

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

LETTER OF FINDINGS

<p>School Division 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 mboyd@fcps.edu DMSchaefer@fcps.edu</p>	<p>Parent Ms. Callie Oettinger REDACTED</p>
<p>Date Complaint Received April 7, 2023</p>	<p>Systemic Complaint</p> <p>Complainant (if other than Parent or Adult Student) N/A</p>
<p>Notice of Complaint Date April 18, 2023</p>	<p>Findings Date June 6, 2023</p>
<p>Complaint Appeal Date July 6, 2023</p>	<p>Corrective Action Plan Date July 6, 2023</p>
<p>Complaints Department Phone # (804) 225-2013</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....”¹ 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....”² Accordingly, this office is authorized to investigate alleged systemic

¹ 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*].

² *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. Procedural Safeguards

Complainant alleges that LEA violated state and federal special education regulations regarding procedural safeguards.

More specifically, the Complainant alleges that:

- "For years, FCPS has misled parents about their procedural safeguards, by leading them to believe that a local administrative review within FCPS, done by a hearing officer that is an employee of FCPS, is in compliance with IDEA and implementing state regulations. Hence, parents have taken this local administrative review route, at which there is NO impartial hearing officer and NO hearing in compliance with IDEA or implementing state regs. Indeed, I did this myself back in 2016, because I was falsely led to believe this was my recourse – and the same practice continues today. See FCPS's pre-formatted notice of appeal form here: [NOTICE OF APPEAL \(fcps.edu\)](#)"

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- “This appeal option is “not in compliance with IDEA, Sec 504, or VAC, and 2) by its own existence in its student rights & responsibility manual, and on the FCPS site, falsely lead parents to believe that they are accessing procedural safeguards under fed and state implementing regs.”
- Complainant cites the LEA’s student rights and responsibilities manual as follows: “If the parent/guardian does not agree to a change in special education placement or with the outcome of the MDR, they have the opportunity to request a local administrative review within FCPS. The parent/guardian may also request an expedited due process hearing through the Virginia Department of Education according to the procedures outlined in the VDOE Special Education Procedural Safeguards Requirements (<https://www.fcps.edu/sites/default/files/media/forms/se4.pdf>).”
- Complainant quotes the following from the FCPS website: “An administrative review (AR) is a Fairfax County Public Schools (FCPS) informal, voluntary process to resolve special education and Section 504 disputes, convened at the request of the parent or the school principal. The parent or principal must submit a written request specifically describing their concern that is signed and dated to the office of Due Process and Eligibility. Issues related to child find, special education eligibility or Section 504 qualification, manifestation determination review or 504 causality hearing, and individualized education program (IEP)/504 Plan can be addressed through an AR. The administrative review committee consists of FCPS staff members with specific expertise, who have not had prior involvement and are impartial. The administrative review committee considers all available, relevant oral and written information before rendering an opinion or decision. A summary statement of the review discussion, opinion, and recommendations is provided to the parent and becomes part of the student record. The entire process typically takes up to six weeks to complete.” [Dispute Resolution Options | Fairfax County Public Schools \(fcps.edu\)](#)
- Subsequent to the filing of the complaint on April 7, 2023, Complainant forwarded additional materials supporting her claim. These materials were attached to the Notice of Complaint. Some of these materials address disproportionate representation of Students with disabilities in disciplinary processes and raise questions with regard to data collection.
- In summary, Complainant alleges that local dispute resolution options are (i) represented as required steps before a parent may seek IDEA dispute resolution options and/or (ii) are used to delay access to IDEA dispute resolution options.

Applicable Regulations:

- The implementing regulations for IDEA, at 34 C.F.R. § 300.504, and the Virginia Regulations, at 8 VAC 20-81-170.E., set forth the required content of the procedural safeguards notice to be provided to parents.

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- The implementing regulations for IDEA, at 34 C.F.R. §§ 300.506, 300.151-153, 300.507-518, and 300.530-535, and the Virginia Regulations, at 8 VAC 20-81-190, 200, 210, and 160 address mediation, special education complaints, due process, and discipline of students with disabilities, respectively.

Findings:

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

Analysis:

