

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

LETTER OF FINDINGS

<p>School Division Loudoun County Public Schools Dr. Scott A. Ziegler, Interim Superintendent Dr. Patricia D. Nelson, Director, Special Education Ms. Donna Smith, Assistant Director, Procedural Support 21000 Education Court Ashburn, Virginia 20148-5526 Scott.ziegler@lcps.org Patricia.d.nelson@lcps.org Donna.Smith@lcps.org</p>	<p>Parent N/A</p>
	<p>Student Systemic Complaint</p>
<p>Date Complaint Received August 12, 2021, September 30, 2021, October 8, 2021</p>	<p>Complainant (if other than parent) Melissa K. Waugh, Esq. Belkowitz Law, PLLC 10427 North St., Ste. 200, Fairfax, Virginia 22030 Joan H. Proper, Esq. Judiciary Place 9300 W. Courthouse Rd. Ste. 202 Manassas, Virginia 20110</p>
<p>Notice of Complaint Date October 19, 2021¹</p>	<p>Findings Due Date January 28, 2022²</p>
<p>Complaint Appeal Date February 28, 2022³</p>	<p>Corrective Action Plan Date February 28, 2022</p>
<p>Complaints Department Phone # (804) 225-2013</p>	

¹ The Notice of Complaint includes a reissuing of Student 1’s complaint, sent out on August 23, 2021. Student 2’s complaint Notice was due on October 12, 2021, however this Office determined that it was necessary to address such concerns in a systemic complaint after the receipt of Student 3’s complaint alleging similar IEE violations.

² This investigation was originally due on December 7, 2021. However, the investigation was extended due to the significant amount of documentation provided for this complaint, including supporting documentation from the complainants and additional time by the school division to respond to the systemic complaint, in addition to the complexity of the issues presented in the complaint, and the corresponding need to obtain additional information including verifying market costs.

³ The thirty (30) day period for filing an appeal under the Virginia Regulations, at 8 VAC 20-81-200.E, expires on February 27, 2022, which falls on a Sunday. Accordingly, the appeal will be due on the next business day, Monday, February 28, 2022.

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SYSTEMIC COMPLAINT AUTHORITY

This complaint identifies three individual students, and alleges that the actions of Loudoun County Public Schools (LCPS) with regard to these students reflects systemic practices within the division related to its independent education evaluations practices. 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—such as the VDOE—are “required to resolve any complaint that meets the [sufficiency] requirements” set forth in the 2006 implementing regulations, “including complaints that raise systemic issues...”⁴ 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...”⁵ Accordingly, this office is authorized to investigate alleged systemic violations of special education regulations. In this specific complaint, the complainants have provided both student specific allegations and systemic allegations against LCPS or the local education agency (LEA).

We will identify the students by number in this Letter of Findings. These students have been included in this complaint to demonstrate certain alleged violations committed by the LEA.

PRELIMINARY NOTES:

A. Applicable Regulations

This office based its investigation and findings on the reauthorization of the federal *Individuals with Disabilities Education Improvement Act*, effective December 3, 2004, (IDEA 2004), its implementing federal regulations, effective October 13, 2006, and the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* (Virginia Regulations), effective July 7, 2009, and reissued on January 25, 2010, and July 29, 2015, which governed the delivery of special education and related services at the time the events cited in this complaint allegedly occurred. The Virginia Regulations are available online at:

⁴ 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*].

⁵ *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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www.doe.virginia.gov/special_ed/regulations/state/regs_speced_disability_va.pdf.

B. Sufficiency of Complaint

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. (See 34 C.F.R. § 300.153).

C. On-Site Visit

Based on Complainant's supporting materials, the school division's response documentation, and additional 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—Independent Educational Evaluation (IEE)-

Parents have alleged that LEA has violated regulations governing IEEs⁶. These allegations fall into two general categories.

