



*Private Special Education Concerns
Related to the Virginia General Assembly Study
to Manage the Quality and Costs of
Private Day Educational Placements
Funded Through the Children's Services Act*

Report of the VAISEF Special Education Advisory Group

September 12, 2017

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Introduction

During the 2017 Session of the Virginia General Assembly, House Appropriations and Senate Finance Committee members and staffers considered recommendations offered by a work group studying private day special education placements through the Children's Services Act (CSA). This workgroup, under the direction of the CSA State Executive Council and authorized by state budget language adopted during the 2016 Session, met several times during the summer of 2016. This issue had also been part of a two year study conducted by the Virginia Commission on Youth (**2015 House Document #14: *The Use of Federal, State and Local Funds for Private Educational Placements of Students with Disabilities – HJR 196, 2014***).

In the course of the 2016 work group's study, they reviewed data presented by the Office of Children's Services (OCS), the Virginia Department of Education (VDOE) and also the Virginia Association of Independent Specialized Education Facilities (VAISEF). In the course of their review, it became apparent to the work group that several issues emerged on which all could reach consensus:

- After several years in which the *total* number of children served and the *total* expenditures under the state CSA program had *declined*, beginning in FY 2014 and FY 2015, *both the number of total children served and the total expenditures under the CSA program began to increase*.
- While most of the programs of CSA, and the number of children served by them (i.e. residential, foster care, etc.), and their associated costs had been maintained at a *relatively flat level* during that time, the number of children served in private day special education placements and their associated costs had *risen* significantly.
- Of the population served in private day special education placements, the greatest increase in placements had been seen *in children diagnosed with autism*.
- Despite the significant funding that was being directed at these placements, there appeared to be a lack of data that could offer objective outcome results for these placements and show fair comparisons between services offered in the public school setting versus in the private school setting.

With these shared findings, the work group labored to make recommendations back to the CSA State Executive Council for their consideration. After intensive discussion and deliberation, they reached consensus on several recommendations, the main ones being:

- Requesting funding to allow local school divisions to apply for pilot programs to test and implement strategies for increasing the education of students with disabilities in the least restrictive public school setting.
- Requesting VDOE, local school divisions and VAISEF to work together to identify mutually agreed upon, evidenced-based definitions of outcome measures applicable and appropriate for the population of children served in private special education day school placements. Outcomes and indicators for students served in private settings should mirror those already collected and reported by VDOE and, to the extent possible, be controlled for severity of the disabilities served in both the public and private educational settings.

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- Requesting that the CSA be amended to allow funding for certain services to students with disabilities served in the public school setting [NOTE: This practice had been allowed until 2011; after this change in policy, more private day placements began to be made.]

The following option was presented to the work group only at their last meeting and the concept had not been previously discussed by them at all:

- Amend the CSA to “carve out” and transfer CSA state pool funding for special education services to children with disabilities to the Virginia Department of Education, to then be allocated directly to local school divisions for them to determine how these children would be served.

This concept was consistently opposed by the work group. However, the CSA State Executive Committee overruled that opposition and moved this option forward in the final report submitted to the General Assembly in the fall of 2016. The main opposition cited for this concept included:

- Potential loss of “sum-sufficiency” of these special education funds once they would be transferred to VDOE. This aspect of special education funding (as part of CSA) could potentially be shifted to local governments, having a potential chilling effect on special education services needed by this population.
- Beginning to carve out specific services from the CSA continuum will eventually lead to the dissolution of the CSA program, a unique and collaborative multi-disciplinary process to serve children and at-risk families, which is often viewed as a model service delivery system around the country.
- Many local school divisions do not want this responsibility, nor do they have the personnel, programmatic or physical infrastructure in place to effectively carry out this significantly increased state mandate.

The final report from the work group, including the option on the special education “carve out” which they had opposed, was sent from the CSA State Executive Committee to the Governor and the House Appropriations and Senate Finance Committees. The Governor chose not to use any of the options presented when formulating his amendments to the state budget or preparing any legislation for the 2017 Session.

