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October 25, 2021

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

Fairfax County Public Schools
Complaint Relating to Inadvertent Disclosure of Legal Invoices

Dear Sir or Madam:

I am writing in reference to the Systemic Complaint filed against Fairfax County Public Schools ("FCPS") on September 27, 2021 as a result of our inadvertent and mistaken release of records in the course of responding to a request submitted under the Virginia Freedom of Information Act ("VFOIA"). The complaint alleges violations of the Virginia Regulations Governing Special Education Programs for Children with Disabilities in Virginia (and the federal Individuals with Disabilities Education Improvement Act, Dec. 3, 2004 (IDEA)), because the records disclosed in error included references to a number of FCPS students, all unrelated to the complainants. The Complainant also alleges retaliation by and on behalf of FCPS as a consequence of our efforts to seek return of the records produced by mistake, though it is our understanding that the retaliation complaint is not within the purview of this investigation.

FCPS takes these allegations, and the inadvertent administrative error that gave rise to them, very seriously. We wish to inform your investigation of this important matter by providing a summary of relevant background and a description of the substantial efforts we have taken to date to respond to and remediate the error. Though we have attempted to summarize events in what is essentially a chronological order, please note that, in reality, FCPS was proceeding on many fronts simultaneously in order to secure return of these records on the earliest possible date and avert the possibility of further dissemination by or through complainants.

Relevant background and FCPS's remediation efforts are described below.

Disclosure of Records in Error and Immediate Response.

On September 10 and 13, 2021, FCPS personnel provided Debra Tisler (Parent B in the Complaint) with links through Dropbox to 1,316 pages of legal invoices in response to a request she submitted under the Virginia Freedom of Information Act ("VFOIA"). The records provided

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to Ms. Tisler were disclosed in error by FCPS, prior to review by counsel and with incomplete redactions of student, personnel, and privileged content.

On September 15, 2021, FCPS personnel learned of the error from a third party and immediately deactivated the Dropbox link and notified Ms. Tisler of the mistake. At 2:53 p.m. that afternoon, FCPS's FOIA Officer sent the following email message to Ms. Tisler:

Please be advised that certain information was provided in error to you via the links below. Please delete or destroy any versions or copies of the records you may have to protect any sensitive information that was released in error. The records are being re-reviewed to ensure all exempt information is removed.

New links will be provided to you with the corrected records. Thank you for your understanding in this matter.

Efforts to Communicate; Further Dissemination of Records by Complainant.

From that day through September 23, 2021, FCPS counsel made at least eight attempts to contact Ms. Tisler (by telephone, email, and hand-delivered correspondence) in an effort to secure the prompt return of the records disclosed in error and prevent their dissemination to third parties. When FCPS personnel learned that Ms. Tisler had shared the invoices with Callie Oettinger (Complainant), counsel made similar, repeated efforts to contact Ms. Oettinger for purposes of securing the prompt return or destruction of records known to contain information relating to students.

Neither Ms. Tisler nor Ms. Oettinger ever responded to any of our calls, emails, or letters seeking return of these records and information related to third-party dissemination, other than a single response from Ms. Oettinger acknowledging receipt of an email but refusing to return or destroy the records. In fact, Ms. Tisler told the courier of one letter: "tell [the School Board's counsel] to not send anything else to her home or come onto her property again." Meanwhile, Ms. Oettinger posted 103 pages of the improperly redacted invoices on her website (<https://specialeducationaction.com/>) on September 25, 2021, along with multiple, related posts in the days that followed.

During the same timeframe, Ms. Tisler appears to have shared information relating to FCPS's invoices with an unknown number of recipients, including a contributor to the Daily Wire website (<https://www.dailywire.com/>) who, on September 28 and 29, 2021, published detailed information derived from the invoices.

Legal Review of Invoices and Identification of Students.

Working on a parallel track in the days following notice of the mistaken disclosure, FCPS counsel conducted a full review of the 1,316 pages of invoices initially provided to Ms. Tisler (and shared with Ms. Oettinger), redacting all identifiable information relating to students, along with other exempt and privileged content. We performed this task on an expedited basis for purposes of fulfilling FCPS's obligation to notify the parents of all students whose information

was disclosed in error. We also sought to satisfy FCPS's obligation under FOIA by providing Ms. Tisler with the properly redacted set of documents that she should have received in the first instance.