A. Funding Limits

The first issue raised in this complaint involves LCPS' establishment of cost criteria for obtaining IEEs. We will examine this issue in two contexts. First, we will examine whether the cost criteria has been established as permitted by applicable law and regulations. Second, we will examine whether the cost criteria effectively limits the scope of the IEE in a manner not permitted by the applicable law and regulations. Finally, we will examine whether the school division has a compliant process for ensuring that exceptions to the cost criteria as it relates to scope are considered. The complaint contains facts that, while stated cumulatively, implicate each of these concerns. In this regard, Complainants allege as follows, first with regard to LCPS systemically, and then with regard to Student 1 and Student 2:

Systemic Allegation – Funding Limits Generally

- LCPS has established funding limits so low that it is not possible for the following students and similarly situated students to obtain an IEE at public expense. The current cap is \$2,000.00.
- The funding limits (cost caps) at public expense are also so low that they prevent Parents from obtaining more comprehensive evaluations when the one completed by LCPS is at issue. For

⁶ This Office will only investigate the allegations that were specifically alleged on the October 19, 2021, Notice of Complaint. Any new allegations may be submitted a new complaint.

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example Student 2 alleges that she was seeking an IEE that would “identify additional areas of need during the comprehensive evaluation process.” And, that LCPS’ funding limits prevented such an IEE.

- LCPS’ process for responding to a request for a unique circumstances waiver to funding limits is in violation of special education laws and regulations.

Student-Specific Allegations Funding Limits Generally

- Student 1:
 - On June 8, 2021, Parent 1 requested an IEE for a psychological, educational, and auditory processing disorder evaluation. On June 14, 2021, Parent 1 disagreed with the [IEP] team’s decision to find [Student] eligible in the disability category of Intellectual Disability. On June 26, 2021, Parent 1 received a letter from LEA approving the requested IEEs and containing a list of potential providers and LEA’s guidelines for IEEs.
 - On August 4, 2021, Parent 1 emailed Mr. John Lody (Director of Diagnostic and Prevention Services) to request a waiver of the \$2,000.00 fee for both the psychological and educational evaluation for which her chosen provider, Dr. Culotta, charges \$3,450.00. Parent 1 received no response from LEA. The LEA made no determination that the amount charged by Dr. Culotta was unreasonable, but informed the provider the LEA would pay only \$2,000 for his evaluations. Parent 1 alleges LEA’s unreasonable fee caps violated her rights to an independent IEE at public expense.
- Student 2:
 - On February 19, 2021, an IEE was requested by Parent 2. On February 22, 2021 the IEE was approved by Mr. Lody. Mindwell was selected as the provider. On March 8, 2021, Parent 2 received a letter from LCPS stating that she would have to pay the difference between the approved \$2000 and the Mindwell cost.
 - This complainant asserts that the fee cap is far below the market rate. In addition, the complainant asserts that she requested a “waiver” for the fee cap in a September 1, 2021, email stating that “[student] requires an evaluator that has expertise in dyslexia, ADHD, and social-emotional evaluations who can identify and evaluate these multi-faceted, intertwined issues and possibly identify additional areas of need during the comprehensive evaluation process.” LCPS denied her request stating that, “The issue is not that the Parent chose a provider who charges a higher rate for the same tests, it’s that she chose a provider who conducts a much more comprehensive evaluation than one provided for only \$2,000. Mr. Lody went on to say that “Licensed child and school psychologists in the Commonwealth of

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Virginia including those on LCPS's representative list are qualified to assess students with attention, learning, behavioral, and social-emotional difficulties; therefore, this justification is neither unique nor scarce.”

- In addition, the Complainant asserts that LCPS' refusal to pay for the more comprehensive evaluation violates her right to an IEE because no other evaluator will provide the more comprehensive evaluation at the fee that LCPS is willing to pay. Specifically, the Parent was seeking an evaluation that would assess areas that should be evaluated, those potentially beyond LCPS' evaluations.

B. IEE Report Criteria

The second issue raised in this complaint involves the conditions and criteria that LCPS imposes upon IEEs. We are asked to consider whether a school division may impose requirements related to the content, delivery and discussion of the IEE report. Specifically, the allegations with regard to LCPS systemically, and with regard to Student 1, Student 2 and Student 3, are as follows:

Systemic Allegation – Report Criteria Generally

Students 1, 2, and 3 allege that LCPS imposes conditions and criteria on the IEE provider and the IEE report that violates the regulations. This criteria is outlined in LCPS guidelines. Specifically, LCPS:

- Requests that reports be amended, language revised, and that recommendations be removed from reports.
 - These requests were inconsistent with the criteria LCPS had established in its guidelines. However, even if the requests are consistent with LCPS' established criteria, the criteria established by LCPS is not consistent with the regulations and the Parent's right to a truly independent evaluation.
- Requires IEE providers to submit their reports to the LEA for review and for potential modifications, before providing a copy to the Parent(s).
- Requires a pre-evaluation discussion between the provider and [LEA] to limit the scope of the evaluation to that of the evaluation conducted by [LEA];

