

**VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES  
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES  
LETTER OF FINDINGS<sup>1</sup>**

<b>School Division</b> Fairfax County Public Schools Ms. Dawn Schaefer, Acting Director, Office of Special Education Procedural Support Ms. Lourrie Duddridge, Senior Educational Specialist, Due Process and Eligibility 8270 Willow Oaks Corporate Drive—Second Floor Fairfax, Virginia 22031 <a href="mailto:DMSchaefer@fcps.edu">DMSchaefer@fcps.edu</a> <a href="mailto:leduddridge@fcps.edu">leduddridge@fcps.edu</a>	<b>Parent</b> <div style="background-color: black; height: 15px; width: 100%;"></div> <div style="background-color: black; height: 15px; width: 100%;"></div> <div style="background-color: black; height: 15px; width: 100%;"></div> <div style="background-color: black; height: 15px; width: 100%;"></div> <b>Student</b> <div style="background-color: black; height: 15px; width: 100%;"></div>
<b>Date Complaint Received</b> June 22, 2021	<b>Complainant (if other than parent)</b> N/A
<b>Notice of Complaint Date</b> June 24, 2021	<b>Findings Date</b> August 11, 2021
<b>Complaint Appeal Date</b> September 10, 2021	<b>Corrective Action Plan Date</b> September 10, 2021
<b>Complaints Department Phone #</b> (804) 225-2013	

During the period addressed in the complaint allegations, Student was an eight-year-old student in Fairfax County Public Schools (LEA (local education agency)) and eligible for special education and related services under IDEA '04 as a student with a Developmental Delay (DD).

**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](http://www.doe.virginia.gov/special-ed/regulations/state/regs_speced_disability_va.pdf).

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

Prior to the issuance of the *Notice of Complaint* in this case, this office reviewed the complaint documentation and determined that it met the filing requirements of the regulations.

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<sup>1</sup>For ease of reading throughout this Letter of Findings, quotations may be designated by the following typeface/colors: *Purple italics* = Complainant/Parent; *blue italics* = LEA; *black italics* = VDOE/ODRAS/other.

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
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### C. On-Site Visit

Based on Complainant's supporting materials, the school division's response documentation, and additional information, this office determined that conducting an on-site visit would not have produced any more determinative facts than were presented in the written correspondence, and therefore, we had sufficient information to bring our investigation to closure without an on-site visit.

### D. Chronology

A review of the record indicates the following chronology:

 = IEP meeting conducted

Date	Event
<b>Events Occurring More Than 365 Days Before June 22, 2021</b>	
October 16, 2018	<ul style="list-style-type: none"><li>Student found initially eligible under DD category.</li></ul>
October 19, 2018	<ul style="list-style-type: none"><li>IEP meeting conducted; <b>Parent provided consent to proposed initial IEP.</b></li><li>IEP provided for placement at LEA Alternative Learning Center (ALC).</li></ul>
<b>Events Occurring Within 365 Days of June 22, 2021</b>	
September 3, 2020	<ul style="list-style-type: none"><li>IEP meeting conducted; <b>annual IEP</b> and speech, assistive technology (AT) evaluations proposed; Parent did not provide consent to IEP or evaluations.</li></ul>
March 22; April 26, 28; May 21, 2021	<ul style="list-style-type: none"><li>LEA issued notice(s) of proposed <b>reevaluation</b> meeting(s)</li><li>Meetings did not occur.</li></ul>
April 29, 2021	<ul style="list-style-type: none"><li>LEA issued notices for proposed <b>IEP</b> meetings for May 10, 11, and 14, 2021, for purpose of <b>annual IEP development.</b></li><li>Meetings did not occur.</li></ul>
May 21, 2021	<ul style="list-style-type: none"><li>LEA issued notice of proposed May 27, 2021, <b>annual IEP meeting.</b></li><li>Meeting did not occur.</li></ul>
June 3, 2021	<ul style="list-style-type: none"><li>LEA issued notices for proposed June 9, 2021, <b>annual IEP and reevaluation meetings.</b></li><li><u>IEP</u> meeting did not occur.</li></ul>
June 4, 2021	<ul style="list-style-type: none"><li>Via email (7:22 p.m.), LEA advised Parent that IEP facilitator and <i>the IEP team have coordinated to honor your request for an emergency facilitated IEP/Reevaluation meeting for [Student]. Please see the below date and time that has [sic] been established to honor your requests and the mandated [LEA] timelines.</i></li></ul>