Action by the 2017 Virginia General Assembly

Budget amendments were drafted and introduced by various members of the House and Senate that incorporated many of the options presented by the 2016 work group. There were also amendments introduced that incorporated the “carve out” option that had been opposed by the work group. The House and Senate versions of the budget presented midway through the 2017 Session included provisions that leaned heavily in the direction of seeking implementation of the “carve out” option.

After intensive lobbying by advocacy groups such as VAISEF and by the parents of children and private special education schools potentially impacted, the final version of the budget adopted by House and Senate conferees contained language directing the staff of the appropriate House Appropriations and Senate Finance subcommittees to facilitate a work group to “examine the options and determine the actions necessary to better manage the quality and costs of private day educational programs currently funded through the Children’s Services Act.” This effort is to be conducted under the oversight of the General Assembly’s Joint Subcommittee for Health and Human Resources Oversight. As part of this study, the work group is charged with considering the following:

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- Amending the CSA to transfer the state pool funding for students with disabilities in private day educational programs to the VDOE.
- Identification and collection of data on an array of measures to assess the efficacy of private special education day school placements.
- Identification of the resources necessary in order to transition students in private day school settings to a less restrictive environment.
- Role of Local Education Agencies in determining placements and overseeing the quality, cost and outcome of services for students with disabilities in private day educational programs.
- An assessment of the Individualized Education Program (IEP) process as compared to federal requirements, including how that process relates to the role of CSA Family Assessment and Planning Team (FAPT) in determining services for students with disabilities whose IEP requires private day educational placement

As part of this consideration, the work group shall also examine the following logistical issues:

- Funding impacts.
- Necessary statutory, regulatory or budgetary changes.
- Other relevant actions necessary to implement any recommended actions.

A report on any preliminary findings and recommendations is due to be submitted to the Chairmen of the House Appropriations and Senate Finance Committees by November 1, 2017. The full Joint Oversight Subcommittee is scheduled to hear a report on this issue at its December meeting.

Action by VAISEF

In response to the action taken in the budget by the 2017 General Assembly, VAISEF President Gary Jones, Ph.D, the CEO at Youth For Tomorrow, appointed the VAISEF Special Education Advisory Group to review the data presented to the 2016 work group on this issue, to study the charge given to the 2017 work group and to offer their own analysis and make recommendations. The Advisory Group is composed of a diverse and talented collection of leaders within the private special education community, with years of experience in the field (see roster on p. 2). The Advisory Group has so far held two meetings to review the data, discuss the issues involved and to develop this report. A special education symposium was held to discuss this issue with experts in the field, on September 12, 2017 at Charterhouse School on the campus of United Methodist Family Services in Richmond.

We stand ready to assist the General Assembly and work with other relevant stakeholders to address this issue and offer prudent and reasonable recommendations to address these options moving forward. This is an important issue, vital to the long term well-being of many families in Virginia, and also significantly impacts funding decisions at the state and local level. It deserves our thoughtful, evidenced-based and collaborative attention.

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The VAISEF Special Education Advisory Group has made a careful review of data presented to the various previous studies on the topic of private special education day placements, as well as new data that has been subsequently presented. We will present our findings and recommendations, to the extent possible, within the framework of the charge contained in the 2017 budget language to the new legislative work group studying this issue. We will also make additional recommendations that go beyond what may be in that initial charge.

Legislative Study Work Group Options for Consideration

Work Group Option #1: *Amending the CSA to transfer the state pool funding for students with disabilities in private day educational programs to the VDOE.*

VAISEF Findings:

- **The General Assembly decision 25 years ago to provide sum-sufficient funding for private day school placements was visionary.**
 - Virginia was ahead of its time when it decided to look at the “Whole Child” instead of department by department. It is important that today’s legislators remember their predecessors’ visionary intent and purpose of the Children’s Services Act — “to create a collaborative system of services and funding that is child-centered, family-focused and community-based when addressing the strengths and needs of troubled and at-risk youths and their families in the Commonwealth.” *Va. Code §2.2-5200*. This law (i) preserves families; (ii) protects the welfare of children; (iii) encourages early intervention; (iv) creates responsive services with an understanding of the unique needs of each child; (v) increases interagency collaboration; (vi) acknowledges the importance of public/private partnerships; and (vii) provides for flexible use of funding.
 - Any action, such as shifting special education funding from the CSA to the VDOE, that would result in repealing sum-sufficient funding for private day placements completely guts the intent and purpose of this effective legislation resulting in, among other things, more children with disabilities not receiving FAPE, more children with disabilities being suspended or expelled from public school, and an increase in litigation.
 - Special education funding is a significant portion of the overall CSA budget. Carving out and transferring this funding to VDOE for use by public schools could begin the process of dismantling the very structure of CSA. A child or a family with a child with disabilities that requires special educational services is likely to also have other “at-risk” factors needing services beyond special education. The current CSA collaborative and multi-disciplinary structure would be lost, much to the detriment of those families who so desperately need the services. If there is to be a discussion about the future role of the CSA, then it should be a JLARC level study, not a by-product of the desire to keep private special education day placement costs down.

