REDACTED

From: REDACTED
Sent: Thursday, July 06, 2023 4:55 PM
To: 'DOE - ODRAS, rr'; 'Patricia Haymes'; 'Lisa Coons'; 'Hollins, Samantha'
Cc: 'Michelle C Reid'; 'Tracy M Ritenour'; 'Austin, Ayorkor'
Subject: 6.6.23 LOF Appeal
Attachments: FINAL pdf REDACTED COVID systemic 8-24-20.pdf

Importance: High

This is an appeal to the 6.6.23 Letter of Findings. It cites the NOC and LOF for the 2020 systemic complaint I filed. VDOE's LOF for the complaint is attached and a link to the NOC is included below.

Please confirm receipt of this appeal, that VDOE can fully access the attached and link below, and that VDOE will be forwarding the full complaint to the appealing hearing officer.

Thanks,

Callie Oettinger
REDACTED

1. In its decision, VDOE fails to address that "voluntary process for local dispute" is not included in or governed by IDEA or implementing state regulations.

2. State complaints and due process hearings are supposed to be decided by neutral, unbiased complaint specialists or hearing officers who issue decisions. The enforcement and/or appeal of these decisions are established in IDEA and implementing Virginia regulations. Likewise, mediations are supposed to be facilitated by neutral, unbiased mediators, and the enforcement of mediated agreements is established in IDEA and Virginia regulations.

3. Local administrative reviews are neither facilitated by, nor are their decisions made by, neutral, unbiased mediators. Unlike IDEA, they don't prohibit the attendance of lawyers during Resolution meetings if Parents don't have lawyers. - not members of the school with which the parent disagrees. The decisions are not made by neutral unbiased parties and they are not enforceable under IDEA.

4. In its decision, VDOE places weight on a) FCPS's argument that such a process is not prohibited and on b) OSEP's Q&A on Dispute Resolution:

> "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."

5. It would make little sense for Congress to have established such a detailed and comprehensive dispute resolution system and yet allow LEAs to bypass the system at their option.

6. Significantly, it is impossible to ignore VDOE's choice to lean on a 10-years old 2013 U.S. Dept. of Education Q&A to make its decision that the "local dispute resolution mechanisms in question in this complaint is permissible", when in 2020, VDOE refused to place weight on U.S. Dept of Education's 2020 Q&A on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak.

7. In the Notice of Complaint issued May 18, 2020, VDOE was clear that it would not be following a Q&A that was more current in 2020 that the 2013 VDOE chooses to follow today. VDOE specifically stated:

> "Significantly, US ED also stated that its Q &A document "does not create or confer any rights for or on any person. This Q & A document does not impose any additional requirements beyond those included in applicable law and regulations. The responses presented in this document generally constitute informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented here and are not legally binding." See: https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf

8. In the Letter of Findings issued August 24, 2020, VDOE again made it clear that it would not be placing weight on the 2020 Q&A.

> On page 18, VDOE specifically states:
>
> Even US Ed has acknowledged that its Q&A document "does not create or confer any rights for or on any person. This Q&A document does not impose any additional requirements beyond those included in applicable law and regulations. The responses presented in this document generally constitute informal guidance representing the interpretation of the Department . . . and are not legally binding. (47)

9. Foot note 47 states:

> Q & A document. Similarly, at least one state education agency, in addressing a complaint regarding IEP implementations during COVID-19 closures has stated: "This non-binding guidance document is entitled to weight only to the extent that it has the power to persuade."

10. On page 19, VDOE went on to state:

> Absent any legally binding authority, at least one legal expert has suggested that a "reasonableness" standard may be applicable regarding FAPE responsibility during COVID-19 closures . . . "

11. The LOI continues to poke holes in the 2020 Q&A in subsequent pages and sections.

12. In 2022, OCR found FCPS at fault and cited this 2020 Q&A to support its findings.

13. Had FCPS chosen to follow the guidance document in 2020 it would not be in the state it is today. Instead, FCPS chose otherwise.

14. The appeals officer could state that the above is exactly why FCPS should place weight on the 2013 Q&A today. However, that would be admission that Hearing Officer Cecil Creasey was incorrect in his 2020 finding and that FCPS should have been found in noncompliance in 2020. Failure to place weight on the 2013 Q&A would lead toward the local administrative reviews being found to be NOT permissible.

15. In addition, the 2013 Q&A is specific in that is speaks to the established dispute resolution. It specifically states:

> "The purpose of this Memorandum is to introduce the updated and combined question and answer (Q&A) document on the dispute resolution procedures that are set out in the Part B regulations, published in the Federal Register on August 14, 2006, including mediation procedures (34 CFR §300.506), State complaint procedures (34 CFR §§300.151-300.153), and due process procedures (34 CFR §§300.507-300.516 and 300.532-300.533)."

16. In Perez vs Sturgis, Justice Gorsuch stated the following in the Court's decision:

> "The Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.,* seeks to ensure children with disabilities receive a free and appropriate public education. Toward that end, the law sets forth a number of administrative procedures for children, their parents, teachers, and school districts to follow when disputes arise. The question we face in this case concerns the extent to which children with disabilities must exhaust these administrative procedures under IDEA before seeking relief under other federal antidiscrimination statutes, such as the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq."*
>
> Gorsuch does not note alternate dispute resolution processes that LEAs may engage in under IDEA-related disputes.

17. In addition, VDOE fails to address the unbiased hearing officers for its manifestation determinations that occur outside of the local administrative hearings. These hearing officers are hired by FCPS, which makes them biased toward their employer and paycheck.

18. These hearing officers do not have the power to change the LREs of students. IDEA is clear that this belongs to IEP teams. Yet FCPS hearing officers are judge and jury, making decisions they do not have the power to make.