Student-Specific Allegations – Report Criteria Generally

- Student 1:
 - Parent 1 alleges that “Certain provisions in LCPS's Guidelines interfere with parents' right to truly independent IEE and impose impermissible conditions/criteria IEE's.” Specifically LCPS's Guidelines do this by:

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- Requiring IEE providers to refrain from making recommendations for placement or eligibility decisions.
 - Requiring IEE providers to submit their reports to the LEA for review and potential modifications before providing a copy to the Parent(s).
- Student 2:
 - Parent 2 requested a “waiver” from the agency criteria requiring that the IEE provider’s reports not include statements regarding placement or eligibility. Parent 2 also requested a “wavier of the Guideline that the original report be sent to the school first so they could review and potentially revise it before sending it to her. She stated that “any review of the report, and certainly requiring changes to the report, prior to her receiving it violates the right to an independent IEE.”
 - LCPS denied the request stating that the LCPS evaluators are not allowed to make recommendations regarding eligibility and placement as that is a decision for the team. In addition, LCPS stated that the report is sent to LCPS first to ensure conformity with their guidelines and not to alter the independent nature of the report.
 - The inability of Dr. Simpson (IEE provider) to make recommendations regarding eligibility directly interferes with the parent’s right to request an independent evaluation of whether or not [Student] might meet criteria for eligibility under another category and why or why not. The inability to make recommendations regarding placement also interferes with the parent’s right to an independent determination of what an appropriate education would look like for a child with a complex learning profile.
 - Student 3:
 - LCPS approved the IEE on December 5, 2019. Due to the pandemic, the IEE was not completed and the report was not issued to LCPS until December 1, 2020.
 - The outside evaluator was Dr. Ling. He submitted a 22-page report to LCPS per their guidelines.
 - “On December 9, 2020, Susan Supcoe, Eligibility Coordinator for LCPS, sent a letter to Dr. Ling indicating there were statements in the report for which LCPS required amendments. Ms. Supcoe stated, ‘To meet the requirements of the special education regulations, Loudoun County Public Schools requires you to make the following amendments to your evaluation so that we may proceed with providing the evaluation to the parents and school and processing the invoice for payment.’”

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Such changes requested that statements such as "[Parent] reports that this included [Student] breaking [their] thumb when thrown to the ground by an aide," be clarified or omitted. Thus, payment was conditioned on changing the report. The final report looked incomplete. The final report the Parent received from LCPS was 19 pages, the Parent later received a 22-page report only after inquiring after the "original report."

- "LCPS did not provide any authority or criteria confirming that the report amendments that LCPS requested of Dr. Ling were required or that payment of his invoice was conditioned on him making the amendments." The required changes are not consistent with LCPS' criteria as outlined in their guidelines.

Applicable Regulations and other Guidance/Authority:

- 34 C.F.R. § 300.502(a)(3)(i); 8 VAC 20-81-10.
- 34 C.F.R. § 300.502; 8 VAC 20-81-170.B.
- 34 C.F.R. § 300.502(a)(2); 8 VAC 20-81-170.B.1.b and B.2.f.
- 34 C.F.R. § 300.502(e); 8 VAC 20-81-170.B.2.f.
- U.S. Department of Education (USED), Office of Special Education Programs (OSEP):
 - *Letter to Wilson*, 16 IDELR 83 (October 17, 1989).
 - *Letter to Thorne*, February 5, 1990 (16 IDELR 606).⁷
 - *Letter to Anonymous*, February 2, 1995 (22 IDELR 637).⁸
 - *Letter to Anonymous*, 103 LRP 22731 (2002).
 - *Letter to Baus*, 65 IDELR 81; 115 LRP 8855 (February 23, 2015).⁹

⁷ OSEP stated in *Thorne*: *In order to avoid unreasonable charges for IEEs, a district may establish maximum allowable charges for specific tests. If a district does establish maximum allowable charges for specific tests, the maximum cannot simply be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. Rather, the maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria.*

⁸ OSEP stated in *Anonymous*: *A school district may establish maximum allowable charges for specific tests to ensure that the cost of a publicly funded IEE is reasonable. The maximum fee cannot be an average of fees customarily charged in the area by professionals qualified to conduct the specific test, but rather, must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. However, in all cases, the district must give the parent an opportunity to demonstrate that unique circumstances justify going outside of the district's fee criteria, and if they do, the district must pay that fee.*

