

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

LETTER OF FINDINGS¹

School Division Fairfax County Public Schools Dr. Jane Strong, Director, Office of Special Education Procedural Support Ms. Dawn Schaefer, Coordinator of Due Process and Eligibility 8270 Willow Oaks Corporate Drive—Second Floor Fairfax, Virginia 22031 jestrong@fcps.edu DMSchaefer@fcps.edu	Parent
	Student
Date Complaint Received August 7, 2020	Complainant (if other than parent) NA
Notice of Complaint Date August 14, 2020	Findings Date October 2, 2020
Complaint Appeal Date November 2, 2020 ²	Corrective Action Plan Date November 2, 2020
Complaints Department Phone # (804) 225-2013	

During the period addressed in the complaint allegations, Student was a 15-year-old student in Fairfax County Public Schools (LEA (local education agency)).³ In 2016, Student became eligible for special education and related services as a student with a Specific Learning Disability (SLD).

A. Applicable Regulations

On May 28, 2009, the Virginia Board of Education adopted revised regulations to reflect IDEA '04 and its 2006 implementing regulations. The Board's revised regulations became effective on July 7, 2009, and were reissued on January 25, 2010, and on July 29, 2015, at 8 VAC 20-81-10 *et seq.* (the "Virginia Regulations"). Accordingly, this office based its investigation and findings on the Virginia Regulations, which are applicable to the allegations forming the basis of the complaint. The Virginia Regulations are available online at http://www.doe.virginia.gov/special-ed/regulations/state/regs_speced_disability_va.pdf.

B. Sufficiency of Complaint (See 34 C.F.R. § 300.153)

¹For ease of reading throughout this Notice of Complaint, quotations may be designated by the following typeface/colors: *Red regular/italics* = Complainant/Parent; *blue italics* = LEA; *black italics*: US ED; VDOE/ODRAS; other.

²The thirty (30) day period for filing an appeal under the Virginia Regulations, at 8 VAC 20-81-200.E, expires on November 1, 2020, which falls on a Sunday. Accordingly, the appeal will be due on the next business day, Monday, November 2, 2020.

³The record indicates that Student will reach age 17 on December 12, 2020.

LETTER OF FINDINGS

Dr. Jane Strong, Director, Office of Special Education Procedural Support
Ms. Dawn Schaefer, Coordinator of Due Process and Eligibility

October 2, 2020

Page 20 of 37

- On July 6, 2020,²¹ LEA advised Complainant/Parent that it had not completed the audiological evaluation proposed in September 2019, as Complainant/Parent had not provided consent; LEA then provided Complainant/Parent with a Notice and Consent for Evaluation form in response to Complainant/Parent's June 26, 2020, request; and
- On July 31, 2020,²² LEA *declined my request for reimbursement of the [private] auditory evaluation.*

Applicable Regulations and other Guidance/Authority:

- 34 C.F.R. § 300.15; 8 VAC 20-81-10.
- 34 C.F.R. § 300.502(a)(3)(i); 8 VAC 20-81-10.
- 34 C.F.R. § 300.502; 8 VAC 20-81-170.B.
- 34 C.F.R. § 300.502(a)(2); 8 VAC 20-81-170.B.1.b.
- 34 C.F.R. § 300.502(e); 8 VAC 20-81-170.B.2.f.
- 34 C.F.R. §§ 300.303 and 300.304; 8 VAC 20-81-70.
- 34 C.F.R. § 300.303(a) and (b); 8 VAC 20-81-70.F.
- 8 VAC 20-81-60.B; 8 VAC 20-81-70.H.
- 34 C.F.R. § 300.300; 8 VAC 20-81-60.B.2; 8 VAC 20-81-70.G; 8 VAC 20-81-170.E.1.a.

Findings:

The Office of Dispute Resolution and Administrative Services find LEA in noncompliance on this Issue.

Analysis:

Regulatory Background

- Special education regulations (34 CFR 300.15; 8 VAC 20-81-10), define “evaluation” as “procedures used ... to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.”
- These regulations (34 C.F.R. § 300.502(a)(3)(i); 8 VAC 20-81-10) define “independent educational evaluation” (IEE) as “an evaluation conducted by a qualified examiner or examiners who are not employed by the local educational agency [school division] responsible for the education of the child in question.”

²¹ See LEA's July 14, 2020 (12:04 p.m.), email to Complainant/Parent, included in the complaint submission.

²² See LEA's July 31, 2020 (11:28 a.m.), email to Complainant/Parent, included in the complaint submission.

