


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

NOTICE OF COMPLAINT¹

School Division Fairfax County Public Schools Dr. Michelle Boyd, Assistant Superintendent, Special Services Ms. Dawn Schaefer, Acting Director, Special Education Procedural Support 8270 Willow Oaks Corporate Drive—Second Floor Fairfax, Virginia 22031 mboyd@fcps.edu DMSchaefer@fcps.edu	Parent(s) – INDIVIDUAL STUDENTS AND SYSTEMIC COMPLAINT See Appendix A
Date Complaint Received September 27, 2021	Student(s) – INDIVIDUAL STUDENTS AND SYSTEMIC COMPLAINT
Notice of Complaint Date October 6, 2021	See Appendix A
Early Resolution Date/ LEA Response Due Date October 25, 2021	
Additional Information Due Date November 9, 2021	Complainant (if other than parent) Ms. Callie Oettinger
Findings Due Date November 26, 2021	
Complaints Department Phone # (804) 225-2013	

The Office of Dispute Resolution and Administrative Services in the Virginia Department of Education (VDOE) has received a complaint alleging that Fairfax County Public Schools (FCPS or “LEA”) has violated federal and state laws and regulations governing special education programs. This notice of complaint gives official notice to all parties that a formal written complaint has been filed with our office and confirms that it is sufficient pursuant to federal special education regulations.

APPLICABLE REGULATIONS:

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

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This office will base its investigation and findings on the reauthorization of the federal Individuals with Disabilities Education Improvement Act, December 3, 2004 (IDEA '04), its implementing federal regulations, adopted October 13, 2006 (the 2006 implementing regulations), and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, effective on July 7, 2009, and were reissued on January 25, 2010, and on July 29, 2015, (the Virginia Regulations). The Virginia Regulations are available online at http://www.doe.virginia.gov/special_ed/regulations/state/regs_speced_disability_va.pdf.

PRELIMINARY NOTES:

Scope of Investigation – Individually Named and Unidentified Students

As set forth in detail below, this complaint involves the alleged violation of special education laws and regulations regarding confidentiality of student records. We anticipate that the investigation of these allegations may be somewhat procedurally complex because it involves records of: (i) the Complainant's child; (ii) the children of five other parents identified by the Complainant; and (iii) special education students in FCPS generally, whether named in the school division's disclosure or not. In addition, during this investigation, this office may identify other special education students specifically named in the disclosure but not identified by the Complainant. The investigation of and communication regarding each category of students will differ to some degree.

In this regard, and as an initial matter we must address our basic authority to investigate this complaint. Complainant has requested that “*a systemic investigation be done.*” In its *Analysis of Comments and Changes* for the 2006 implementing regulations, the U.S. Department of Education (US ED), Office of Special Education Programs (OSEP) has stated that state education agencies are “required to resolve any complaint that meets the [sufficiency] requirements” set forth in the 2006 implementing regulations, “including complaints that raise systemic issues....”² OSEP has also stated that “the broad scope of the State complaint procedures, as permitted in the regulations, is critical to each State's exercise of its general supervision responsibilities. The complaint procedures provide parents, organizations, and other individuals with an important means of ensuring that the educational needs of children with disabilities are met and provide the SEA [state education agency] with a powerful tool to identify and correct noncompliance....” Accordingly, this office is authorized to investigate alleged systemic violations of special education regulations. As noted above, in addition to its systemic nature, the complaint involves certain named students. Our approach in this case is also informed by federal guidance. Specifically, the Office of Special Education and Rehabilitative Services (OSERS)(US ED) has addressed the interplay between systemic and individual complaints. It stated that a “State complaint alleging systemic

² U.S. Department of Education, Office of Special Education Programs, *Analysis of Comments and Changes*, at 46605, Federal Register, Vol. 71, No. 156 (August 14, 2006) [hereinafter referred to *Analysis*].

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noncompliance could be one that alleges that a public agency has a policy, procedure, or practice applicable to a group of children that is inconsistent with [the special education] regulations. An example of a complaint alleging systemic noncompliance is a complaint alleging that an LEA [local educational agency] has a policy, procedure, or practice that would limit extended school year (ESY) services to children in particular disability categories or the type, amount, or duration of services that can be provided as ESY services. If the complaint names certain children and alleges that the same violations apply to a class, category, or similarly situated children, the SEA [state education agency] must review all relevant information to resolve the complaint, but would not need to examine additional children if no violations are identified in the policies, procedures, or practices for the named children. However, if the SEA identifies violations for any of the named children, the SEA's complaint resolution must include measures to ensure correction of the violations for all children affected by the alleged systemic noncompliance described in the complaint. Additionally, the SEA would need to examine the policies, procedures, and practices that may be causing the violations, and the SEA's written decision on the complaint must contain procedures for effective implementation of that decision, including corrective actions to achieve compliance....”³

Disclosure to and Among Parents

The very same special education laws and regulations that are the subject of this complaint require that we ensure that procedures are in place so that the parents of the named children receive confidential information only about their own children. This office may share information about other children within the named group only if a parent has granted permission for that access.⁴ While we will investigate the allegations with regard to each of these other students, we note that no contact information was provided by the Complainant for these other parents. To the extent that we have been able to identify contact information for these parents from records available to the Virginia Department of Education, we are forwarding this Notice of Complaint to them. To the extent that such information is not available to us, we will seek to obtain it during the course of the investigation and will notify the parents as soon as is practicable.