⁹ In addressing whether a parent can request an IEE in an area that was not previously assessed by the school [division's] evaluation in its 2015 *Letter to Baus* (65 IDELR 81; 115 LRP 8855), OSEP stated that [w]hen an evaluation is conducted in accordance with 34 CFR §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to

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- *Letter to Carroll*, 68 IDELR 279; 116 LRP 46076 (October 22, 2016).¹⁰
- *Analysis of Comments and Changes* at 46689-46690, Federal Register, Vol. 71, No. 156 (August 14, 2006).
- *Seth B. v. Orlean Parish Sch.*, 810 F.3d 961 (5th Cir. 2016).
- *Abarca v. Goleta Union Sch. Dist.*, 2017 WL 700082, 69 IDELR 156, 2017 WL 700082 (C.D. Cal. 2017)

Findings:

This office finds as follows:

	Systemic	Student 1	Student 2	Student 3
Subissue 1A	Noncompliance	Premature	Noncompliance	N/A
Subissue 1B(i)	Compliance	Compliance	Compliance	N/A
Subissue 1B(ii)	Noncompliance	Dismissed	compliance	Noncompliance
Subissue 1B(iii)	Noncompliance	N/A	N/A	N/A

Analysis:

General Regulatory Background

- Special education regulations (34 CFR 300.15; 8 VAC 20-81-10), define “evaluation” as “procedures used ... to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.”

assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.

¹⁰ In its October 22, 2016, *Letter to Carroll* (68 IDELR 279; 116 LRP 46076), OSEP addressed an inquiry regarding whether, once a [school division’s] evaluation is complete and the parent communicates a desire for a child to be assessed in a particular area in which they [sic] have not previously expressed concern, would the [school division] have the opportunity to conduct an evaluation in the given area before a parent invokes the right to an IEE. OSEP advised that the IDEA affords a parent the right to an IEE at public expense and does not condition that right on a [school division’s] ability to cure the defects of the evaluation it conducted prior to granting the parent’s request for an IEE. Therefore, it would be inconsistent with the provisions of 34 CFR § 300.502 to allow the [school division] to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parents’ request for an IEE at public expense or filing a due process complaint to show that its evaluation was appropriate. Under 34 CFR § 300.502(b)(5), a parent is entitled to **only one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees** [emphasis added].

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- These regulations (34 C.F.R. § 300.502(a)(3)(i); 8 VAC 20-81-10) define “independent educational evaluation” (IEE) as “an evaluation conducted by a qualified examiner or examiners who are not employed by the local educational agency [school division] responsible for the education of the child in question.”
 - Parents have the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school division. More specifically, the regulations provide that, upon receipt of a parental request for an IEE, the school division must, without unnecessary delay, either (i) **initiate** a due process hearing to show that its evaluation is appropriate; or (ii) ensure that an IEE is conducted at public expense unless the school division demonstrates in a due process hearing that the evaluation obtained by the parent does not meet the school division’s criteria (34 C.F.R. § 300.502).
 - Further, the regulations (34 C.F.R. § 300.502(a)(2); 8 VAC 20-81-170.B.1.b and B.2.f) direct school divisions to provide to the parent, upon request for an IEE, information about where an independent educational evaluation may be obtained and the applicable criteria for IEEs.
- Additionally, these regulations (34 C.F.R. § 300.502(e); 8 VAC 20-81-170.B.2.f) specify that, if the IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the school division agency uses when it initiates an evaluation, **to the extent those criteria are consistent with the parent's right to an IEE**. Except for the criteria, a local educational agency may not impose conditions or timelines related to obtaining an IEE at public expense.¹¹

Subissue 1A(i) IEE Cost Criteria

Regulatory Background - OSEP Guidance and Analysis/Commentary

- As a well-settled matter, LEAs may establish reasonable cost criteria for IEEs to avoid unreasonable charges.
 - In 1990, OSEP advised that a public agency may establish criteria to ensure that the cost of a publicly-funded IEE is reasonable. “In order to avoid unreasonable charges for IEEs, a district may establish maximum allowable charges for specific