LETTER OF FINDINGS

Dr. Jane Strong, Director, Office of Special Education Procedural Support
Ms. Dawn Schaefer, Coordinator of Due Process and Eligibility

October 2, 2020

Page 21 of 37

- Parents have the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school division. More specifically, the regulations provide that, upon receipt of a parental request for an IEE, the school division must, without unnecessary delay, either (i) initiate a due process hearing to show that its evaluation is appropriate; or (ii) ensure that an IEE is conducted at public expense unless the school division demonstrates in a due process hearing that the evaluation obtained by the parent does not meet the school division's criteria (34 C.F.R. § 300.502).
- Further, the regulations (34 C.F.R. § 300.502(a)(2); 8 VAC 20-81-170.B.1.b and B.2.f) direct school divisions to provide to the parent, upon request for an IEE, information about where an independent educational evaluation may be obtained and the applicable criteria for IEEs.
- Additionally, these regulations (34 C.F.R. § 300.502(e); 8 VAC 20-81-170.B.2.f) specify that, if the IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the school division agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. Except for the criteria, a local educational agency may not impose conditions or timelines related to obtaining an IEE at public expense.²³

Scope of IEEs—OSEP Monitoring Report

- As a preliminary matter, we note that special education regulations (34 C.F.R. § 300.305(c)(6); 8 VAC 20-81-70.C) direct school divisions to establish policies and procedures to ensure that its evaluations are “sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.”
 - Accordingly, when a parent believes a school division has failed to comply with this regulatory requirement, the parent may (i) request an additional evaluation; or (ii) pursue one of the federally mandated dispute resolution options.
- On June 23, 2020, the Office of Special Education Programs (OSEP), U.S. Department of Education, issued a letter summarizing the results of its May 2019 on-site visit to the Virginia Department of Education (Office of Dispute Resolution; Office of Special Education Program Improvement).

²³See also, U.S. Department of Education, Office of Special Education Programs, *Analysis of Comments and Changes*, at 46689-46690, Federal Register, Vol. 71, No. 156 (August 14, 2006). VDOE has also stated that *the qualifications of the IEE evaluator must be the same as the criteria that the LEA uses when it initiates an evaluation....* Virginia Department of Education, *Discipline of Children with Disabilities Technical Assistance Resource Document* (Fall 2010) <http://www.doe.virginia.gov/support/student_conduct/discipline_children_disabilities.pdf>

LETTER OF FINDINGS

Dr. Jane Strong, Director, Office of Special Education Procedural Support
Ms. Dawn Schaefer, Coordinator of Due Process and Eligibility

October 2, 2020

Page 22 of 37

- Relevant to the issue before us—that is, a parental request for an IEE based on a disagreement with the scope of a school division’s evaluation (i.e., its “comprehensiveness”)—are OSEP’s findings regarding 8 VAC 20-81-170.B.2.a and B.2.e. Specifically, OSEP stated that:

*When presented with inquiries from individuals about the scope of a parent’s right to an IEE at public expense, since 1995, OSEP has consistently taken the position that a parent’s right to an IEE at public expense is not limited to those assessments that were part of the public agency’s evaluation. OSEP’s interpretation is supported by the plain language of the statute and regulation, which do not restrict a parent’s right to an IEE at public expense to those assessments previously conducted by the public agency. See OSEP Letter to Fisher (1995); OSEP Letter to Baus (2015)...; and OSEP Letter to Carroll (2016), That is, **disagreement over the evaluation conducted by an LEA includes a disagreement about the appropriate scope of the assessment**, such as when an LEA fails to assess suspected areas of a child’s educational needs simply because of shortages of evaluation personnel. In addition, OSEP has explained that a parent’s right to an IEE is not contingent upon the public agency being first afforded an opportunity to conduct an assessment in an area that was not part of the initial evaluation or reevaluation. See OSEP Letter to Thorne (1990) and OSEP letter [sic] to Carroll (2016) [emphases added].²⁴*

²⁴ In its October 22, 2016, *Letter to Carroll* (68 IDELR 279; 116 LRP 46076), OSEP addressed an inquiry regarding whether, “once a [school division’s] evaluation is complete and the parent communicates a desire for a child to be assessed in a particular area in which they [sic] have not previously expressed concern, would the [school division] have the opportunity to conduct an evaluation in the given area before a parent invokes the right to an IEE.” The OSEP advised that the IDEA “affords a parent the right to an IEE at public expense and does not condition that right on a [school division’s] ability to cure the defects of the evaluation it conducted prior to granting the parent’s request for an IEE. Therefore, it would be inconsistent with the provisions of 34 CFR § 300.502 to allow the [school division] to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parents’ request for an IEE at public expense or filing a due process complaint to show that its evaluation was appropriate. Under 34 CFR § 300.502(b)(5), a parent is entitled to only one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees.”

Similarly, in addressing “whether a parent can request an IEE in an area that was not previously assessed by the school [division’s] evaluation” in its 2015 *Letter to Baus* (65 IDELR 81; 115 LRP 8855), OSEP stated that “[w]hen an evaluation is conducted in accordance with 34 CFR §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.”

