Study of
School Enrollment Practices
for Virginia's Kinship Caregivers

Draft Legislation
Advisory Group Comments Received to Date

Cate Newbanks – FACES of Virginia Families

- *Change "severe" to "serious" regarding economic hardship so it is congruent with the previous descriptor regarding family situation.*

- *Will the last section which indicates before and after school care impact those with a child care waiver, and, if so then we might want to note this is not effective to those with a child care waiver?*

Ruth McCall-Miller – Norfolk Department of Human Services

- *Seems clear and to the point*

Rosemarie Stocky – Hanover County Public Schools

- *The proposed language is quite problematic. It includes "factors" to be "considered" by school boards when faced with requests to enroll kids whose parents do not reside within the division. So, what are we to do with those factors once we "consider" them? If we consider them and then decide that the kid should not be allowed to enroll, have we met our obligation or would we be violating the law by doing so? It is not clear.*

- *One of the factors to be "considered" uses the terms "serious family event" and "serious economic hardship." Another factor to be "considered" uses this language: "a serious family situation which makes living with family members unhealthy for the child." None of these terms is defined, leaving school divisions with the responsibility of interpreting what they mean. Moreover, by asking the school division to consider these things, it places the school division staff in the position of doing some sort of due diligence presumably. Are we to send out school social workers to conduct some sort of evaluation of the family each time such a request is made? Do we,* or other school divisions, have school staff that could spend time doing that kind of thing?

Lisa Bennett – JustChildren

- *Based on the group discussion and minutes, I understood the purpose of the draft was to codify the ability of those in informal kinship relationships and non-relative caregiver relationships to establish residency for free public schooling. Unfortunately, I believe the proposed draft actually serves to weaken the presumption of residency for all groups already identified in §22.1-3. Currently, 22.1-3(A) deems those persons of school age who are listed in subsections 1-6 to be residents entitled to free public schooling in very strong language. Under the current proposed draft legislation, whether one has legal custody or court appointed guardianships, is just a factor for school districts to consider. We do not want to add uncertainty where there was clarity. Legislation which merely identifies factors for consideration and fails to indicate how that the factors should be weighed is insufficient. Each proposed factor also contains at least one undefined term causing additional uncertainty.*

- *I, therefore, propose that rather than draft a separate subsection called §22.1-3.1:1, which would be placed after §22.1-3.1 referencing Birth Certificates, that additions be made to 22.1-3 itself. Add either a subsection C or a subpart 7 to section A of §22.1-3 to address residency in informal and formal kinship arrangements and expand on non-relative caregivers acting in loco parentis and require the adult to identify the basis for the claim of residency and that it has not been made solely for school purposes. If desired, a reference to §22.1-264.1 which makes it a misdemeanor to any person to knowingly make a false statement regarding the residency of a child, as determined by §22.1-3 could be included.*

- *I would add to §22.1-3(A). The public schools in each school division shall be free to each person of school age who resides within the school division. Every person of school age shall be deemed to reside in a school division:*
  - *When the parents of such person are unable to care for the person and the person is living, not solely for school purposes, with an adult relative as part of a formal or informal kinship care arrangement or with a non-relative care-giver acting in loco parentis and that adult asserts that it is due to either (i) a serious family event or (ii) significant economic hardship or (iii) other good cause.*
  - *When the person is living part time in more than one school division, then where the majority of time is spent in its school division provided that the person is not living there solely for school purposes. A person receiving before or after school care or residing part time within a school division solely for school purposes shall not be considered a resident for purposes of §22.1-3.*

- *If however, you wish to proceed with the proposed draft, I caution against using terms that are not defined or failing to use terms which are easily referenced. For instance, child is not defined in this section but §22.1-1 does define "person of school age". Elsewhere, "Child" means any natural person under 18 years of age and does not encompass the entire eligible population to be enrolled. § 63.2-100. Definitions. (Welfare-Social Services). Thus, I would consistently use person of school age or person rather than child.*

  § 22.1-3:1:1. Determining bona fide residency for persons to whom public school shall be free.