¹¹See also, U.S. Department of Education, Office of Special Education Programs, *Analysis of Comments and Changes*, at 46689-46690, Federal Register, Vol. 71, No. 156 (August 14, 2006). VDOE has also stated that *the qualifications of the IEE evaluator must be the same as the criteria that the LEA uses when it initiates an evaluation...* Virginia Department of Education, *Discipline of Children with Disabilities Technical Assistance Resource Document* (Fall 2010) <http://www.doe.virginia.gov/support/student_conduct/discipline_children_disabilities.pdf>

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tests. If a district does establish maximum allowable charges for specific tests, the maximum cannot simply be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. Rather, the maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria."¹²

- In 1995, OSEP advised that “[t]o avoid unreasonable charges for IEEs, a school district may establish maximum allowable charges for specific tests. The maximum fee cannot be an average of fees customarily charged in the area by professionals qualified to conduct the specific test, but rather, must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria. If an IEE that falls outside the district's criteria is justified by the child's unique circumstances, that IEE must be publicly funded.”¹³
- In 2002, OSEP further advised that: “[t]he denial of an IEE based solely on financial cost would be inconsistent with 34 CFR § 300.502. To avoid unreasonable charges for IEEs, the school district may establish maximum allowable charges for specific tests. When enforcing **reasonable cost containment criteria**, the district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria. If an IEE that falls outside the district's criteria is justified by the child's unique circumstances, that IEE must be publicly funded. If the total cost of the IEE exceeds the maximum allowable costs and the school district believes that there is no justification for the excess cost, the school district cannot in its sole judgment determine that it will pay only the maximum allowable cost and no further. The public agency must, without unnecessary delay, initiate a hearing to demonstrate that the evaluation obtained by the parent did not meet the agency's cost criteria and that unique circumstances of the child do not justify an IEE at a rate that is higher than normally allowed [emphasis added].”¹⁴

¹² See, footnote 2.

¹³ U.S. Department of Education, Office of Special Education Programs, *Letter to Anonymous*, February 2, 1995 (22 IDELR 637).

¹⁴ U.S. Department of Education, Office of Special Education Programs, *Letter to Anonymous*, 103 LRP 22731 (2002).

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- Subsequently, in its *Analysis* regarding its 2006 implementing regulations, the USED stated its longstanding position that public agencies should not be required to bear the cost of unreasonably expensive IEEs.
 - The USED further stated that “[a]lthough it is appropriate for a public agency to establish **reasonable cost containment criteria** applicable to personnel used by the agency, as well as to personnel used by parents, a public agency would need to **provide a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees fall outside the agency's cost containment criteria.** Section 300.502(b)(2) provides that if the parent requests an IEE at public expense, the public agency either must ensure that the IEE is provided at public expense or file a due process complaint notice to request a hearing to demonstrate that the agency's evaluation is appropriate [emphasis added].¹⁵

Analysis: Systemic Allegation

- Complainants allege that LEA has established funding limits so low that it is not possible for the following students and similarly situated students to obtain an IEE at public expense. Complainants note that LEA’s current cost cap is \$2,000.00. The LEA’s criteria apply to various type assessments, as identified below.
- In support of Complainants’ systemic allegation, Complainants submitted LEA’s *Guidelines for Independent Educational Evaluation* revised in August 2021. In August 2021, the following fees were established by LEA as meeting the criteria under which an evaluation could be obtained:

Psychological evaluation -- up to \$1,150.00
Educational evaluation -- up to \$850.00
Developmental evaluation -- up to \$350.00
Speech/Language evaluation -- up to \$400.00
Assistive Technology evaluation -- up to \$1,000.00
Functional Behavioral Assessment -- up to \$1,000.00
Other related service evaluations -- up to \$350.00

Complainants also submitted a copy of LEA’s guidelines that were revised in February 2016 and August 2020. A review of the guidelines showed that LEA’s fee cap remained the same over the relevant timeframe.

¹⁵U.S. Department of Education, Office of Special Education Programs, *Analysis of Comments and Changes* at 46689-46690, Federal Register, Vol. 71, No. 156 (August 14, 2006).