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Work Group Option #2: *Identification and collection of data on an array of measures to assess the efficacy of private special education day school placements.*

VAISEF Findings:

- **Much time is spent expressing frustration concerning the costs of special education services, but there is not enough being done to show the positive outcomes resulting from that investment.**

- VAISEF enthusiastically endorses the 2016 work group recommendation on gathering outcome measures, which is summarized as follows:

“Requesting VDOE, local school divisions and VAISEF to work together to identify mutually agreed upon, evidenced-based definitions of outcome measures applicable and appropriate for the population of children served in private special education day school placements. Outcomes and indicators for students served in private settings should mirror those already collected and reported by VDOE and, to the extent possible, be controlled for severity of the disabilities served in both the public and private educational settings.”

- In addition, it is recommended that Virginia review studies conducted in other states, such as Arizona, Massachusetts and New Jersey that show the cost effectiveness of providing special education services in the private setting versus the public setting.

Work Group Option #3: *Identification of the resources necessary in order to transition students in private day school settings to a less restrictive environment.*

VAISEF Findings:

- **Virginia’s Regulations Governing Special Education Programs (8VAC20-81) already provide the tools necessary to manage the quality and costs of private day placements.**
 - Ask the parents of a child with a disability about the process they experienced to get their child into a private day school. It can be a frustrating, intimidating, time-consuming, years-long battle to finally get the services their child desperately needs. Yet, there is a misperception that children are being easily placed in private day schools with little consideration or deliberation. If there is any concern about placements, the Virginia Department of Education, pursuant to 8VAC20-81-20(10), has the authority to review local school jurisdictions’ justification for its placements and assist those jurisdictions with planning and implementing any necessary corrective actions. Furthermore, if a local school jurisdiction has placed a child in a private day school and does not believe that the child should remain at that placement, they have the right under 8VAC20-81-210(A)(3) and (E)(2) to a hearing on whether the child should remain in that placement.

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- **Early intervention programs will result in decreased rates of placements of children with serious disabilities.**
 - In 1996, 1 in 2500 children were diagnosed with autism spectrum disorder. Today, that ratio is 1 in 68. It is no surprise that with such a drastic increase in diagnoses, more children with autism and other serious disabilities need to receive FAPE in a private day school. Fortunately, with autism, early intervention treatment produces significant results. A replication study of the Lovaas Model of Applied Behavior Analysis found that 48% of all children showed rapid learning, achieved average post-treatment scores, and at age 7, were succeeding in regular education classrooms. With the ability to diagnose autism in infants as young as 16 months old, families are able to receive intervention services much earlier. Due to the better insurance coverage laws in Virginia, more families have just recently had the resources available to them for these services. While there has not been enough time to show that these services have reduced the need for placement in private day schools for children with autism, research suggests that this will be the result. The sooner these children receive services after a diagnosis, the greater the likelihood that they will be able to receive FAPE in the public school setting thereby saving a tremendous amount of spending by the state for special education services for these children. Reducing funding for all special education placements is an ill advised reaction at a time when early intervention services will reduce the number of students with autism requiring such placements.
- **Private special education schools save Virginia money because they are staffed with trained professionals who are able to educate students who might otherwise ultimately be expelled from public school.**
 - Private day schools provide essential services to localities that cannot provide it themselves. Most, if not all, localities would agree that private day schools are indispensable. For less populated school districts, it is nearly impossible to have a classroom to meet the needs of the populations we serve. All of the children we serve have unique needs. Many of them have behavioral challenges that manifest in the form of aggression by hitting and spitting on staff, destroying property inside and outside of the classroom, and verbally assaulting staff and peers. Teachers in public school sometimes feel unsafe around a child with such behaviors and, in fact, liability issues may prevent the child from receiving services in a school district because of staff safety concerns. Furthermore, in a public school, these students may be more likely to be suspended or expelled for such behavior. For students who have the potential to live independent lives, their chances of finding and maintaining employment are slim if they are expelled or constantly suspended. Without a job, these individuals will require assistance from Medicaid after they age out of special education. Instead of paying taxes, they will be supported by taxes. Fortunately, private day school staff are trained to work with these behaviors, allowing us to keep children in school, educate them and prepare them for further education, employment, and independent living, as mandated by federal law. Moreover, our efforts save the state money by allowing these students to remain at home with their parents or guardians during their school age years instead of having to receive residential treatment.
- **Private non-profit special education schools offset costs with private philanthropy funding.**
 - Our non-profit private schools make an additional investment in the services they provide with significant private philanthropy funding, over and above what the CSA pays for these services. Public schools do not have the same access to these types of funds to augment these types of