  In addition to those persons enumerated in 22.1-3, a person of school age is deemed to reside in a school division where one or more of the following conditions are present:
  1. *(delete);*
  2. *the person is living with an adult relative as part of a formal or informal kinship care arrangement and that adult relative asserts that it is due to either (i) a serious family event or (ii) significant economic hardship or (iii) other good cause;*
  3. *the person is living with a non-relative caregiver and the non-relative caregiver asserts that it is due to the parent's inability to care for the child, a serious family situation, or significant economic hardship or other good cause; [l1]*
  4. *if the person is living part time in more than one school division, then where the majority of time is spent in its school division.*

     A person residing in a school division solely for school purposes shall not be considered a resident of that school division for purposes of § 22.1-3. In addition, a person receiving before or after school care or residing part time within a school division solely for school purposes shall not be considered a resident for purposes of §22.1-3.
- *It may be necessary to repeal §22.1-255 Nonresident Children or identify this new section as a substantial modification of that section. Additionally, the minutes reflect that the Advisory Group was concerned that there was not a dispute resolution process identified and that has not been addressed.*

Wendell Roberts – Virginia School Board Association & Virginia Council of School Attorneys

After receiving the draft, I took the opportunity to share the draft legislation with the members of the Virginia Council of School Attorneys ("COSA"). The Virginia COSA provides a statewide forum for the discussion of legal issues and problems encountered by school attorneys in providing legal counsel, advice, and representation to school boards in Virginia. Since virtually all school board attorneys encounter the legal issues associated with residency and enrollment, I believed this forum was an ideal one to share the draft. In addition to the draft, I provided some background on the Commission and the goal of addressing the needs of Kinship Care providers so that everyone reading the draft would do so with the proper context. Furthermore, in the background I referenced the two A.G. opinions on residency, which the commission has referenced throughout this process.

It should not be surprising that I received many comments concerning the draft from many school divisions across the state. I received comments from in-house attorneys representing 10 school divisions. In addition to in-house counsel, attorneys from three private law firms that represent multiple school division across the state provided their comments as well. Every person responding to the draft expressed both their serious concerns with the draft and their general interest in the issue. While articulation of each respondent's concern was slightly different, there were some common themes which ran through all of the responses, which are summarized. There was near unanimous agreement among the COSA respondents that many of the terms in sub-sections 2 and 3 are vague and far too broad to implement. For example, "serious family event", "serious or severe economic hardship", "unhealthy for the child" are all terms and phrases which are not defined and whose subjective meanings are practically an invitation for dispute, disagreement, differing opinions, and future conflict. Said another way, the aforementioned terms and phrases can reasonably mean different things to different people, particularly when the people interpreting them are informal caretakers and/or school administrators.

For this reason, most COSA members recognize, value, and support the use of custody orders, obtained through the local J&DR court, as an essential tool for informal caretakers in the school enrollment process. The J&DR courts are designed and staffed to assess, analyze, and adjudicate families at all levels and crisis and make objective determinations of custody after considering factors like "serious family event", "serious or severe economic hardship", "unhealthy for the child." The resulting custody order thus becomes an objective instrument for school divisions to use in making a determination of residency for school enrollment purposes. Of course, it is well settled that a custody order is not the sole determination of whether a child is a resident who is entitled to a free education. Under current law, the school division must still make an independent determination whether the student is residing with the informal caretaker "solely for school purposes" and whether the parents are "unable to care for" the student. See §22.1-3(A)(4) of the Code of Virginia. However, most COSA members agree that a court order granting custody of the student to an informal caretaker would both simplify and expedite the enrollment process.