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- In addition to LEA’s guidelines, Complainants submitted the following Special Education Services Agreements: (1) an agreement originally entered into with Dr. Karen Larson and Associates on October 1, 2015, showing that Dr. Karen Larson and Associates agreed to perform IEE services in the area of Psychological Evaluation at a rate of \$1,150.00 and Educational Evaluation at a rate of \$850.00,¹⁶ (2) an agreement with Child Psychology Services, LLC beginning on March 15, 2021, and ending on June 30, 2023, showing that Child Psychology Services, LLC agreed to perform IEE services in the area of Psychological Evaluation at a rate up to \$1,150.00 and Educational Evaluation at a rate up to \$850.00,¹⁷ and (3) an agreement with NeuroBehavioral Associates beginning on July 20, 2021, and ending on June 30, 2023, showing that NeuroBehavioral Associates agreed to perform IEE services in the area of Psychological Evaluation at a rate of \$1,150.00 and Educational Evaluation at a rate of \$850.00.¹⁸
 - In Dr. William Ling’s affidavit, Dr. Ling discussed being authorized to provide IEEs to students in LEA. Dr. Ling’s comprehensive evaluation, which would identify all of a child’s special education needs and related services, costs \$3,000.00.
- Complainants submitted LEA Special Education Advisory Committee’s (SEAC’s) Approved Meeting Minutes dated October 5, 2016; and highlighted the public comments discussing LEA’s inadequate IEE funding and the financial burden it placed on parents. Specifically, it was stated that LEA needed “to provide adequate funding for IEEs. Currently [LEA] provides up to \$2,000.00 for an IEE. There is not an independent educational evaluator in Loudoun and Fairfax counties who charges less than \$2,500.00. This leaves the parents with a balance of upwards of \$500.00.”
 - Complainants also resubmitted LEA SEAC’s Guidelines for IEEs Recommendations Summary dated May 5, 2021, and highlighted that (i) LEA had not changed its cost cap for over five years, (ii) LEA’s cost cap was substantially less than neighboring school districts, and (iii) LEA’s cost cap was substantially less than the current market rate for IEEs.¹⁹

¹⁶ On March 18, 2016, Dr. Karen Larson and LEA signed the agreement.

¹⁷ On March 17, 2021, Child Psychological Services, LLC signed the agreement. On March 18, 2021, LEA signed the agreement.

¹⁸ On July, 26, 2021, Demetria Riddlespurger, Practice Manager with NeuroBehavioral Associates signed the agreement. On July 27, 2021, LEA signed the agreement.

¹⁹ The SEAC Guidelines for IEEs Recommendations Summary dated May 5, 2021, was initially submitted with Student 1’s complaint.

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- To further illustrate that LEA’s cost cap is unreasonable, Complainants submitted another copy of the information listed in Chart 1,²⁰ and included a Speech-Language Evaluation Comparison Chart (Chart 2). Chart 2 contained the following relevant information:

Business Name	Evaluation(s) Performed	Cost of Evaluation (private pay)
Progressive Speech Therapy	CASL’s, TILLS, Special Language Skills Assessments “Fault Analysis	\$950.00 (base cost for 3 hours of testing) ²¹
Children’s Speech Therapy Center	Varies depending on concerns for student(s).	\$250.00 (for 1 hour of testing)
The Coleman Therapy Center	Varies depending on previous testing and concerns for student(s)	\$175.00 (per hour for a comprehensive evaluation but the total cost will depend on how much testing is required)
Skillbuilders LLC.	Depends on intake and concerns for student(s)	\$800.00

- Complainants created a Functional Behavior Assessment (FBA) Fee Chart (Chart 3), which included the following relevant information:

Business Name	Evaluation(s) Performed	Cost of Evaluation (private pay)
Autism Outreach Inc.	FBA	Assured Complainant that cost would be covered by the school through IEE process; 3-12 hours; \$225/hour; \$675-2700
Ashburn Psychological & Psychiatric Services	Evaluations only performed by one doctor, and not often;	\$225/1st hour; \$190 after; must pay for transportation

²⁰ Complainants initially submitted Chart 1 with Student 1’s complaint and it is discussed in more detail below.

²¹ A Progressive Speech Therapy representative advised that there are additional costs for any additional testing, which is determined during testing.

