sources ($9,000) x the number of affected students (generating between $1 million and $1.25 million), id. at 75. Perhaps not surprisingly, given his position in the case, Superintendent Bosher declined to propose any alternatives to the proposed withholding. Bosher T.476-79.

These solutions, though undoubtedly offered in good faith, appear insufficient to serve the strong and legitimate federal interest in having the states comply with the provisions of IDEA-B. Forgoing $52,000--less than .09% of the IDEA-B FY 1995 funds--would seem to be an

extremely small price to pay for the ability to continue to withhold services the federal government has concluded are required. Indeed, since the federal funding obviously covers only a small portion of the actual costs of educating a child with disabilities, the Commonwealth might actually come out ahead financially by avoiding the total costs of the special education services. The other formulas, while involving relatively larger amounts of money, still amount to only around 2% of the total available funds. The danger is great that, with these and like formulas, states would be tempted to avoid serving groups of eligible children, perhaps including the most challenging ones, and consider the foregone portion of the federal grant a reasonable cost of doing business. Such an approach is clearly unacceptable if the expansive goals of IDEA-B are to be realized.

In addition, the above formulas are in the nature of fines for non-compliance, an approach inconsistent with the structure of § 1416 and the statute in general. As the Court stated in Bd. of Educ. v. Rowley, 458 U.S. at 183:

Thus, although the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility. Compliance is assured by provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the Act . . . and by the provision of judicial review.

(Emphasis added).

For their part, counsel for ED asserted that IDEA-B clearly authorizes withholding of all remaining unobligated FY 1995 funds. They argued that the stated exceptions in § 1416 (a)--which in any event are permissive with the Secretary--are inapplicable in this proceeding. The first authorizes the Secretary to withhold funding allocable to the programs, projects, or parts thereof that are in non-compliance with the statute. The second permits the Secretary to limit the withholding to the LEA or intermediate educational unit in non-compliance. Counsel argues that the nature of the non- compliance in this case fits neither of these scenarios. Plainly, VaDOE's non-compliance is not program-specific, but rather is complete for those who come within the definition of affected children. Pursuant to ED's interpretation of the statute, an interpretation that I have upheld, the approximately 126 students are not receiving a FAPE; they are receiving no services whatsoever. Nor is the failure or unwillingness to provide services limited to any geographic area or entity. As VaDOE emphasized throughout the hearing, its position represents a state-level determination that local educational agencies should have the flexibility to determine whether to provide special education services to the affected children.

Nor does the instant proceeding lend itself to the compliance agreement approach Counsel for ED described in connection with the Commonwealth of Puerto Rico's efforts to comply with the statute. T.691. Such an approach--often referred to as a plan of correction in other contexts -- is suited more towards an inability to comply with a statute rather than the unwillingness to comply that is evident here.

The decision to withhold funding in connection with a program. as complex as IDEA necessarily involves subtle issues of judgment and policy that are peculiarly within the purview of the agency officials charged with implementing the statute's provisions and administering its programs. To overturn that judgment, I would have to be persuaded that the proposed withholding was clearly improper or unfair. I have not been so persuaded. The issue is not whether the proposed action is harsh or of such magnitude as virtually to coerce the grantee's compliance with the conditions ED advocates. Rather, the issue is whether it is within the Assistant Secretary's discretion to seek such a remedy, a remedy that she is entitled to hope will cause VaDOE to conclude compliance is the path of least resistance.

Finally, because FY 1994 funds were released to VaDOE pursuant to the Fourth Circuit decision in Va. Dep't of Educ. v. Riley, supra, because FY 1995 funds will not be withheld unless and until the Secretary upholds this initial decision, and, if appealed, such decision is in turn upheld on appeal, VaDOE both continues to have access to critical funding, is in a better position to plan around the loss of future funds if that occurs, and if the Commonwealth decides not to comply with ED's interpretation of the statute. 19

Moreover, the Commonwealth presumably is about to submit its three-year plan for the 1996-1998 period. Whatever the equities may have been in March 1994 when the Assistant Secretary first proposed a disapproval of the 1993-1995 State Plan, the current balance is not so weighted in favor of VaDOE as to preclude the Assistant Secretary's resort to the statutory withholding remedy.