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June 9, 2021	<ul style="list-style-type: none"><li>• <b>Reevaluation team</b>—including Parent—convened;<sup>2</sup> LEA proposed evaluations for Student.</li></ul>
June 10, 2021	<ul style="list-style-type: none"><li>• Via email (6:05 p.m.), Parent refused consent to proposed evaluations.</li><li>• Parent asserted: <i>...reevaluation and eligibility is [sic] unnecessary....</i></li></ul>
June 16, 2021	<ul style="list-style-type: none"><li>• Via email (10:52 p.m.), Parent advised LEA <i>I have the flu-again. I'm still not feeling well...I don't think I will be able to attend....</i></li></ul>
June 17, 2021	<ul style="list-style-type: none"><li>• Via email (8:31 a.m.), IEP facilitator advised Parent: <i>Since you will not be in attendance at this meeting, I will not be in attendance. However, due to the timeline they are facing[,] [LEA] may elect to meet in order to make the eligibility determination. That will be their decision to make. However, please keep in mind that they will still need your signed approval before implementing any changes. I am very sorry you are unwell</i> [emphases in original].</li><li>• Eligibility and annual IEP meetings conducted without Parent.</li><li>• Team found Student ineligible for special education under IDEA '04.</li></ul>
June 18, 2021	<ul style="list-style-type: none"><li>• Via email (1:18 p.m.) to Parent, LEA sent <i>paperwork from yesterday's eligibility and IEP meeting for [Student]. We met as an IEP team to ensure we could provide you with a proposal for ESY and Recovery Services. On the last pages of each document is where we will need your consent....Additionally, we are happy to meet with you to review the proposal, should you have any questions....</i></li></ul>
June 22, 2021	<ul style="list-style-type: none"><li>• ODRAS received complaint submission.</li></ul>
June 24, 2021	<ul style="list-style-type: none"><li>• ODRAS issued Notice of Complaint.</li></ul>
September 3, 2021	<ul style="list-style-type: none"><li>• Annual IEP review anniversary date.</li></ul>
October 16, 2021	<ul style="list-style-type: none"><li>• Triennial reevaluation anniversary date.<sup>3</sup></li></ul>

## ISSUE(S) AND REGULATIONS:

### **1. Individualized Education Program (IEP)—Parental Participation. Evaluation, Reevaluation, and Eligibility—Parental Participation.**

Parent has alleged that LEA has violated special education laws and regulations governing parental participation in a **June 17, 2021**, IEP/eligibility meeting(s).

More specifically, Parent has alleged that:

<sup>2</sup> See 8 VAC 20-81-80.B.1.

<sup>3</sup> Student's initial IEP identifies October 16, 2021, as the triennial reevaluation date.

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- *I emailed last week that I was sick.... I asked to re-schedule in order to be present for my son's IEP meeting, an emergency IEP [sic] meeting that It [sic] initiated and requested and [sic] facilitated IEP [sic] meeting; and*
- LEA conducted *an IEP [sic] meeting ... without me in attendance.*

### Applicable Regulations:

- 34 C.F.R. § 300.322; 8 VAC 20-81-110.E.
- 34 C.F.R. § 300.501(b)(2); 8 VAC 20-81-170.A.1.b.1.a-c.
- 34 C.F.R. § 300.322(a); 8 VAC 20-81-110.E.1.
- 34 C.F.R. § 300.322(d); 8 VAC 20-81-110.E.4.
- 34 C.F.R. §§ 300.303 and 300.304; 8 VAC 20-81-70.
- 34 C.F.R. § 300.303(b); 8 VAC 20-81-70.F.
- 8 VAC 20-81-70.F.2.
- 34 C.F.R. § 300.501; 8 VAC 20-81-170.A.1.
- 34 C.F.R. §§ 300.303 and 300.304; 8 VAC 20-81-70.
- 8 VAC 20-81-60.B; 8 VAC 20-81-70.H.
- 34 C.F.R. §§ 300.306 through 311; 8 VAC 20-81-80.
- 8 VAC 20-81-80.C.