FCPS completed its review of invoices on September 24, 2021, and we arranged for a private process server to deliver the corrected version to Ms. Tisler's address later that day. At the time, we hoped that Ms. Tisler would accept the properly redacted versions and return to FCPS (or destroy) the records known to contain information regarding students other than her own. To date, both Ms. Tisler and Ms. Oettinger have refused to return or destroy the records containing confidential information relating to students, along with sensitive information regarding past and present employees of this school division.

Issuance of Parental Notifications.

On September 27, 2021, FCPS's Deputy Division Counsel issued notices to eighteen individuals advising them that information relating to their student had been inadvertently disclosed in response to a request under VFOIA.¹ As required by FERPA and Virginia Code § 22.1-287.02(B), the notification described the type of information that was disclosed, the date of the disclosure, and the remedial steps undertaken by FCPS in response.

FCPS did not issue the notices described above to the Complainant, because information relating to her students was not disclosed in the released documents. The name "Oettinger" appears only in reference to a VFOIA request submitted to FCPS by Ms. Oettinger in late 2020 as a community member.

Legal Action by FCPS.

As a result of Ms. Tisler's and Ms. Oettinger's refusal to return the records, on September 27, 2021, FCPS filed a Complaint in Fairfax County Circuit Court seeking preliminary and permanent injunctions ordering them, among other things, to return the original invoices and refrain from disseminating them. The lawsuit does not seek any monetary damages.

At a hearing on September 30, 2021, a Fairfax County Circuit Court Judge temporarily ordered Complainant Oettinger and Ms. Tisler to immediately cease disseminating any of the records produced in error and to take down any internet posts containing the records. On October 22, 2021, the court heard arguments on the permanent injunction and has taken the matter under advisement.

While the Complainant has characterized these actions as retaliation, they were instead one of the numerous attempts that FCPS has made to address the inadvertent disclosure and reduce the impact to families and staff. It is notable that while the complaint raises privacy concerns on behalf of Complainant's student as well as other families, Ms. Tisler's and Ms. Oettinger's actions are the reason for the extensive dissemination and publication of this confidential

¹ Two such notices were provided to parents through their legal counsel. Not all of these students receive special education services; as directed by the Notice of Investigation, we have excluded those students from the requested information.

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information. FCPS has made extensive efforts to mitigate any damage from the inadvertent disclosure, and Ms. Tisler and Ms. Oettinger did not just refuse to assist in mitigation efforts, they purposely exacerbated the error and its potential impact to the families highlighted in the complaint by disseminating the confidential student information.

Systemic Breach Claim

I hope that this information is helpful to VDOE as it investigates the recent complaints filed against the school division. FCPS has undertaken extensive remediation efforts to minimize the impact of any disclosures on the students and families.

In addition, FCPS notes that while Complainant has styled the complaint as evidence of a systemic issue with the protection of student educational records, the information disclosed did not derive from educational records, but rather from legal invoices prepared by third-party outside counsel. FCPS deeply regrets this disclosure, and also notes that there has never been a prior instance of a failure to protect documents of this type, which contain information related not only to students, but also to staff as well as information protected by the attorney-client privilege that is typically treated with the utmost sensitivity. The unfortunate, isolated error was the result of multiple factors that included recent staff turnover in the Office of Division Counsel, and the office of the FOIA Coordinator, and the fact that the school division is responding to an unprecedented number of requests for information through FERPA, FOIA and subpoenas.

Additional Information Submitted

The additional information requested in your Notice of Complaint is attached and organized as follows:

Attachment A: Detailed Chronology of Events, with relevant documentation

Attachment B: (1) Narrative Statement of Response to Specific Allegations Related to Students Named in the Complaint (A-F), along with Summary Table stating whether the information disclosed in the FOIA materials constituted PII with regard to Students A-F and identifying any relevant exceptions.

Attachment C: Name and Contact Information for any other student with information included in the FOIA response who is a student with a disability, along with a summary of the information disclosed as to each additional student.

Attachment D: Statement regarding local policies and procedures regarding confidentiality of education records, and process in place to ensure that they are followed.

I am the point of contact for FCPS in this matter. If you have any questions, please contact me at 571-423-1250 or edkennedy@fcps.edu.

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Sincerely,



Ellen Kennedy

CC: Callie Oettinger, Complainant (By Email) (Attachments A&D only, per the Notice of Investigation page 4, indicating that other parents identified in the complaint have not submitted consents to release information related to their student(s)).

Attachments