

April 22, 2020

Dr. James F. Lane
Superintendent of Public Instruction
Virginia Department of Education
101 North 14th Street
Richmond, Virginia 23219
Submitted via email to james.lane@doe.virginia.gov

**Re: Virginia Department of Education Responsibilities During COVID-19
State of Emergency**

Dear Dr. Lane,

On behalf of our clients, many of whom are low-income public school students, the Legal Aid Justice Center¹ thanks the Virginia Department of Education (VDOE) for its commitment to ensuring educational opportunity for all children during this challenging time. We sincerely appreciate VDOE's swift convening of the Continuity for Learning (C4L) Task Force to provide guidance and recommendations regarding educational equity in Virginia, and we write to offer feedback on this guidance and other guidance issued by VDOE, as well as the continuing responsibilities of VDOE and local educational agencies throughout this crisis and beyond.

We found the "Virginia Learns Anywhere" guidance issued by C4L to be thorough and innovative in naming examples of ways divisions can meet the diverse needs of students in light of the barriers presented by COVID-19. We commend the recommendations that encourage districts to seek authentic and engaged feedback from families and develop innovative partnerships with local organizations.² Only through consistent and open accountability measures and partnerships will districts be able to maximize equitable educational opportunities for its students. Parents and those organizations who are deeply tied to communities should be

¹ The Legal Aid Justice Center ("LAJC") is a non-profit organization that partners with communities and clients to achieve justice by dismantling systems that create and perpetuate poverty. Our JustChildren Program provides representation and advocacy on behalf of economically disadvantaged children attending Virginia's public schools, and we are committed to ensuring that all children have the tools they need to succeed in school and in their communities.

² For example, the guidance encouraged districts to "send out a questionnaire to gather information about each students' learning environment, access to technology and adult learning support;" "form a division-level or school-based Return to Learning Equity Team that includes community-based organizations, wrap around partners and representatives from state-operated programs (foster care, detention facilities, and hospitals);" and, "leverage all community wrap-around services including partnerships with local civil rights organizations, faith-based organizations, nonprofits, and relevant media outlets, to ensure that information reaches every population."

considered vital partners to divisions in these efforts. We also appreciate the robust guidance regarding English Learner (EL) education, the acknowledgement that professional development in remote learning is a critical need for teachers, and the emphasis on culturally responsive learning. Finally, we appreciate the recent guidance from VDOE and the Virginia Department of Social Services (VDSS) regarding educational stability for children in foster care.

However, we also identified some gaps in the guidance collectively issued by VDOE regarding certain vulnerable groups, including children experiencing homelessness, children in alternative placements, and children with disabilities. We also have some concerns about accountability mechanisms for local divisions in adhering to VDOE guidance. We hope VDOE will address these concerns, outlined below, as additional guidance is created and released.

A. Protecting Educational Rights of Homeless Youth

While the “Virginia Learns Anywhere” guidance mentions that divisions should consider the needs of students experiencing homelessness, it does not provide specific examples of ways divisions should be reaching out to those students or ensuring ongoing compliance with the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) (“McKinney-Vento”). Under McKinney-Vento, local divisions have “an ongoing obligation to remove barriers to the enrollment and retention of homeless children and youths.”³ Further, local divisions must ensure that “homeless students are attending classes and participating fully in school activities immediately upon the student being identified as eligible for McKinney-Vento rights and services.”⁴ The obligations of divisions pursuant to McKinney-Vento remain in full force and effect, even during school closures.⁵

Public school data reported to the U.S. Department of Education during the 2017-2018 school year shows that an estimated 20,393 public school students in Virginia experienced

³ United States Department of Education, Education for Homeless Children and Youths Program Non-Regulatory Guidance Title VII-B of the McKinney-Vento Homeless Assistance Act, as amended by the Every Student Succeeds Act, Updated August 2018, p.24 <https://nche.ed.gov/mckinney-vento/>.

⁴ United States Department of Education, Education for Homeless Children and Youths Program Non-Regulatory Guidance Title VII-B of the McKinney-Vento Homeless Assistance Act, as amended by the Every Student Succeeds Act, Updated August 2018, p.24 <https://nche.ed.gov/mckinney-vento/>.

⁵ See, for example, the United States Interagency Council on Homelessness, Supporting Children and Youth Experiencing Homelessness during the Covid-19 Outbreak: Questions to Consider, March 16, 2020, <https://www.usich.gov/tools-for-action/supporting-children-and-youth-experiencing-homelessness-during-the-covid-19-outbreak-questions-to-consider/>, stating “Processes for providing school meals and other services should be modified to ensure that unaccompanied youth are able to access meals and services, consistent with applicable McKinney-Vento Act requirements.”

homelessness over the course of the year,⁶ a number that is sure to rise given the economic fallout of COVID-19, even with a statewide moratoriums on evictions. VDOE should emphasize this ongoing obligation pursuant to McKinney-Vento and provide guidance on specific ways divisions and liaisons can continue to fulfill those requirements during this time.