### Findings:

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

### Analysis:

#### *Regulatory Background*

- Special education regulations (34 C.F.R. §§ 300.303 and 300.304; 8 VAC 20-81-70) set forth the procedures and requirements governing the evaluation and reevaluation of students with disabilities. More specifically, these regulations (34 C.F.R. § 300.303(b); 8 VAC 20-81-70.F) provide that a reevaluation shall be conducted at least once every three years, unless the parent and the school division agree that a reevaluation is unnecessary.<sup>4</sup>

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<sup>4</sup> Additionally, the Virginia Regulations, at 8 VAC 20-81-70.F.2, provide that school divisions shall not conduct a reevaluation more than once a year unless the parent and the school division agree otherwise. If the school division



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- If a reevaluation is conducted for purposes other than the child's triennial reevaluation, the reevaluation process, including eligibility determination, shall be completed in 65 business days of the receipt of the referral by the special education administrator or designee for the evaluation. The parent and eligibility group may agree in writing to extend the 65-day timeline to obtain additional data that cannot be obtained within the 65 business days (8 VAC 20-81-70.H).
- Significantly, in the case of a triennial reevaluation, however, the process—including eligibility determination, must be initiated in sufficient time to complete the process prior to the third anniversary of the date eligibility was last determined.
- Special education regulations (34 C.F.R. §§ 300.306 through 311; 8 VAC 20-81-80) set forth requirements for determinations of eligibility for special education, including, but not limited to, provisions addressing eligibility criteria, notice, written summaries, and team composition.
  - The Virginia Regulations (8 VAC 20-81-80.C) provide that, upon completion of the administration of assessments and other evaluation (or after determining that additional data are not needed) a “group of qualified professionals” and the student's parent(s) determine (i) whether the student is, or continues to be, a student with a disability and (ii) the student's educational needs.<sup>5</sup>
- These regulations underscore the parent's right to participation in meetings regarding FAPE and the identification, evaluation, and educational placement of the student (34 C.F.R. §

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does not agree with the parent's request for a reevaluation, the school division must provide the parent with prior written notice of its refusal of the parent's request.

<sup>5</sup> The determination of whether a student is a student with a disability is made by the parent(s) and a group that is collectively qualified to (i) conduct, as appropriate, individual diagnostic assessments in the areas of speech and language, academic achievement, intellectual development and social-emotional development; (ii) interpret assessment and intervention data, and apply critical analysis to those data; and (iii) develop appropriate educational and transitional recommendations based on the assessment data. The eligibility group may be an IEP team, as long as these requirements and meeting notice requirements (8 VAC 20-81-170) are met.

The group shall include, but not be limited to: (i) LEA personnel representing the disciplines providing assessments; (ii) the special education administrator or designee; (iii) the parent(s); (iv) a special education teacher; (v) the student's general education teacher or, if the student does not have a general education teacher, a general education teacher qualified to teach a child of the student's age; or for a child of less than school age, an individual qualified to teach a child of the child's age; and (vi) at least one person qualified to conduct individual diagnostic examinations of children, such as school psychologist, speech-language pathologist, or remedial reading teacher.

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300.501; Virginia Regulations, at 8 VAC 20-81-170.A.1). These regulations also set forth requirements for meeting notices.