³ U.S. Department of Education, Office of Special Education Programs, *Memorandum, Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B)* 61 IDELR 232; 113 LRP 30291 (July 23, 2013).

⁴ As a technical matter, we note that Complainant transmitted the submission via Complainant's personal email; accordingly, Complainant's electronic signature was sufficient to authenticate the complaint submission by Complainant for purposes of 8 VAC 20-81-200.B.2.⁴ However, the submission failed to include a valid signature (electronic or other) for the other individual.⁴ Accordingly, the submission does not constitute a “joint filing” with regard to the Other Individual. This technical distinction should have no effect on the Other Individual's ability to receive information concerning her child, or, if the procedures listed above are followed, concerning the other named children.

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Further, in addition to failing to provide contact information, the submission failed to include a release authorization from the other named parents. Therefore, as explained above, this office will provide Complainant and each of the identified parents with a copy of this Notice of Complaint but will not discuss the complaint with or provide additional information to any parent regarding any student other than their own. That being said, each parent is free to provide us with a release if they want other parents to receive information regarding their child.

Such releases need not be complex. They must, however, expressly authorize the Virginia Department of Education to release complaint-related information, include the names of each other parent to whom disclosure is authorized, and there must be a way of linking the release to the parent. For instance, the release could either contain the actual signature of the parent or be sent from an email address owned or controlled by the parent.⁵

Finally, if any parent wishes to share information regarding this investigation regarding parent's own child with the other parents, such parent may certainly do so on his or her own initiative. In addition, any parent may choose not to participate in the complaint by informing this office.

IMPORTANTLY, WE REMIND THE SCHOOL DIVISION THAT IT SHOULD ENSURE THAT ANY COMMUNICATIONS REGARDING A SPECIFIC STUDENT IN CONNECTION WITH THIS COMPLAINT SHOULD BE SHARED ONLY IN ACCORDANCE WITH ANY AUTHORIZATION DIRECTED TO IT.

ISSUE(S) AND REGULATIONS:

1. Procedural Safeguards—Confidentiality of Records.

Complainant has alleged that LEA has violated special education laws and regulations governing confidentiality of education records with regard to **Students identified on Exhibit A and on a systemic basis**.

More specifically, Complainant has alleged that:

- *In response to a FOIA [Freedom of Information Act] request, [LEA] provided [Other Individual] almost 1500 pages of documents that breach the privacy of students, their parents,*

⁵ We note that Other Individual has been in communication with us *through the named Complainant* regarding co-filing the complaint regarding joining as a co-complainant. Because we lack communication tied directly to the Other Individual we cannot identify her a “co-complainant” as such. Regardless of whether or not she is so named, our investigation with regard to her child will proceed in the same fashion, with no distinction as to whether she is a co-complainant or simply a named parent.

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and staff. Before [Other Individual] knew the request included a breach, [Other Individual] shared the document with me;

- *My own information was breached, as was information related to numerous students in special education and their parents (in addition to info about other students, parents, and staff);⁶ and*
- *More specifically information was released regarding O, Parent C and her son, Parent D and her son, Parent E and her kids, and Parent F are just a few of the parents and students with special needs whose privacy was breached.*

Applicable Regulations and Other Relevant Authority:

- The 2006 implementing regulations, at 34 C.F.R. § 300.613, and the Virginia Regulations, at 8 VAC 20-81-170.G, set forth generally provisions governing confidentiality of information. These provisions address, among other things, parental rights to inspect and review education records relating to the student.
 - Federal and state regulations (8 VAC 20-81-10) define “education records” as those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term also has the same meaning as “scholastic record.” In addition to written records, education records include electronic exchanges between school personnel and parent(s) regarding matters associated with the student’s educational program, such as scheduling of meetings or notices.
- Additionally, the 2006 implementing regulations, at 34 C.F.R. § 300.623, and the Virginia Regulations, at 8 VAC 20-81-170.G.11, direct school divisions to protect the confidentiality of **personally identifiable information** (PII) at collection, storage, disclosure, and destruction stages.
- Special education regulations (34 C.F.R. § 32; 8 VAC 29-81 10) define the term “personally identifiable” as information that contains (i) the name of the child, the child's parent, or other family member; (ii) the child’s address; (iii) a personal identifier, such as the child's social security number or student number; or (iv) a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

⁶To the extent the materials Complainant provided address an alleged unauthorized release of personally identifiable information regarding students who are not eligible for special education and related services under IDEA '04, our office has no jurisdiction to address this concern. In addition, our office has no authority to address releases of personally identifiable information of staff.