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services. With their budgets already stretched thin, it is doubtful that public schools could provide a similar level of quality from the amount “saved” by not spending CSA dollars in private day placements. It is estimated that on an aggregate basis, many millions of private philanthropy dollars are used to augment the special education services provided by non-profit private schools.

Work Group Option #4: *Role of Local Education Agencies in determining placements and overseeing the quality, cost and outcome of services for students with disabilities in private day educational programs.*

VAISEF Findings:

- **Innovative solutions must be encouraged.**
 - In addition to understanding the importance of and outcomes associated with early intervention for children with autism and utilizing already existing special education regulations, other cost-savings solutions are available. For example, public/private partnerships between local school jurisdictions allowing private day schools to run classrooms in the public school could help reduce costs. Furthermore, encouraging local school jurisdictions to use private day school staff instead of having to hire their own for services such as speech and language could also reduce costs. Moreover, VAISEF strongly supports collecting data on measures to assess the efficacy of private special education day school placements and give greater confidence to those who must make these placement decisions in the best interests of the child, while at the same time being cognizant of the public funds being utilized. This knowledge will be the best indicator of how best to eventually transition students in private day school back into the public school setting. A successful transition back to a public school will increase the chances of that student remaining there. For those students who have the potential to be educated with their peers in public school, that is always the goal.

Work Group Option #5: *An assessment of the IEP process as compared to federal requirements, including how that process relates to the role of CSA Family Assessment and Planning Team (FAPT) in determining services for students with disabilities whose IEP requires private day educational placement.*

VAISEF Findings:

- **Virginia’s current funding structure for providing an appropriate education to children with disabilities is a model that will be followed by other states as a result of the United States Supreme Court’s decision in *Endrew F. v. Douglas County*.**
 - Although the children who we serve have physical, learning and emotional disabilities, funding their appropriate education is not a medical issue. It is a legal issue that requires an understanding of federal law and Virginia special education regulations. The Individuals with Disabilities Education Act (“IDEA”) mandates that children with disabilities are provided a Free and Appropriate Public Education (“FAPE”). To provide FAPE to a child with a disability, schools must provide students with an education, including specialized instruction and related services, that prepares the child for further education, employment, and independent living. 20 U.S.C. §1400(c)(5)(A)(i). Federal courts

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have struggled with the standard of the term “appropriate.” The Supreme Court, however, clarified this issue in its March 2017 opinion in *Endrew F. v. Douglas County School District*. The Court held “When all is said and done, a student offered an educational program providing ‘merely more than de minimis’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly...awaiting the time when they were old enough to ‘drop out.’” Now, a child’s “educational program must be appropriately ambitious in light of his circumstances” and “every child should have the chance to meet challenging objectives.” As a result of this holding, public schools around the country that relied upon a lower standard will now be in a position of having to truly educate their students with disabilities or find a private day school that is capable of doing so. Because other states do not have an adequate funding structure in place to ensure compliance with this higher standard, they are ultimately going to look at Virginia as a model of how to follow federal law and provide FAPE to a child who is unable to receive that right in a public school setting.