- Specifically, these regulations (34 C.F.R. § 300.322; 8 VAC 20-81-110.E) set forth requirements regarding parental participation in IEP meetings, and include provisions addressing meeting notices.<sup>6</sup>
- The regulations (34 C.F.R. § 300.322(a); 8 VAC 20-81-110.E) direct school divisions to “take steps to ensure” that a parent is either present at each IEP meeting or afforded the opportunity to participate. The school division is to schedule the meeting at “a mutually agreed upon time and place,” and must use other methods to ensure parental participation, such as telephone conference calls and audio conferences. The regulations (34 C.F.R. § 300.322(d); 8 VAC 20-81-110.E.4,) specify that a school division may conduct an IEP meeting without the parent if it is unable to convince the parent that he should attend. The school division must have a record of attempts to arrange a mutually agreed on time and place.<sup>7</sup>

### *Review of Record*

#### ➤ *Eligibility Meeting*

- LEA has asserted that its actions were consistent with special education regulations. LEA stated that *the reevaluation process for [Student] was initiated on March 22, 2021. The 65<sup>th</sup> [business] day of the process was identified as June 23, 2021.*<sup>8</sup>
  - LEA indicated that it proposed numerous dates for a meeting to determine needed reevaluation data (8 VAC 20-81-70.B), and that Parent participated in the June 9, 2021, meeting, but refused consent to proposed reevaluations.

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<sup>6</sup> Further, in establishing requirements for IEP team composition, special education regulations (34 C.F.R. § 300.321; 8 VAC 20-81-110.C) provide that the team must include, among others, the parent, and at least one regular education teacher of the child (if the child is or may be in the regular education environment), at least one special education teacher of the child, and representatives of the school division who are knowledgeable about the general education curriculum and the availability of school division resources, and personnel qualified to provide or supervise the provision of special education. The IEP team members may include, at the discretion of the parents and the school division, individuals with particular knowledge or expertise regarding the student. The inviting party determines whether the individual has the required knowledge or expertise.

<sup>7</sup> Similarly, the 2006 implementing regulations, at 34 C.F.R. § 300.501(b)(2), and the Virginia Regulations, at 8 VAC 20-81-170.A.1.b.1.a-c, outline the steps a school division shall take in order to ensure that the parent(s) are afforded the opportunity to participate in meetings, including requirements for the meeting notice to be provided to the parent.

<sup>8</sup> Our calculations confirm that June 23, 2021, was the 65<sup>th</sup> business day following March 22, 2021.

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- LEA stated that it convened the June 17, 2021, *eligibility meeting...without [Parent] ... (who had indicated an inability to attend due to illness) due to the requirement that the meeting be held on or before [Wednesday,] June 23, 2021. June 18, 2021 [Friday], was a holiday* and LEA personnel were unavailable on June 21 or 22, 2021.
- As the chronology indicates, the eligibility and IEP teams convened on June 17, 2021, without Parent.
- Significantly, the record indicates that Student's proposed reevaluation and eligibility determination were for purposes of the required **triennial** reevaluation. As indicated in the June 9, 2021, report of the reevaluation team:

<b>Reason for reevaluation:</b> Triennial	<b>Date Referral Received (if initiated by parent):</b>
<b>Reeval Reason Details or Concerns:</b> The team is meeting for [REDACTED] triennial reevaluation. [REDACTED] receives special education services as a student with a Developmental Delay.	

- Pursuant to 8 VAC 20-81-70.H (cited above), the 65-business-day timeline was not applicable.<sup>9</sup> Here, LEA was simply required to initiate Student's triennial reevaluation process—and complete it—*prior to the third anniversary of the date eligibility was last determined*. In the case before us, that anniversary date has yet to occur: **October 16, 2021**.
  - Accordingly, there was no regulatory basis—or other compelling reason—for LEA to conduct the June 17, 2021, triennial eligibility determination meeting without Parent.