VI. Conclusion

To summarize the conclusions reached in this Initial Decision:

l. IDEA-B requires State educational agencies--in this case VaDOE -- to assure the Secretary in its State plans that all eligible children are receiving FAPE, including special education services for students with disabilities expelled or suspended long-term (10 days or more) for conduct unrelated to their disabilities (though such services may be provided in a setting different from the pre-misconduct educational setting);

2. It is VaDOE's current practice, as well as its past practice, not to require its LEAs or other relevant educational entities to provide such services to the affected population of children with disabilities, as defined in the preceding paragraph. To the extent its regulations appear to allow the students described in the preceding paragraph to be expelled/suspended long-term without provision of special education services such regulations are inconsistent with IDEA-B's requirements;

3. ED's interpretation of IDEA-B's requirements, described in paragraph 1 of this section, is properly characterized as an interpretive rule, and thus not subject to the notice and comment provisions of the APA;

4. ED's decision on December 17, 1993, to add the new condition of compliance with the provisions of paragraph 1 of this section before finally approving VaDOE's 1993- 1995 State

Plan was a legitimate response to a citizen complaint that raised questions concerning VaDOE's compliance with ED's interpretation of IDEA-B's requirements;

5. While ED's enforcement of the standards enunciated in paragraph 1 was neither uniform nor always aggressive, there is insufficient evidence to suggest that, during the relevant time periods, ED knowingly approved State plans that indicated explicitly an inability or unwillingness to comply with paragraph 1 above. To the extent ED examined some but not all State plans that were silent on the issue, an administrative agency is not required to enforce a statute in an all or nothing fashion. ED's choice of enforcing the provisions against VaDOE was rational in light of the complaint received in November 1993; and

6. It is within the Assistant Secretary's discretion, pursuant to 20 U.S.C. § 1416, to seek withholding of unobligated FY 1995 IDEA-B funds and any future funding under IDEA-B unless and until the Applicant comes into compliance with the requirements of the statute.

Initial Decision Issued This [6TH] day of April, 1995, Washington, D.C.

By: Robert D. Dinerstein

Hearing Officer

Original: Office of Hearings and Appeals, Docket Clerk

Copies sent (certified mail/return receipt requested):

Secretary Richard W. Riley

Suzanne Sheridan, Esq. and Ronald Petracca, Esq., Counsel for Assistant Secretary of OSERS, U.S. Department of Education, Washington, D.C.

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1 In this decision, references to the hearing transcript in this proceeding are in the form "[Witness] T. [page number]." References to VaDOE's exhibits are in the form "VaDOE Ex. [exhibit number]." References to ED's exhibits are " ED Ex. [exhibit number]."

2 In its Post-Hearing Memorandum, filed October 27, 1994, ED indicates, at 24, that the "withholding action would only terminate Virginia's ability to spend funds for FY 1995 that have not already been obligated, and future funding." The relevant trigger date would be the date the withholding actually is imposed. Because of the decision by the U.S. Court of Appeals for the Fourth Circuit in Virginia Dep't of Educ. v. Riley, 23 F. 3d 80 (4th Cir. 1994), the Department is not seeking to withhold any unspent funds from FY 1994 that may remain unobligated. Id. at 24 n.15.

3 Initially, on April 5, 1994, Secretary Riley appointed the undersigned as Hearing Officer in ED's proposed plan disapproval action. After the Fourth Circuit's decision in Va. Dep't of Education v. Riley, supra, that action was dismissed and ED instituted the instant proceeding to withhold FY 1995 funding.

4 Pursuant to 34 C.F.R. § 300.585(a), the Hearing Officer must issue an initial decision, on which the parties are entitled to comment. The Secretary issues the final decision, 34 C.F.R. § 300.5855 (f), (j).

5 It must be said, however, that the Pre-Hearing Memorandum of Commonwealth of Virginia, at 12 and 17, implies that the issue in the case is whether children with disabilities whose misconduct is hot caused by their disability may be expelled or long-term suspended at all. But it is clear from the entire record in this matter that ED's Office of Special Education and Rehabilitative Services ("OSERS" does not dispute whether such children may be expelled or suspended. Rather, OSERS contends that the relevant educational agency must continue to offer such children special education services.

6 Throughout this proceeding, the parties have treated long-term suspensions as those exceeding ten days. This line of demarcation is consistent with the Supreme Court's decision in Honig v. Doe, 484 U.S. 305 (1988), which held that unilateral suspensions of over ten days violated IDEA-B's "stay-put" provision, 20 U.S.C. § 1415(e) (3), when the child's misconduct was related to his or her disability. After Honig, local educational agencies have had to empanel a team of qualified professionals to determine whether the child's misconduct was "causally related" to his or her disability. As discussed below, if the misconduct is causally related, the child may not be suspended long-term or expelled. If the misconduct is not causally related, the child may be so disciplined. The instant proceeding focuses on the latter group of school children.