- To begin our analysis, we must distinguish between two processes referenced by Complainant in her filing. The first relates to the school division's use of internal hearing officers, raised especially in Complainant's additional information on discipline data. The second relates to the school division's "administrative review" process.
- First, we will address the use of division-employed "hearing officers".
 - Every student, whether disabled or not, has a right to receive due process of law in connection with disciplinary actions such as long-term suspensions or expulsions. In essence, this means that a student facing disciplinary action has a right to a hearing. School divisions must have procedures to address how these matters are handled. Some divisions, particularly larger ones, have multi-step processes involving appeals to hearing officers and ultimately to the school board. See *Virginia Code, Section 22.1-277 et seq.* Our review of the record shows this to be the case within the LEA.
 - Students with disabilities have additional rights with regard to disciplinary actions, including the right to a manifestation determination review, which may, if the behavior is determined to be a manifestation, return the student to his or her pre-disciplinary placement. If a violation of the code of student conduct is determined not to be a manifestation, the school division can proceed with the regular disciplinary process, which allows the student to have the same disciplinary appeal as any other student. See 34 C.F.R. § 300.530(c).
 - In short, the manifestation determination review focuses on the relationship of the behavior to the disability, while the regular disciplinary appeal process allows the student to challenge the allegations about what occurred and the appropriateness of the disciplinary sanction. The school system must conduct MDRs AND must provide due process with regard to school removals when the actions in question are determined not to be a

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manifestation. Thus, we find no violation in the composition of these systems.³

- Next, we address the school division’s use of “administrative review”. In its complaint response, LEA provides the following:
 - “For many years, [LEA] has offered an administrative review as an option for parents to locally and informally resolve disputes related to Child Find, special education eligibility or Section 504 qualification, manifestation determination review or 504 causality hearing, and individualized education program (IEP) or 504 Plan decisions. Participation in the FCPS administrative review process is voluntary and is not a prerequisite for nor does it preclude access to any of the dispute resolution options outlined in the VDOE Special Education Procedural Safeguards. This process is facilitated by specialists in Due Process and Eligibility (DPE), who are designated to receive requests for administrative reviews. Specialists consult with the parents and their representatives, as appropriate, to understand and articulate their concerns. The DPE specialist then organize [sic] a panel of FCPS staff members with specific expertise, who have not had prior involvement in the matter at issue and are impartial. The DPE specialist facilitates the meeting at which the administrative review committee meets with the parent and school to consider all available and relevant oral and written information before rendering an option or decision.
 - The school division also recites that the review panel is comprised of staff members “who hold the same roles as the staff members who made the decision that is at issue.” It argues that the use of an internal review process is not prohibited by applicable regulations, and that, the regulations, in fact, *encourage* the availability of such options, as evidenced by its requirement of an early resolution period during a state special education complaint.
 - A review of the history of IDEA regulations, as well as guidance provided by OSEP such as its July 23, 2013 Q&A on Dispute Resolution, shows that, as a whole, IDEA encourages parties to resolve disputes at any early stage, while offering a range of dispute resolution options. We find that the existence of a voluntary process for local dispute resolution does not, in and of itself, violate the applicable regulations.
- Having determined that the provision of the local dispute resolution mechanisms in question in this complaint is permissible, we must then look to whether the manner in which these systems are implemented is consistent with IDEA procedural safeguards. To do that, we have reviewed a number of documents.

³ Complainant has provided certain local news reports concerning discipline of students within the LEA. The question of whether LEA has disproportionately disciplined students with disabilities has been reviewed in connection with our cyclical monitoring of FCPS. Disproportionality has consequences for ongoing programming, in that it may require allocation of a portion of federal funding to coordinate early intervening services, but it is not a matter of compliance, as such. Accordingly, the issue will be addressed in such monitoring.

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- First, we have reviewed the LEA's Procedural Safeguards notice, found at <https://www.fcps.edu/sites/default/files/media/forms/se4.pdf>. The Procedural Safeguards accurately outline the three mandated dispute resolution options provided for under IDEA, but do not address "administrative review".
- We also have reviewed the LEA's Student Rights and Responsibilities document, at <https://www.fcps.edu/system/files/forms/2022-08/SRR-2022-23.pdf>. First, we note that the document outlines the different avenues available to resolve concerns within the division. It specifically directs parents of students with disabilities to the division's Office of Due Process and Eligibility for more information.
- More importantly, the document specifically addresses discipline of students with disabilities, stating, "Parents who disagree with a change in special education placement or the MDR teams' conclusions may request a local administrative review within FCPS. The parents may also request an expedited due process hearing through the Virginia Department of Education..." Significantly, this information is incomplete. Challenges to an MDR may also be addressed through mediation and complaints, but the document is silent in this regard.
- The most extensive information regarding the "administrative review" process is found in LEA's Special Education Handbook for Parents, found at: <https://www.fcps.edu/sites/default/files/media/forms/SpecialEducationParentHandbook.pdf>.
- LEA draws our attention to the following language contained under the heading "Administrative Review": "A parent or an FCPS principal may request an administrative review to resolve disputes. The administrative review process is voluntary and does not preclude the parent or FCPS from taking further steps, such as mediation or a due process hearing." The Handbook then goes on to describe the other available dispute resolution options. This language, taken alone, is clear, and unlikely to suggest to parents that it is a prerequisite to other procedural safeguards.
- However, other material in the Handbook is problematic. The Handbook describes the administrative review process under a heading titled "The Appeals Process." Before addressing administrative review, mediation, state complaints, resolution meetings and due process hearings, the handbook provides the following:

