

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

**LETTER OF FINDINGS**

<p><b>School Division</b> Fairfax County Public Schools Dr. Michelle Boyd, Assistant Superintendent, Special Services Ms. Dawn Schaefer, Director, Special Education Procedural Support 8270 Willow Oaks Corporate Drive—Second Floor Fairfax, Virginia 22031 <a href="mailto:mboyd@fcps.edu">mboyd@fcps.edu</a> <a href="mailto:DMSchaefer@fcps.edu">DMSchaefer@fcps.edu</a></p>	<p><b>Parent</b> Ms. Callie Oettinger REDACTED REDACTED REDACTED</p>
<p><b>Date Complaint Received</b> April 20, 2023</p>	<p><b>Systemic Complaint</b></p> <p><b>Complainant (if other than Parent or Adult Student)</b> N/A</p>
<p><b>Notice of Complaint Date</b> May 1, 2023</p>	<p><b>Findings Date</b> June 19, 2023</p>
<p><b>Complaint Appeal Date</b> July 18, 2023</p>	<p><b>Corrective Action Plan Date</b> July 18, 2023</p>
<p><b>Complaints Department Phone # (804) 225-2013</b></p>	

**SYSTEMIC COMPLAINT AUTHORITY**

This complaint alleges a systemic violation related to provision of services to students with disabilities. In its *Analysis of Comments and Changes* for the 2006 implementing regulations, the U.S. Department of Education (USED), 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....”<sup>1</sup> 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....”<sup>2</sup> Accordingly, this office is authorized to investigate alleged systemic

<sup>1</sup> 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 as *Analysis*].

<sup>2</sup> *Analysis*, at 46601. In this instance, OSEP was responding to a number of commenters, including one who stated that the State complaint procedures should be used only for systemic violations that reach beyond the involvement of one child in a school....” Further, OSEP stated that “placing limits on the scope of the State complaint system, as suggested by the commenters, would diminish the SEA’s ability to ensure its LEAs [local education agencies] are in compliance with [IDEA ’04] and its implementing regulations, and may result in an increase in the number of due process complaints filed and the number of due process hearings held.”

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violations of special education regulations.

### A. Applicable Regulations

On May 28, 2009, the Virginia Board of Education adopted revised regulations to reflect IDEA 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 will base 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

<https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/>.

### B. Sufficiency of Complaint (See 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.

### C. On-Site Visit

Based on Complainant's supporting materials, the school division's response documentation, and other 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.

## **ISSUE(S) AND REGULATIONS:**

### **1. Free Appropriate Public Education – Related Services.**

Complainant alleges that LEA violated state and federal special education regulations regarding provision of a free appropriate public education by refusing certain related services to students enrolled in the LEA.

More specifically, the Complainant alleges that:

- "FCPS has a practice of refusing the "related service" and "supplementary aid and service" of vision therapy to special education students countywide."
- Complainant outlines pertinent caselaw differentiating between medical services, which school divisions are not required to provide under IDEA, and related services that must be provided as appropriate for a student to receive FAPE. Complainant asserts that vision therapy is a related service, rather than a medical service. In addition, Complainant sets forth specific facts related to an individually named student that are included in the attached complaint.

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### Applicable Regulations:

- The 2006 implementing regulations, at 34 C.F.R. § 300.101, and the Virginia Regulations, at 8 VAC 20-81-100, mandate that all individuals with disabilities, from age 2 to 21 inclusive, residing in Virginia, shall have available a free and appropriate public education (FAPE). Further, the 2006 implementing regulations, at 34 C.F.R. § 300.17, and the Virginia Regulations, at 8 VAC 20-81-10, define FAPE to mean special education and related services that, among other things, are provided in conformity with an IEP that meets applicable regulatory requirements.
- The 2006 implementing regulations, at 34 C.F.R. § 300.34, and the Virginia Regulations, at 8 VAC 20-81-10, define “related services” to mean “transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education and includes speech-language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation counseling; orientation and mobility services; and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services; social work services in schools; and parent counseling and training. Related services do not include a medical device that is surgically implanted including cochlear implants, the optimization of device functioning (e.g., mapping), maintenance of the device, or the replacement of that device. The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music and dance therapy), if they are required to assist a child with a disability to benefit from special education.” The regulations contain certain additional qualifications and clarifications regarding LEA responsibility relating to surgically implanted and other medical devices.

### Findings:

The Office of Dispute Resolution and Administrative Services finds LEA to be in non-compliance with regard to issue.

### Analysis:

- The governing legal standard for determining whether a service is a “related service” that school divisions are required to provide if necessary for the provision of FAPE, and “medical services” which are excluded, was developed by the United States Supreme Court in the 1980s and 1990s, in two cases, *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), and *Cedar Rapids Community School District v. Garrett F.*, 526 U.S. 66 (1999).