Significantly, OSEP has stated that its letters are “provided as informal guidance and [are] not legally binding [emphasis added], but [represent] an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.”

LETTER OF FINDINGS

Dr. Jane Strong, Director, Office of Special Education Procedural Support
Ms. Dawn Schaefer, Coordinator of Due Process and Eligibility

October 2, 2020

Page 23 of 37

- The OSEP specifically concluded that *the provision of Virginia’s regulation, 8VAC20-81-170(B)(2)(a)²⁵ and (e)²⁶, are inconsistent with 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502, because the State’s regulation restricts a parent’s right to an IEE at public expense to only those areas in which the public agency had previously evaluated the child.²⁷*

May 2019 Request for “Audiological IEE”

- As the chronology indicates, LEA completed an evaluation for Student in summer 2019, consisting of educational, psychological, and sociocultural assessments and an audiological consult/observation. Complainant/Parent provided consent to these evaluations, which LEA completed in July 2019.
 - It is unclear from the record whether this evaluation process constituted an accelerated or “early” triennial evaluation; in any case, we need not resolve the full “nature” of this evaluation to reach our findings here.²⁸

²⁵ “The parent(s) has the right to an independent educational evaluation at public expense if the parent(s) disagrees with an evaluation **component** obtained by the local educational agency.” [emphasis added].

²⁶ “A parent is entitled to only one independent evaluation at public expense each time the public educational agency conducts an evaluation **component** with which the parent disagrees.” [emphasis added].

²⁷ The OSEP directed VDOE to take the following “next steps”:

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

²⁸ Student’s proposed September 2, 2020, IEP cites the August 12, 2019, eligibility date and identifies August 12, 2022, as the “3-Year Reevaluation Date.” The associated prior written notice indicates consideration of these evaluations in the eligibility determination process.

LETTER OF FINDINGS

Dr. Jane Strong, Director, Office of Special Education Procedural Support
Ms. Dawn Schaefer, Coordinator of Due Process and Eligibility

October 2, 2020

Page 24 of 37

- Approximately one month after the completion of this evaluation, Complainant/Parent requested an IEE, but failed to identify a particular evaluation process with which Complainant/Parent disagreed. When LEA inquired regarding the particular evaluation, Complainant/Parent initially declined to be specific. Accordingly, LEA was left to assume that Complainant/Parent's request referred to the summer 2019 evaluation process, and granted IEEs for educational and psychological evaluations.
 - Complainant/Parent then inquired as to why LEA had not granted an "audiological" IEE, as the evaluation process had included an audiology consultation/observation. LEA advised that, as it had not conducted an audiological evaluation as part of the summer 2019 evaluation process, *there is no requirement for [LEA] to provide an audiological IEE at public expense.*
- As the chronology indicates, Complainant/Parent and LEA exchanged numerous emails in the ensuing months regarding, inter alia, (i) Complainant/Parent's questioning of LEA's IEE cost criteria; and (ii) LEA's refusal of the "audiological" IEE request.
- Ultimately, in summer 2020, Complainant/Parent obtained independent evaluations from two providers: a private neuropsychologist, who completed the approved educational and psychological IEEs, and a private audiologist/SLP, who completed the audiological/"auditory processing" IEE, for which LEA had not granted approval nearly one year before.²⁹
- Having obtained this "audiological"/"auditory processing" IEE, Complainant/Parent submitted the above complaint allegations, seeking as a proposed resolution that LEA *pay for the full cost of the private Auditory assessment.*
- While this office notes the "extensive and continuing amount of hearing and review officer decisions concerning IEEs at public expense evidence not only the frequency of the issue but also the need for a careful legal analysis"³⁰ as well as unfolding case law,³¹ in reaching our conclusion, we are necessarily constrained by the findings and directives of the OSEP report.

²⁹ The private audiologist/SLP's completion of the approved speech/language IEE is not at issue in this complaint investigation. The IEE reports were included in LEA's response.

³⁰ P. Zirkel, *Independent Educational Evaluation Reimbursement Under IDEA: The Latest Update* (2017) < <https://perryzirkel.files.wordpress.com/2013/08/iee-reimbursement-checklist-052017.pdf> >

³¹ Although not binding judicial authority in Virginia (which is located in the 4th Circuit), the September 17, 2020, ruling of the 2nd Circuit Court of Appeals in *D.S. ex rel. M.S. v. Trumbull Bd. of Educ.*, 20 LRP 28133 (2d Cir. 2020) provides an example of unfolding jurisprudence regarding IEEs. The Court specifically held that "an FBA is not an evaluation for the purpose of triggering a parent's IEE right." In reaching its finding, the Court indicated its disagreement with, inter alia, "two [OSEP] policy letters in which it too endorses the conclusion that FBAs are the equivalent of evaluations for purposes of triggering the right to an IEE." (See *Letter to Scheinz*, 34 IDELR 34; 34 LRP 63 (June 7, 2000); *Letter to Christiansen*, 48 IDELR 161; 107 LRP 45740 (February 9, 2007).