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- The FERPA regulations (34 CFR § 99.3) state that the term “PII” includes, but is not limited to (a) the student's name; (b) the name of the student's parent or other family members; (c) the address of the student or student's family; (d) a personal identifier, such as the student's social security number, student number, or biometric record; (e) other indirect identifiers (e.g., the student's date of birth, place of birth, and mother's maiden name); (f) *other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty* [emphasis added]; or (g) information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.⁷
- The 2006 implementing regulations, at 34 C.F.R. §§ 300.32 and 300.623, and the Virginia Regulations, at 8 VAC 20-81-170.G.10, specify that parental consent must be obtained before PII is disclosed to anyone other than school division officials, **unless the information is contained in the education records, and the disclosure is authorized under the Family Education Rights and Privacy Act** (20 USC § 1232g).
 - Parental consent is not required before personally identifiable information is disclosed to school division officials collecting, maintaining, or using personally identifiable information as required by special education regulations, with limited exceptions (34 C.F.R. § 99.3; 8 VAC 20-81-170.G.10.b).
- The US ED Student Privacy Policy Office has stated that an “unauthorized disclosure” *occurs when personally identifiable information from a student’s education record is made available to a third party who does not have legal authority to access the information. Such an unauthorized disclosure can happen inadvertently, as occurs when information about an individual is unintentionally revealed through, for example, a security breach of the electronic system that is used to maintain and access the education records, or when a teacher or administrator accidentally leaves paper reports that include personally identifiable information in an unsecured location.*⁸

⁷ The Privacy Technical Assistance Center within the U.S. Department of Education (US ED) has stated that PII “includes information that can be used to distinguish or trace an individual’s identity either directly or indirectly through linkages with other information.” U.S. Department of Education, Privacy Technical Assistance Center, *Data Governance Checklist*, PTAC-CL-1, December 2011 (revised June 2015) <https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Data%20Governance%20Checklist_0.pdf>

⁸ U.S. Department of Education, Student Privacy Policy Office, Privacy Technical Assistance Center, <https://studentprivacy.ed.gov/glossary#glossary-node-252>

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- One exception to the parental consent requirement is material constituting “directory information”—defined by FERPA regulations as “*information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.*” This information may include, inter alia, “*the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.*”⁹
- The Virginia Regulations governing the Management of the Student's Scholastic Record in the Public Schools of Virginia, at 8 VAC 20-150-20, direct school divisions to manage the scholastic records of all students in compliance with applicable law, including FERPA, IDEA 2004, and various provisions of the Code of Virginia, including, but not limited to, §§ 16.1-260, 16.1-305.1, 16.1-305.2, 22.1-287, 22.1-287.1, 22.1-288.2, and 22.1-289.

OTHER:

Failure to allege violation. Complainant asserted that LEA *failed to notify individuals about the breaches. I had to contact [LEA] and ask why I wasn't made aware that it breached my own privacy [emphasis added] AGAIN [emphasis in original].* This concern does not constitute an alleged violation of special education regulations and will not be included in the complaint investigation.¹⁰

Retaliation. In additional email correspondence (e.g., September 28, 2021 (11:49 a.m.; 10:07 p.m.)). Complainant requested that this office *add retaliation to our state complaint* and provided (i) correspondence from LEA counsel requesting Complainant and Other Individual return *records that were mistakenly and inadvertently released by [LEA]*; (ii) LEA's September 28, 2021, filings

⁹ 34 C.F.R. § 99.3.

¹⁰ See also, US ED, Student Privacy Policy Office, Privacy Technical Assistance Center, *Data Breach Response Checklist* (September 2012) <https://studentprivacy.ed.gov/sites/default/files/resource_document/file/checklist_data_breach_response_092012_0.pdf>.

In its commentary regarding the 2008 amendment of the FERPA regulations, US ED stated that it *does not have the authority under FERPA to require that agencies or institutions issue a direct notice to a parent or student upon an unauthorized disclosure of education record [emphasis added]. FERPA only requires that the agency or institution record the disclosure so that a parent or student will become aware of the disclosure during an inspection of the student's education record. ... FERPA does not require an educational agency or institution to notify students that information from their education records was stolen or otherwise subject to an unauthorized release, although it does require the agency or institution to maintain a record of each disclosure. 34 CFR 99.32(a)(1). In any case, direct student notification may be advisable if the compromised data includes student SSNs and other identifying information that could lead to identity theft.*” 73 Fed. Reg. 74843 (December 9, 2008).