### ➤ IEP meeting

- While LEA has responded that it convened an **IEP meeting** that same day without Parent to *ensure we could provide you with a proposal for ESY and Recovery Services*,<sup>10</sup> we find this an insufficient justification for convening the IEP team in Parent's absence.
- We find the following persuasive:

<sup>9</sup> We note that 8 VAC 20-81-70.H.1 grants school divisions great flexibility in initiating and scheduling the triennial reevaluation process, while ensuring completion by the third anniversary date. In contrast, 8 VAC 20-81-70.H.2 specifically cites the 65-business-day timeline in the context of reevaluations *for purposes other than the child's triennial....*

<sup>10</sup> LEA echoed this justification in its July 28, 2021, email response to a request for clarification from this office.

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- Significantly, there is no indication that LEA faced a regulatory timeline (e.g., annual IEP meeting date, etc.) prompting the convening of Student’s **annual IEP** meeting on June 17, 2021.
  - The September 3, 2020, proposed IEP (for which Parent did not provide consent and which LEA described as the **annual IEP**) identified September 3, 2021, as the next annual IEP review date.
  - Even if LEA sought to “consolidate” the June 17, 2021, IEP meeting with the eligibility meeting (8 VAC 20-81-110.B.8), we have found no justification for the convening of any associated triennial reevaluation/eligibility meeting in Parent’s absence, as indicated above.
- While special education regulations permit an LEA to conduct an IEP meeting without a parent when it is unable to convince the parent to attend (8 VAC 20-81-110.E.4), LEA made no such attempts.
- Additionally, there is no indication that LEA attempted to use an alternative method to ensure Parent’s participation (8 VAC 20-81-110.E.3).
- Based on the foregoing, we find LEA in noncompliance for convening the June 17, 2021, eligibility and IEP meetings without Parent.
  - While we find LEA in noncompliance, we nonetheless acknowledge the challenges of convening required IEP members—particularly after the conclusion of a school year conducted during a global pandemic. We also note LEA’s expressed concerns regarding (i) Parent’s *history of prolonging the IEP process*;<sup>11</sup> and (ii) a failure to obtain Parent’s consent to an IEP proposal in nearly three years.
  - Further, although we commend the parties’ attempts to use an IEP facilitator, we must also note the option of a due process hearing when IEP facilitation, multiple meetings, and state-sponsored mediation fail to produce an IEP for which a parent grants consent.
  - Finally, although we find LEA in noncompliance, we continue to note and distinguish *Doug C. v. Hawaii Dept. of Ed.*, 720 F.3d 1038 (9<sup>th</sup> Cir. 2013), in which the 9<sup>th</sup> Circuit Court of Appeals found that the school division (State of Hawaii) violated special education

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<sup>11</sup> In its July 28, 2021, email response to a request for clarification, LEA cited the number of meetings required to produce the August 2019 (eight) and September 2020 (nine) annual IEPs.



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regulations when it conducted an annual IEP meeting without the parent. In reaching its ruling, the Court reviewed the school division's actions in the meeting scheduling process and the annual meeting deadline. In the parent's absence, the IEP team changed the student's placement. The Court found that the lack of parental participation in the meeting denied FAPE to the student. The Court stated that "the regulatory framework of the IDEA places an affirmative duty on agencies to include parents in the IEP process."

- Significantly—unlike Virginia's special education regulations—Hawaii's special education regulations do not require parental consent to effectuate a change in placement (or to amend an IEP). Accordingly, while the 9<sup>th</sup> Circuit's ruling may be instructive, it is not binding on the 4<sup>th</sup> Circuit, and its potential application in Virginia can be distinguished on the basis of Virginia's parental consent requirements.

### **CORRECTIVE ACTION PLAN:**

This office found LEA in noncompliance on this Issue; accordingly, we request that LEA:

1. Ensure that the **eligibility team—with Parent in attendance**—reconvenes **on or before the October 16, 2021, triennial anniversary date** to conduct Student's triennial reevaluation and eligibility determination;
  - Provide this office with documentation of the reconvened eligibility meeting, including the updated **eligibility meeting summary** (8 VAC 20-81-80.D.9) and **associated prior written notice** (8 VAC 20-81-170.C).
  - The record suggests seeming internal inconsistencies in the June 17, 2021, eligibility documentation. The materials LEA included in its response indicated a determination of **ineligibility** for the categories of Emotional Disability (ED); Specific Learning Disability (SLD); and Developmental Delay (DD)(Student's current eligibility category); **however:**
    - the associated PWN indicated a finding of ineligibility solely for DD; and
    - the Notice of Eligibility Determination that Student *continues to be eligible for special education services*.