- **Decreasing funding for private educational placements will result in increased litigation.**
 - Local school jurisdictions are prohibited from making a placement determination based upon cost. However, if the funding from the state is significantly reduced because sum sufficiency is lost, a majority of the jurisdictions will not have the resources necessary to adhere to federal law and place a student in a private day school to receive FAPE. More parents will pursue their right to seek a decision on placement in the federal or state courts if the administrative due process hearing does not rule in their favor. These parents will have a very convincing argument that their child was not placed in a private day school simply because the local school jurisdiction made the decision not to place the student based solely on cost. Per federal law, parents who are successful with their claims in court can request and be awarded their attorney’s fees. With more and more parents successful in court, local school jurisdictions will be responsible for significant legal fees in addition to the cost of private placement. Furthermore, these jurisdictions’ actions risk a Department of Justice comprehensive investigation of special education services and failure to provide FAPE to its students.
 - Anything that disincentivizes placements in private day school settings increases the likelihood of parents/guardians making unilateral placements without the input and benefit of the CSA process; and pursuing litigation against local school jurisdictions for retroactive payment of those services. This strategy is one a number of jurisdictions have seen an increase over recent years, adding substantial legal costs to localities and an inability for the LEA to appropriately assess and recommend the most appropriate and cost effective educational placement.
 - Failure of jurisdictions to appropriately place a student with special needs risks a Department of Justice comprehensive investigation of special education services and failure to provide FAPE to its students. As a result, any decision by the General Assembly that would result in decreased funding for special education will have the potential to actually increase costs.

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Other VAISEF Findings and Recommendations:

A. More study and analysis must be given to understanding what is driving costs and placements in private special education day schools.

- Much attention and concern has been directed at the increase in costs and placements in private special education day schools over the last few years. The immediate reaction seems to be a drive to arbitrarily reduce these placements and serve the same population in the public school setting, thus reducing the costs of providing these services. This is a false premise and ignores the true issue. There has been an increase in the number of children with significant special needs, especially in the case of autism, in recent years. This has increased the need for placements outside of the already overtaxed public school system. To somehow think that if CSA special education funding is shifted in direction to local school divisions through the VDOE will solve this problem is erroneous. While some school divisions have developed innovative approaches to serving this population and should have the ability to build on those efforts, many other school divisions (especially in rural areas) simply would not have the physical, programmatic or personnel infrastructure available to replicate what is being done at the private school level, even with the proposed shift in CSA funding.

B. Efforts to bring cost and decision-making into “alignment” at the local level must be considered carefully to avoid decisions being made solely for financial reasons.

- There has been considerable discussion concerning cost and decision-making “alignment” into the CSA at the local level. One of the biggest criticisms heard has been the idea that IEP decisions are made on special education placements without input from CSA, who then must “write the check” to pay for the services. The assumption being made is that if those making the decision are more responsible for making the payments for those services, then placement decisions will be impacted. It is critically important to remember that making placement decisions based upon cost is unlawful. Moreover, to do so loses sight of what is in the best interest of the child. As pointed out previously, getting an IEP team to agree on a private special education placement can be a difficult, expensive and time-consuming undertaking for a family. Federal law speaks clearly on this issue and the sufficiency provisions of CSA were established for these very reasons.

C. More thorough understanding must be gained by decision-makers on the true nature and scope of private special education services.

- Important decisions are being made on the future of these programs, decisions that have real life impact on families of children with disabilities. However, we are concerned that decision-makers may not have a full understanding of the nature and scope of the special education services provided in the private sector. More time must be spent observing first-hand the nature and severity of the disabilities these children present and the challenges of serving them. A greater understanding must be gained of the difference between trying to serve these same children in the public setting, versus the specialized care and education that is given by private educators trained to teach these children and schools established and devoted to the sole mission of serving these students and their families. Visiting one private day school for a few hours is a good first step, but that is only a snapshot. We encourage and would be happy to facilitate a series of visits to a variety of schools around the Commonwealth to help decision-makers gain a full understanding of the issues involved.

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D. The future of the CSA should be determined through a comprehensive study conducted by JLARC.