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in local circuit court related to LEA’s request for a preliminary injunction to enjoin Complainant and to enjoin *from continuing to possess, access, or disseminate confidential information, including identifiable student and personnel information, that was inadvertently and mistakenly released to [Other Individual] in response to a request under the Virginia Freedom of Information Act (the “[LEA] Records”)* and then shared with [Complainant]. *The [LEA] Records contain information that is confidential under both Virginia Code and federal law.*

Our office has authority only to address issues arising under IDEA and its related federal and state regulations. However, we note that, if Complainant has concerns regarding retaliation or disability, racial, or other discrimination, Complainant may contact the Office for Civil Rights within the United States Department of Education at:

Washington DC (Metro)
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-1475

Telephone: 202-453-6020
FAX: 202-453-6021; TDD: 877-521-2172
Email: OCR.DC@ed.gov

EARLY RESOLUTION REQUIREMENTS:

Our complaint system has an Early Resolution System that supports both parties working cooperatively to resolve this matter prior to the due date for the school division’s response without formal investigation by our office. We believe early resolution will benefit both parties and that it is in the best interest of students. Early resolution may include use of the statewide special education mediation system. We have enclosed a brochure for the complainant that describes mediation that is voluntary on the part of both parties. Both parties are asked to keep our office informed of changes in the status of this complaint.

If this complaint is resolved within the 10-day timeline, the school division must furnish a written response, including the following:

1. A record of contacts with the complainant;
2. A statement of the proposed resolution;
3. A signed statement indicating that the complainant has agreed to the resolution and the details of the resolution.

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If the complaint is not resolved, the school division must furnish a written response, including all requested documentation in the areas noted below, by the designated due date, as indicated above. The school division must simultaneously provide a copy of the response, along with all submitted documentation, to the complainant if the complaint was filed by the parent or parents of the student, a student who has reached the age of majority, or their attorney. *If the complaint was filed by another individual, the school division must provide a copy of the response and documentation to the complainant only if a release signed by the parent or parents or the student who has reached the age of majority has been provided.*

INFORMATION/DOCUMENTATION REQUESTED:

- [] A **detailed chronology of events** related to these allegations and any related documentation;
- [] A **narrative statement** regarding each allegation, including a specific statement indicating **whether LEA complied with or violated** regulatory requirements, including a **narrative statement regarding any statutory or regulatory exceptions, as may be applicable, regarding the incidents cited in the complaint allegations,** and any supporting documentation (such as signed teacher statements, prior written notices, IEP meeting recordings (if any), service and telephone logs, email correspondence, and other documents, as may be applicable) or related materials outlining LEA’s position regarding each allegation;
- [] A specific response regarding whether the information contained in the 1,316-page FOIA response materials constituted PII with regard to Students A - F, respectively (the confidentiality of which LEA was required to protect (8 VAC 20-81-170.G.11.a), including a detailed explanation regarding whether the particular information constituted PII with regard to each Student, and any applicable exceptions;
- [] The name and contact information for any other student named in the FOIA response materials who is a student with a disability, as well as a specific response as to whether the information constituted PII with regard to each student, and any applicable exceptions;
- [] A statement, along with any supporting documentation, regarding local policies and procedures regarding confidentiality of education records, as well as processes in place to ensure that those policies and procedures are followed; and

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- [] Any statement, along with any supporting documentation, that LEA deems appropriate for addressing the complaint allegations or, if appropriate, to support the actions taken by LEA in regards to these allegations.

TIMELINES FOR RESPONSE AND ADDITIONAL INFORMATION:

School Division Response Timeline

Both the school division’s response and supporting documentation must be provided by the response due date in order to be considered for review by this office. Should the supporting documentation not be included, our review will rest on the documentation submitted by the response due date.

Please mail or email all documentation to our office, so that it is received by **October 25, 2021**, at the following address(es):

Office of Dispute Resolution and Administrative Services
Virginia Department of Education
P. O. Box 2120
Richmond, Virginia 23218

or

ODRAS@doe.virginia.gov

Additional Information that may be submitted by either party

The complainant and the school division may submit *additional information*, either orally, electronically, by facsimile, or in writing, about the allegations in this complaint. This information must be received by the Office of Dispute Resolution and Administrative Services at ODRAS@doe.virginia.gov or the ODRAS mailing address, above, no later than **November 9, 2021**.

The parties are instructed to copy all response and additional information submissions to each other. Information and/or materials submitted after this date will not be considered by this office, unless specifically requested by ODRAS for the purposes of clarification.

Attachments - Complaint Resolution Procedures
Mediation Brochure