**LEA is to correct these inconsistencies in the documentation created with regard to the reconvened eligibility meeting.**

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- We remind the parties of the parent's right to appeal the subsequent eligibility decision via due process hearing procedures (8 VAC 20-81-80.X.2).
2. Ensure that the **IEP team—with Parent in attendance**—reconvenes to address Student's annual IEP review **on or before the September 3, 2021, annual IEP review date**;
- Provide this office with documentation of the reconvened IEP meeting date, including **any proposed IEP and associated prior written notice**.
    - If the parties are unable to reach an agreement regarding Student's services, they may wish to pursue mediation or due process. Information on mediation and due process is available at our department's web site at [http://www.doe.virginia.gov/special\\_ed/resolving\\_disputes/mediation/index.shtml](http://www.doe.virginia.gov/special_ed/resolving_disputes/mediation/index.shtml); and at [http://www.doe.virginia.gov/special\\_ed/resolving\\_disputes/due\\_process/index.shtml](http://www.doe.virginia.gov/special_ed/resolving_disputes/due_process/index.shtml), respectively, or by calling our office at (804) 225-2013.
3. Provide this office a copy of an **instructional memorandum**, and **evidence of its issuance to all LEA special education administrators**, advising of the regulatory requirements governing parental participation in meetings addressing the identification, evaluation, and placement and the provision of a free appropriate public education (8 VAC 20-81-170.A.1.a.2; 8 VAC 20-81-170.A.1.c), including:
- the necessary steps to ensure that one or both parents are present at each IEP/eligibility meeting, or are afforded an opportunity to participate, including scheduling the meeting at a mutually agreed upon time and place (8 VAC 20-81-110.E.1) and issuing meeting notice (8 VAC 20-81-110.E.2; 8 VAC 20-81-170.A.1.b.1); and
  - the limited circumstances in which an IEP/eligibility meeting may be conducted without the parent, including the requirements addressing (i) use of other methods to ensure parental participation (e.g., conference call, etc.), (8 VAC 20-81-110.E.3; 8 VAC 20-81-170.A.1.c.3); and (ii) documented efforts to convince parents to attend (8 VAC 20-81-110.E.4; 8 VAC 20-81-170.A.1.c.4).

**LEA is to submit documentation regarding this corrective action to our office by September 10, 2021.**

Please maintain documentation of the actions taken as required in this Corrective Action Plan (CAP), including the documentation referenced in the CAP, as this information may be requested during our CAP implementation follow-up process on a later date.

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### **APPEAL INFORMATION:**

Please note that the findings in this Letter of Findings are specific to this case. While general rules are cited, findings in other cases may differ due to distinctions in the specific facts and issues in each case.

Either party to this complaint has the right to appeal these findings within 30 calendar days of our office's issuance of the Letter of Findings. Any appeal must be received by our office no later than **September 10, 2021**.

Enclosed is a copy of the appeal procedures. Written appeals should be sent directly to:

Patricia V. Haymes

Director - Office of Dispute Resolution and Administrative Services

Virginia Department of Education

P. O. Box 2120

Richmond, Virginia 23218

An appeal may also be filed via e-mail correspondence to [ODRAS@doe.virginia.gov](mailto:ODRAS@doe.virginia.gov), or via facsimile transmission to (804) 786-8520.

A copy of the appeal, along with any submitted documentation, must be sent simultaneously to the non-appealing party. Questions regarding these procedures should be addressed to Ms. Sheila Gray at (804) 225-2013, or e-mail at: [Sheila.gray@doe.virginia.gov](mailto:Sheila.gray@doe.virginia.gov).

Attachment – Appeal Procedures