"Options for dispute resolution or appeal are described in the Virginia Special Education Procedural Safeguards Notice, titled Your Family's Special Education Rights. This document is provided to parents with the LSC notice letter and, for special education-eligible students, at least once a year at annual IEP meetings, when a request for a due process hearing has been filed, or when a parent requests a copy. Copies of the safeguards are available at your child's school, at the PRC, and on the FCPS website at <https://www.fcps.edu/sites/default/files/media/forms/se4.pdf> (revised September 2013). If

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you need help understanding the document, you may call the FCPS Office of Special Education Procedural Support at 571-423-4290. The options for resolving differences are summarized in the Alternative Dispute Resolution section of the handbook and explained further in the safeguards notice and other documents provided by VDOE. Parents should also visit the website of the VDOE's Office of Dispute Resolution and Administrative Services at http://www.doe.virginia.gov/special_ed/resolving_disputes/index.shtml, or they may call 804-225-2013 to reach the Office of Dispute Resolution and Administrative Services directly.”

When a parent wants to appeal an action taken by FCPS, or when FCPS refuses a proposal made by a parent related to the identification, evaluation, educational placement, or provision of FAPE, the parent can notify FCPS of his or her intention to appeal by writing the coordinator of Due Process and Eligibility. FCPS has developed a form, Notice of Appeal (SS/SE-130) located 44 at <https://www.fcps.edu/sites/default/files/media/forms/se130.pdf>, which can be used by a parent to communicate the information needed to initiate an appeal. The form provides an opportunity for the parent to describe the nature of the problem, the cause of the problem, and possible solutions, in addition to indicating the appeal option(s) preferred by the parent.

This form can also be obtained at your local school.

In addition to the options described in the *Virginia Special Education Procedural Safeguards Notice*, FCPS has also instituted the administrative review process, to serve as a problem-solving mechanism for parents and staff members. The dispute resolution options available are discussed in greater detail below.”

- First, this document contains an incomplete statement about the provision of the Procedural Safeguards Notice. Procedural Safeguards must also be provided when the parent files the first complaint in a year, and when certain disciplinary decisions are made.
- In addition, the Handbook implies that a single form may be used to institute any “appeal.” However, it addresses only administrative reviews, mediation and due process hearings, but appears to be based upon the state complaint form. While a footnote indicates that use of the form is not mandatory, it recites that it “may be used to give notice” to LEA “of parent disagreement with the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education of [sic] that child.” This may cause considerable confusion for parents wishing to file such a state complaint, especially when they are unfamiliar with terminology, who may end up participating in a process they did not intend to commence.
- Even more troubling is the following: “Please submit this form to Due Process and Eligibility...who shall then forward the request to the Virginia Department of Education.”

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While a parent certainly is required to copy the LEA on state complaints or requests for due process hearings, and while mediation requires agreement by both parties before it can take place, implying that documentation must be submitted first to the school division may adversely affect the Student, as timelines for state complaints commence when VDOE receives the complaint, and timelines for due process commence when both the school division and VDOE have received the request. While we are not in possession of any information suggesting that LEA has in fact used this process to delay the start of timelines or for other improper purposes, it is not required by the regulations, and has the potential for abuse.

- Finally, we note that recent information provided by the Office of Special Education Programs indicates that, if a dispute resolution form asks for information other than the minimum information required under the regulations, that information must clearly be marked as “optional”. Some of the information included on the form falls within this category, such as student ID number. If the student’s identity cannot be confirmed by the required contact information, clarification should be made in the beginning stages of the process but should not delay it.
- Because (i) the Student Rights and Responsibilities handbook contains incomplete information regarding appeals of MDRs, (ii) the special education handbook fails to accurately describe procedural safeguards, and (iii) the form and its use are flawed as described above, the Office of Dispute Resolution and Administrative Services finds the LEA to be in non-compliance with regard to this issue.

CORRECTIVE ACTION:

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

1. Revise its Student Rights and Responsibilities Handbook to correct the error in options for discipline-related dispute resolution.
2. Revise its Special Education Parent Handbook to correct the information about procedural safeguards and to clarify how to request each option.
3. Discontinue use or significantly revise the Notice of Appeal document using the findings of this investigation.
4. Prior to any publication of revisions, submit the same to VDOE for approval.
5. Identify all Students who were the subject of an Administrative Review during the one-year period prior to the issuance of this Letter of Findings.
6. Develop a notice to be approved by VDOE and provided to each identified Student’s parents that informs parents that the issues raised in the Administrative Review may, depending on the particular facts and circumstances, still be addressed through a state complaint, a mediation, or a due process hearing.

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Please provide the foregoing to this office no later than **July 6, 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.

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 **July 6, 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, 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.

PVH/stg

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