7 According to ED Affidavit E-A-1, of the 153 students expelled/suspended from Virginia school systems during the period July 1, 1992, to September 7, 1994, 32 were diagnosed as emotionally disturbed.

8 The Hearing Officer draws no significance from the use in this context of the term "educational services" in lieu of "special education services." In the instant proceeding, it is clear (at least as of the time of the hearing) that OSERS's position is that the services expelled/suspended students must continue to receive are special education. See VaDOE Ex. 12, Attachment 9 (Letter dated March 25, 1994, from Assistant Secretary Heumann to Superintendent Bosher). But compare id. at Attachment 8 (Letter dated March 23, 1994, from Superintendent Bosher to Assistant Secretary Heumann) (proposing "interim agreement" to resolve instant matter in which, in part, Virginia would provide educational services to children at issue) (emphasis added). According to Superintendent Bosher's testimony, Bosher T. 450-54, Virginia's use in the March 23 letter of the term educational services in lieu of special education was a quite conscious choice. The failure to resolve the difference in the nature of required services was one of a number of misunderstandings between the parties, misunderstandings that might have been minimized if not avoided altogether if the parties had spoken with greater precision and candor towards each other.

9 Given the seriousness of the misconduct represented by bringing a gun to school, it is reasonable to think that if congress addressed the issue it would also provide for continued services for those expelled/suspended long-term for less serious offenses. See generally Attachments to Affidavits of the Assistant Secretary, ED Affidavits Nos. E-A-l through E-A-5 (listing reasons for suspensions/expulsions).

10 Although not entirely clear, it appears that some school districts provide either alternative placements for expelled/suspended students without disabilities or participate in a program under the Comprehensive Services Act that provides alternative services to expelled/suspended students. See Bunting T. 116-17, 148; Kelly T. 370. These alternative placements are not IEP-driven (and not provided under the auspices of the state or local educational agency). Moreover, participation by expelled/suspended students with disabilities in these alternative programs appears limited or non-existent. Bunting T. 148; Kelly T. 370. Thus, expelled/suspended students with disabilities may be being treated worse than similarly-situated students without disabilities to the extent the latter have access to alternative placements de facto unavailable to students with disabilities.

11 Of course, there is nothing to prevent Virginia from so opting out. While every state and a number of territories now participate in the IDEA-B program, New Mexico did not participate for a period of time. T.690.

12 In my own work as a law professor who occasionally teaches a seminar in mental disability law, I certainly have known of these reporters and the importance of many of the letters and policies published therein.

13 Some, though not all, of this chronology is also set out in Va. Dep't of Educ. v. Riley, supra, 23 F. 2d at 82-83.

14 The letter included as an attachment proposed regulation § 3.3 B. 11. b.(4), which provided in relevant part that "If there is no causal connection and if the child was appropriately placed at the time of the misconduct, the child may be disciplined the same as a non-disabled child." The letter indicated that cc copies had been sent to Superintendent Spagnolo and the president of the Virginia Board of Education. It further recited that the letter's author had discussed her concerns with Superintendent Spagnolo and others.

15 A number of the documents in this proceeding were offered as exhibits by both parties. For the most part, I have not attempted to supply parallel references for these exhibits.

16 The 1993-1995 State Plan, Va. Ex. 5, had included and incorporated by reference the existing regulations, "Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia," effective July 1, 1990.

17 But given the December 21, 1993, letter from Superintendent Spagnolo, ED Ex. 5, discussed below, ED could perhaps be forgiven for this interpretation.

18 That the Klare letter, ED Ex. 3, identifies the draft 1994 special education regulations as problematic when it appears the prior regulations had almost identical language is not especially relevant. The crucial point is that OSEP received a complaint that called its attention to language it considered problematic unless overridden by more general language in either the state plan, the special education regulations, or both.

19 Furthermore, as noted previously, IDEA comes up for reauthorization this year and there is nothing to prevent Virginia officials from making their views known to members of Congress about the appropriate discipline practices for students with disabilities. The language in § 14603 of the Gun-Free Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518, 3907, enacted as part of the Improving America's Schools Act of 1994, suggests Congress would be receptive to considering broadly the issue of disciplining children with disabilities.