Another set of terms used in the draft which could use clarification are "formal or informal kinship care arrangement" (Lines 10-11). As we discussed in the last Advisory Group meeting, kinship care is defined in the §63.2-100 of the Code of Virginia as the "full-time care, nurturing, and protection of children by relatives." The Code does not differentiate between "informal" or "formal" kinship care, nor is it defined in the draft. However, it is important to note that information distributed by the VA Department of Social Services (VDSS) draws sharp differences between "formal" kinship care and "informal" kinship care. Specifically, the VADSS

distributes through its website two brochures on the topic, entitled "A Guide to Exploring Kinship Care Options." and "Virginia's Legal Options for a Relative when a Child Cannot Live with His Parents." Both can be accessed through this link from the DSS website. http://www.dss.virginia.gov/family/fc/kinship.cgi

The VADSS brochures speak for themselves. However, information contained in the VADSS brochures makes it clear that a family's formal kinship care agreement is an outgrowth of the family's involvement with the J&DR court – whether through foster care, pre-adoption placement, or the more routine transfer of custody. I believe the draft would be better served by defining formal and informal kinship care providers. Because families entering into formal kinship care arrangements, as defined in the VADSS brochures, have gone through an objective process (VADSS and J&DR Court), it is much more likely that school divisions can make determinations regarding residency for enrollment purposes more efficiently and reliably. I believe it is the "informal kinship care" arrangements (however they are defined) which drew the most concern from COSA respondents. Also, please note that the one of the VADSS brochures specifically recognizes the importance of having proper legal documentation for school enrollment purposes.

In addition to the issues discussed thus far, the COSA respondents stress that a myriad of state and federal education laws simply do not support the "informal" kinship care relationships that are proposed. Both school division and students living in kinship care need the certainty of knowing who can and will be legally responsible for a student's day-to-day educational needs after the student is enrolled. School Divisions need to have a legally responsible party to provide medical consent when needed; and in a non-custodial kinship care arrangements, the parent is typically unavailable. Furthermore, federal education laws, such as FERPA, limit who can access a student's education record. Under FERPA, a school division would be precluded from fully discussing student's education records with a non-custodial informal kinship care provider. IDEA and Section 504 do not allow kinship care providers to execute IEP's or other educational plans. Furthermore, should the student want to become involved in athletics, the VHSL does not recognize non-custodial informal kinship care arrangements for eligibility purposes. Thus, students, parents, kinship care providers, and school divisions are the beneficiaries when the student is enrolled after a formal designation of custody.

In their comments, COSA members acknowledged families' reluctance to become involved in the J&DR Courts. However, particularly for families in serious or severe crisis, the J&DR courts provide the protection and support that the families may need. While the processes in J&DR courts do vary, I have found that **uncontested** custody cases (which are what I assume "informal" kinship care cases would be) are neither expensive nor complicated. In many cases families choose not to retain an attorney. Some COSA members suggested that an area for further study which might be helpful is the possibility of creating an expedited hearing process in the J&DR Courts where families that are in crisis and who have an uncontested kinship care arrangement can present their plan to the court so that a judge can approve the plan and transfer custody to the kinship care provider in an expedited manner. I believe expedited hearings to determine custody occur in many judicial districts now. I see no reason why this could not be expanded statewide. Also, many school districts have a practice of using a non-relative caregiver's filed Petition for Custody (which would contain the date of the scheduled custody hearing) as an indication that the informal kinship caregiver will be given custody of the student and allow a student to enroll based on the pending custody petition (i.e., provided, of course, that the other requirements of §22.1-3 of the Code are met). Clearly, since custody of the student is not transferred at the filing of the Petition for Custody, that approach has its risks for all the reasons mentioned in the previous paragraph. However, many school divisions

believe it is the best interest to have the student in school until the custody hearing is held. Expansion of this practice could also be helpful.

In summary, I have confirmed in discussing this matter within the COSA community that school attorneys manage residency and enrollment issues daily; and that the challenges are great and diverse. In Northern Virginia, school divisions encounter foreign nationals who send their children to live with relatives so that they can attend their schools. In the Tidewater/Virginia Beach region, school divisions regularly have to address non-military contractors attempting to enroll their children using Military Powers of Attorneys. In the Southwest, school divisions must respond to West Virginia parents sending their children to live with friends and relatives across the border to play sports and attend our schools. Therefore, issues of residency and custody are not new to any of them.

Based on their responses, the COSA membership wants to support families in crisis. However, the COSA membership does not believe that the needs of the students, the families, and the school divisions are met with the draft presented. The position of the VSBA on the draft legislation is consistent with the view of the COSA membership.