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- *Tatro* involved an eight-year-old student with spina bifida who required a procedure called “clean intermittent catheterization” (CIC) every three or four hours to empty her bladder. The school division argued that it was not required to provide this service, as the definition of “related services” includes only “medical services for diagnostic or evaluation purposes.” Parent asserted that was not a “medical service”, but a “supportive service” required to help the child access special education. The Court found the CIC was in fact a “supportive service”, relying on the fact that a doctor was not needed to perform the services.
- *Cedar Rapids*, decided fifteen years after *Tatro*, involved a medically fragile student who required “continuous one-on-one nursing services” to attend school. Again, the Court held that the school division was required to provide the services, stating that, "Whatever its imperfections, a rule that limits the medical services exemption to physician services is unquestionably a reasonable and generally workable interpretation of the statute. Absent an elaboration of the statutory terms plainly more convincing than that which we reviewed in *Tatro*, there is no good reason to depart from settled law."
- Documentation provided by LEA in this case includes the following:
  - Narrative Statement dated May 19, 2023
  - Declaration of Nicole Warwick, program manager, Hearing and Vision Services
  - Vision Therapy and Educational Visual Impairment Services: What’s the Difference?
  - Association for Educational and Rehabilitation of the Blind and Visually Impaired: The Role and Training of Teachers of Students with Visual Impairment (TSVIs) as a Special Educator and Why TSVIs Do Not Provide Vision Therapy Services. An AER Low Vision Rehabilitation Division Position Paper. Holly Lawson, Amanda Hall Lueck, Marla Moon, and Irene Topor
  - Fairfax County Public Schools: Program Review. Year 2 Final Report completed by the American Institutes for Research (AIR)
  - Parent Information for IEP
- Documentation provided by Complainant in this case includes the following:
  - Complaint dated April 20, 2023
  - Email dated April 21, 2023, and related attachment on [REDACTED] concerning attendance 2010-2022
  - Email dated April 24, 2023
  - Email dated May 31, 2023, and related attachment including narrative additional information.
  - Email dated May 31, 2023, with attachments.
    - Reevaluation materials related to Student 1
    - 2019 IEP for an additional student (identified as Student 2)

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- 2022 Worksheet from Student 1's reevaluation
  - Application and related documentation for a school psychology internship program offered by LEA.
  - Attendance records for Student 1 from 2010-2022
  - Email dated May 31, 2023, with eight attachments.
    - Fairfax Falls Church CSA provider directory.
    - FY 2019 Superintendent's Proposed Budget for Arlington County Public Schools
    - Letter from OSEP on Visual Impairment dated May 22, 2017
    - Federal Register Policy Guidance on Visual Impairment from US Department of Education dated June 8, 2000
    - FY 2020 Superintendent's Proposed Budget for Arlington County Public Schools
    - Loudon County Public Schools SEAC Annual Report
    - Due Process Hearing transcript from October 14, 2000
    - July 26, 2017, Letter from American Federation for the Blind to OSEP
  - Email dated May 31, 2023, with the following attachments.
    - Linked-In Entry 1 for Shira Brothers, Program Manager for Vision and Hearing Services for LEA
    - Linked-In Entry 2 for Shira Brothers, Program Manager for Vision and Services for LEA
    - Invoice for vision therapy services for Student 2
    - Permission from Parent of Student 2 to include Student 2's information in the complaint investigation.
  - Email dated May 31, 2023, with the following attachments.
    - American Optometric Association guidance document
    - Arlington County Public Schools FY-2019 School Board Adopted budget.
    - Arlington County Public Schools Budget FY-2018
    - August 13, 2020, CSA provider directory
    - APS FY-2012 adopted budget
    - Child Find King and Queen County Public Schools
  - Email dated May 31, 2023, with attachment consisting of proposed Resolution Agreement from a due process proceeding involving Student 2, dated December 14, 2022
  - Email dated June 14, 2023, with attachment consisting of OSEP's June 2023 update.
- While the documentation provided is voluminous, the conclusions to be drawn from the documents are fairly straightforward:
    1. LEA takes the position that vision therapy is a medical service required to be provided by a physician, and thus, does not constitute a related service that must be provided by