The Court stated: "The Department of Education's interpretation ignores the plain text of the statute and regulations, and therefore we owe it no deference. [citation omitted]" ("To the extent that there is ambiguity [in a federal regulation],

LETTER OF FINDINGS

Dr. Jane Strong, Director, Office of Special Education Procedural Support
Ms. Dawn Schaefer, Coordinator of Due Process and Eligibility

October 2, 2020

Page 25 of 37

- Based on OSEP’s directive, we must find that, once LEA understood that an “audiological IEE” was included within Complainant/Parent’s August 2019 IEE request, LEA was required to grant that request or initiate a due process hearing to show that its July 2019 evaluation was appropriate. **Because LEA did neither, we find LEA in noncompliance.**
 - As the chronology indicates, on May 12, 2020, nearly 10 months after requesting an IEE (for which LEA granted educational and psychological independent evaluations), Complainant/Parent emailed LEA to again request an IEE. Complainant/Parent advised of the intention *to schedule the IEE for the psychological* and specifically enumerated the IEEs requested—including a *full auditory processing evaluation*.
 - Special education regulations (8 VAC 20-81-170.B.2.e) dictate that a “parent is entitled to only one independent educational evaluation at public expense each time the public educational agency conducts an evaluation ... with which the parent disagrees.”
 - The weight of the record indicates that Complainant/Parent sought IEE(s) in summer 2019 to address concerns regarding Student’s auditory processing needs. While LEA has asserted that its grant of an IEE for a psychological evaluation would address this area, Complainant/Parent ultimately clarified the August 2019 request to include an “audiological” IEE, which LEA refused. This “audiological” IEE would also address Student’s auditory processing needs.
 - Thus, we construe the Complainant/Parent’s request “auditory processing evaluation” as a clarification of the original request for an “audiological” IEE; the record suggests that Complainant/Parent used these terms somewhat interchangeably.³²

we may look to how the federal Department of Education has construed its own regulation. An agency's consistent interpretation of its regulations is to be given controlling weight unless plainly erroneous or inconsistent with the regulation.’); [citation omitted] (‘[A]n agency's interpretation of its own regulation is entitled to deference ... when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous To defer to the agency's position [articulated in an opinion letter] would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.’).”

We further note other statements by the 2nd Circuit Court of Appeals:

- (i) “If a parent disagrees with an evaluation and requests an IEE at public expense, the regulations do not circumscribe the scope of that IEE. See 34 C.F.R. § 300.502(b)(1). Nothing in the statute or regulations suggests that a parent cannot challenge an evaluation on the ground that it was too limited. To the contrary, because the IDEA requires an evaluation to be comprehensive, one would expect that a parent is free to disagree with an evaluation based on its deficient scope....”
- (ii) “Because the only evaluations that trigger a parent's right to an IEE at public expense are the initial evaluation and triennial reevaluations discussed in Section 1414 of the Act, a parent's right to an IEE at public expense ripens each time a new evaluation is conducted....”
- (iii) “If a parent disagrees with a school's intermediary limited assessment because they believe that a more comprehensive evaluation was appropriate at that time, the logical remedy would be more frequent evaluations—and the parents are entitled to request one per year—not an IEE at public expense. If the parent disagrees with those evaluations, then they would be free to request an IEE at public expense with which to counter. We leave those issues for the district court to resolve on remand....”

³² VDOE has updated its guidance regarding auditory processing disorder within its *Speech-Language Pathology*

LETTER OF FINDINGS

Dr. Jane Strong, Director, Office of Special Education Procedural Support
Ms. Dawn Schaefer, Coordinator of Due Process and Eligibility

October 2, 2020

Page 26 of 37

- Bound by the OSEP report, we find that LEA must grant Complainant/Parent’s request for an “audiological”/“auditory processing” IEE. Further, to the extent Complainant/Parent has already procured this independent educational evaluation,” LEA must ensure that it provides for this independent evaluation unless it demonstrates in a due process hearing that this independent evaluation fails to meet LEA’s criteria. (8 VAC 20-81-170.B.2.b.2).³³
 - In reaching our finding, we note that, per the OSEP report, LEA’s attempt to “cure” any omission in conducting its own audiological evaluation does not relieve it of its obligation to grant Complainant/Parent’s request for an “audiological”/“auditory processing” IEE.³⁴
 - Based on (i) the particular facts and circumstances before us; and (ii) OSEP’s directives, we find LEA in noncompliance on this Issue.
-