B. Educational Continuity for Students in Alternative Placements

Second, VDOE has not provided recommendations regarding children who were in alternative placements or children experiencing a suspension or expulsion at the time schools were closed. Existing data demonstrates that this affects an extraordinary number of children, many of whom are students of color or students with disabilities.⁷ VDOE should provide guidance to divisions specific to these students, including a reminder that children whose suspensions or alternative placements were set to conclude at the end of this school year will still be able to return to a comprehensive educational setting at the beginning of the next school year. This is a critical continuation of students' due process rights regarding alternative placements pursuant to Va. Code § 22.1-277.2:1,⁸ which remains in effect.

C. Free Appropriate Public Education for Students with Disabilities

Third, we are particularly concerned about the guidance collectively issued by VDOE⁹ around divisions' obligations pursuant to the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) (IDEA). Although VDOE's guidance instructs that divisions providing online instruction are responsible for providing a Free and Appropriate Public Education (FAPE) to students with Individualized Education Programs (IEPs), and specifically references the March 21, 2020 Supplemental Guidance from Office for Civil Rights and Office for Special Education

⁶ United States Interagency Council on Homelessness, Virginia Homelessness Statistics, <https://www.usich.gov/homelessness-statistics/va/>.

⁷ See Legal Aid Justice Center's *Suspended Progress* Report, October 2018, <https://www.justice4all.org/wp-content/uploads/2018/10/FullSuspendedProgress2018.pdf>.

⁸ Va. Code § 22.1-277.2:1 provides that "A school board may adopt regulations authorizing the division superintendent or his designee to require students to attend an alternative education program consistent with the provisions of subsection A after (i) written notice to the student and his parent that the student will be required to attend an alternative education program and (ii) notice of the opportunity for the student or his parent to participate in a hearing to be conducted by the division superintendent or his designee regarding such placement." If such notice provided that the alternative placement was for a defined period of time, divisions should ensure those timelines are not extended due to COVID-19.

⁹ Including, in particular, the C4L "Virginia Learns Anywhere" guidance and the Special Education and Student Services COVID-19 FAQs at http://www.doe.virginia.gov/support/health_medical/office/covid-19-sess-faq.shtml (updated April 17, 2020).

and Rehabilitative Services,¹⁰ it does not unequivocally state that divisions are responsible for providing FAPE during this time. This contravenes VDOE’s clear obligation as a state educational agency to ensure that every child with a disability within the Commonwealth receives this entitlement.¹¹ Moreover, the guidance and suggestions regarding the provision of services to students with disabilities are sparse, particularly in comparison to the rest of the robust guidance for other student groups provided in the “Virginia Learns Anywhere” document. We strongly recommend that VDOE issue a clear directive to local divisions that they remain responsible for FAPE pursuant to IDEA and Va. Code § 22.1-214. We are developing additional feedback and suggestions regarding the provision of special education services during the COVID-19 state of emergency and will forward these recommendations to Dr. Samantha Hollins, Assistant Superintendent, Department of Special Education and Student Services.

D. Ensuring Accountability and Equity in Educational Services Across the Commonwealth

Finally, we are concerned about the inequitable and inconsistent provision of education in divisions across the Commonwealth during this time. While some divisions will recognize their obligation to provide educational services throughout this crisis, other divisions may choose to not provide services at all. We remind Virginia of its constitutional obligation, still in effect, to provide “for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth.”¹² Although the guidance issued thus far by VDOE provides a thorough list of recommended actions for local divisions, it fails to state a specific measure of the minimum educational services that divisions *must* be providing at this time, which may mean some divisions fail to act.

Accordingly, we encourage VDOE to develop mechanisms to monitor the actions of local divisions, both as a means of accountability and in order to provide necessary support to those divisions who may be particularly struggling to provide sufficient access to its students. For example, the state of Michigan’s Department of Education is requiring all local divisions to submit continuity of learning plans to the state agency for review in order to ensure equitability and accountability for the provision of educational services during COVID-19.¹³ While we do

¹⁰ “To be clear: ensuring compliance with the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction.” Supplemental Fact Sheet (Mar. 21, 2020), at https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

¹¹ 20 U.S.C. § 1412(a)(1).

¹² Va. Const. Art. VIII, Sec. 1.

¹³ See Michigan’s Continuity of Learning and COVID-19 Response Plan (“Plan”) Application Template here, https://www.michigan.gov/documents/mde/MICLPlan.FINAL_685762_7.pdf, accessed April 20, 2020.

not necessarily recommend that VDOE follow this specific action, we nonetheless encourage VDOE to consider the variety of accountability and monitoring mechanisms available during this time to ensure each division is providing at least a minimum level of services to its students during this crisis.

Again, we thank you and all of VDOE for your diligent efforts to ensure educational opportunity for the Commonwealth's students during this difficult time. We further thank you in advance for your consideration of these suggestions. If you have any questions regarding this matter, please do not hesitate to contact me at 804-521-7304 or rachael@justice4all.org.

Sincerely,



Rachael Deane, Legal Director, JustChildren Program



Cassie Powell, Attorney, JustChildren Program

cc: Virginia Board of Education (via email to emily.webb@doe.virginia.gov)

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