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- the LEA. However, LEA provides a variety of educationally based assessments and vision services to meet the individualized needs of students.
2. The Fairfax/Falls Church Children’s Services Act administration has produced a provider directory for school division reference that includes practitioners who provide vision therapy.
  3. Other school divisions in Virginia, namely, Arlington County, Loudoun County and King and Queen County provide some form of vision therapy.
  4. In at least one case, LEA proposed paying for vision therapy to settle a due process complaint.
  5. LEA provides some services to students with disabilities that are “medical” in nature.
  6. Federal guidance is clear that conditions such as convergence insufficiency may be considered to be a vision impairment under IDEA.
  7. Under Medicaid, state plans may allow schools to bill for medical or remedial services, *other than physician’s services*, provided in schools.<sup>3</sup>
  8. Student 1 and Student 2 have disabilities for which vision therapy was recommended.
- None of these conclusions fully resolve the question raised, as outlined below.
    - The fact that a non-school government entity created a directory listing service providers in a particular area not a special education matter.
    - The fact that some school divisions offer the service is irrelevant, in that school divisions may provide more than the minimum levels of services required by law.
    - A settlement offer can include more than the minimum required by law, as a school division may determine that going above the minimum is warranted in light of the particular circumstances, such as assessing the cost of litigation vis a vis the cost of the service. Litigation strategy and advice are protected by the attorney-client privilege, so any attributing any particular meaning to the offer is purely speculative.
    - The existence of a disability such as a convergence deficiency does not, by itself, confer IDEA eligibility. The disability must have an adverse educational impact resulting in the need for specially designed instruction.

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<sup>3</sup> Interestingly, a search of the relevant website indicates that TriCare, the insurance program for military members, retirees and their dependents does not cover vision therapy.

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- The availability of public or private insurance is irrelevant as to whether a service is necessary for a student to receive FAPE. In addition, that is permissible for a school division to bill for a service does not necessarily mean it is required to offer it.
- We acknowledge that since the decisions in *Tatro* and *Cedar Rapids*, more services previously performed by a doctor in his or her office are provided in other settings, in some cases involving the use of technology not available at the time those cases were decided. The same time period has seen changes in the types and levels of services being provided by health professionals other than MD's. Reasonable arguments can be made about how such changes should affect school division obligations under IDEA. These are matters for the courts and Congress. We must rely on the bright line test outlined by the Supreme Court and the limited number of cases beyond the state hearing level. It is important to note that many of those cases focus not on whether "vision therapy" is a required related service, but on whether the recommended vision therapy services were necessary for FAPE or whether the student's needs could be met through different means.
- Because the bright line test depends on whether the service must be performed by a physician, we need not look far for the answer. In fact, the final piece of information necessary for us to make our determination is included in documentation provided by the school division. Attachment 2 recites that vision therapy is "prescribed and implemented by an eye doctor (optometrist or ophthalmologist) or by either a vision therapist or orthoptist under the supervision of an eye doctor."
- It is important to note that in *Tatro*, CIC required a prescription under state law but could, and commonly was, performed by other individuals without significant intervention by a doctor. The court did not address whether the level of physician involvement in the procedure or therapy would alter the result. Because we are looking at this case from a broad, systemic standpoint, and the school division has stated categorically that vision therapy is a medical service as construed by special education law and regulations, we must find the school division to be in noncompliance with regard to this issue.
- To be clear, on an individual basis, the determinative factor with regard to vision therapy is whether it is required to assist the student to benefit from special education. If the student does not need the service, or if the student's needs can be met through other supports and services, then the IEP team may decline to provide vision therapy.
- Lastly, to complete our analysis, we must also address the impact the school division's position had on the individual students identified by the Complainant. We note that with regard to Student 1, we have previously reviewed eligibility and IEP deliberations conducted during the 2021-2022 school year and concluded that the student's needs – regardless of labels applied – were identified and considered as required by applicable law,

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and that the school division proposed an IEP offering FAPE. As the IEE resulting in the request for vision therapy and the needs it identified and recommendations it made in were thoroughly considered in the eligibility and IEP development process with a focus on need, no further action is required for Student 1. It appears that Student 2's services were the subject of a due process hearing in December 2022, and the matter has not been raised pursuant to a state complaint after that time. Thus, we are unable to address Student 2's situation without more information.

- As a result of the foregoing, we find LEA to be in noncompliance with regard to its position that it is not required to provide vision therapy to students, as vision therapy does not fall within the medical services exception.

### **CORRECTIVE ACTION:**

In order to resolve this issue, we direct the LEA to complete the following:

1. Prepare an instructional memo, to be submitted to our office for approval, that outlines the requirements for addressing recommendations for vision therapy, through IEEs or otherwise.
2. Upon approval, provide a copy of the memorandum to all case managers prior to the commencement of the 2023-24 school year.
3. Provide documentation of such dissemination to our Office within one week of the memo's distribution.
4. Identify all students whose requests for vision therapy were denied by the LEA. LEA shall convene an IEP meeting for each such student to determine whether the request was denied based upon the nature of the service. If the request was denied because vision therapy was believed to be a medical service, the team shall determine what, if any, compensatory services are required to remedy the error. These meetings shall be completed pursuant to a schedule to be determined in consultation with VDOE, and documentation of such meetings shall be maintained for review by VDOE.

Please provide the foregoing (or a letter of assurance for steps to be taken upon commencement of the new school year) to this office no later than **July 18, 2023**.

### **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.



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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 **July 18, 2023**.

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).

PVH/stg

Attachments - Appeal Procedures  
Fairfax County "Notice of Appeal" Form