- The proposed shift of special education funding from the CSA to the VDOE is a decision that could impact the very core mission and future existence of the CSA. While the structure and mission of the CSA is a topic worthy of study and consideration, it should NOT be determined by the immediate issue concerning private special education day placements. The CSA process was designed to be a collaborative effort across many continuums, not just education. It pulls together many disciplines to serve families that generally have multiple needs in education, health and human services and, sometimes, juvenile justice areas. The CSA has served the Commonwealth well over nearly a quarter of a century and is unique across the country. Let us not destroy a delicate system of care that is successfully integrating services across multiple agencies in a way that serves children and families best. The future of such a system merits a comprehensive JLARC level study and VAISEF strongly recommends such a study be undertaken.

Conclusions

The passing of the Children's (Comprehensive) Services Act (CSA) in 1993 marked the Commonwealth of Virginia as a visionary, progressive child and family-focused leader throughout the nation. This bold legislative act to break down departmental silo barriers to children's services by creating a pool of sum-sufficient funding through a state and local partnership to purchase services for at-risk youth and their families has changed the trajectory of thousands of lives over the past twenty four years. Further, the mandate that these funds were to be managed by local interagency teams of public, private and parent representatives sparked a needed culture shift in maintaining focus on meeting the needs of identified children as opposed to various departments making decisions without the value added consultation of other stakeholders. The result has been the development and evolution of a child/family driven system of care supported by multi-disciplinary content experts to give the children of the Commonwealth every opportunity to embrace resiliency and become productive, successful members of our communities.

For children in need of special education services, the CSA has been a critical partner in expanding services to support these federally mandated students in being successfully maintained in their homes and community. Any alteration to the sum-sufficient funding model could interfere with the ability of the Commonwealth and localities to meet the Individuals with Disabilities Education Act (IDEA) federal law requiring Local Education Agencies (LEA) to provide a free and appropriate education within the least restrictive environment. **Therefore, VAISEF supports sum-sufficient funding dedicated to private day placements and opposes any effort that would deny children with disabilities their federally mandated right to a free and appropriate education.**

Without the funding for a full continuum of education services including private special education day schools, children with disabilities risk being warehoused in, or expelled from public schools instead of receiving the appropriate mandated service in the least restrictive environment for those *specific* children. Without the provision of appropriate educational instruction these children will ultimately require more services as adults once they age out of special education increasing costs both to localities and the Commonwealth.

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The private sector's ability to provide special education services to children with educational needs that cannot be addressed in the public school setting is unprecedented. Without private day schools as a critical piece of the system of care, maintaining these students in the community is difficult, as evidenced by the number of former residentially placed children now receiving services through private day and living at home. These students are being maintained by the use of wrap around services including private day school education, provided through CSA.

Anything that disincentivizes placements in private day school settings increases the likelihood of parents/guardians making unilateral placements without the input and benefit of the CSA process; and pursuing litigation against local school jurisdictions for retroactive payment of those services. This strategy is one a number of jurisdictions have seen an increase in over recent years, adding substantial legal costs to localities and an inability for the LEA to appropriately assess and recommend the most appropriate and cost effective educational placement. Additionally, decreasing spending for special education now will result in increased costs associated with the inevitable litigation parents will pursue against local school jurisdictions for children not unilaterally placed by parents.

In closing, the mission of the CSA is

“...to create a collaborative system of services and funding that is child-centered, family-focused and community-based when addressing the strengths and needs of troubled and at-risk youth and their families in the Commonwealth.”

This mission has been successfully accomplished throughout the Commonwealth due to the willingness of legislators, public agencies, private providers and parents to work collaboratively over the past twenty four years to ensure that the children in the Commonwealth of Virginia are supported by an evidenced based model that provides the appropriate mental health, social service and education they require in order to lead a healthy productive life.

In the end, we ask that decision-makers seek the advice and input of those who matter the most in this equation, the families and parents of children with disabilities. These are the folks who live in this world every day, who make unimaginable personal and financial sacrifices for the children they love. These are the folks who pay taxes and are your constituents. Listen to their heart-breaking stories before any decisions are made that could adversely impact the delivery of services their children so desperately need.

If you have any questions or other observations, please do not hesitate to contact VAISEF Executive Director Bill Elwood at welwood@elwood-consulting.com.