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	does not accept insurance.	
Continuum Behavioral Health	FBA	\$1,200.00
Behavioral Directions LLC ²²	FBA	\$1,200.00 - \$1,400.00

- Complainants also created an Auditory Processing Disorder (APD) Fee Chart (Chart 4), which included the following relevant information:

Business Name	Evaluation(s) Performed	Cost of Evaluation (private pay)
Jay R. Lucker, Ed.D., CCC-A/SLP, FAAA	APD	\$1,000.00 - \$1,200.00
Family Hearing Services	APD	\$565.00
University of MD Hearing & Speech Clinic	APD	\$800.00 - \$950.00
Gallaudet University Hearing & Speech Ctr.	APD	\$620.00 - \$710.00, depending on the number of tests conducted

- Along with the charts, Complainants submitted several emails discussing evaluator costs. Specifically, an email dated October 20, 2021, from Dr. Barbin with Behavioral Directions, LCC, which advised that an adequate FBA costs approximately \$1,200.00 - \$1,400.00. Dr. Barbin explained that LEA denied Dr. Barbin’s request to increase its fee cap by \$1,200.00 to cover the cost of the FBA. A parent’s email indicated that Cari Syron, Director of Clinical Services at Skill Builders LLC, charged a fee of \$800.00 to conduct a speech-language evaluation; and LEA agreed to only pay up to \$400.00. Another parent’s email discussed Progressive Speech Therapy’s reported inability to conduct IEEs due to the “low rate of pay;” and Little Hands’ fee for conducting a speech-language evaluation that ranged from \$450.00 to \$1,200.00; which was below LEA’s \$400.00 fee cap. An email from NeuroBehavioral Associates’ Practice Manager dated July 27, 2021, which indicated that

²² Behavioral Directions LLC is a provider on LEA’s qualified list.

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the parent would be responsible for paying \$1,450.00 after LEA agreed to pay \$2,000.00 for Student's evaluation.²³

- Complainants also submitted an itemized receipt from Mindwell Psychology, which illustrated that LEA paid \$2,000.00 for a student's IEE but there was a balance of \$1,000.00 that the family was obligated to pay out of pocket.²⁴
- Finally, Complainants submitted LEA's letters responding to several parents' IEE provider requests. The letters advised parents of LEA's cost cap for the relevant evaluation sought and notified parents that their selected evaluator exceeded LEA's fee cap. In the letters, parents were also instructed of their right to pay the remaining charges in order to utilize their selected evaluator who was not an evaluator from LEA's approved list. Complainants maintain that LEA actions with regard to these students reflect systemic practices within the division to deny parents their right to an IEE at public expense.
- In response, LEA asserts that "the [USDOE] interprets its regulations to authorize school divisions to establish reasonable limits on the expenditures for IEEs. This authority includes establishing "reasonable cost containment criteria applicable to personnel used by the agency, as well as to personnel used by parent" to ensure that "public agencies should not be required to bear the cost of unreasonably expensive IEEs."²⁵
- LEA reportedly updated its IEE Guidelines in August 2020 and "established a fee schedule that outlined the maximum dollar amounts [LEA] would pay for different types of evaluations in the event that a parent requested an IEE at public expense." LEA established its fee schedule by "reviewing fees charged by different vendors in the Northern Virginia area and [LEA] established cost criteria that could be met by numerous providers in the local geographic area."

²³ The email referenced Student 1.

²⁴ The itemized bill submitted by Student 6.

²⁵ LEA cited *M.V v Shenendehowa Central Sch. Dist.*, 60 IDELR 213 (N.D.N.Y 2013), which held that a school district may limit the cost of IEEs, so long as the cap does not present the parent from obtaining an independent assessment; *Letter to Fields*, 213 IDELR 259 (OSERS 1989), which held that a parent's selected evaluator must meet the agency's reasonable cost criteria; *Letter to Anonymous*, 22 IDELR 637 (OSEP 1995), which held that a district may establish maximum allowable charges for specific tests. A school division is not required to approve an IEE at public expense for an evaluation that does not meet the school division's cost criterion unless the parent requesting a waiver of the cost criterion can demonstrate that "unique circumstances" exist to warrant waiver of the criterion Id.; see also *Letter to Kirby*, 213 IDELR 233 (OSEP 1989); *Shafi A. v. Lewisville Indep. School Dist.*, 69 IDELR 66 (E.D. Tex. 2016), which held that a school district properly denied the parents' IEE request because the parents' preferred evaluator's fee surpassed the district's cost parameters for private evaluations.

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- Additionally, LEA argues that it “developed a list of multiple providers (currently at 5 total) that could conduct a psychoeducational IEE at [LEA’s] established rates and could satisfy [LEA’s] other IEE criteria. LEA reiterates that maintaining a list of vendors in its geographical location further illustrates the reasonableness of its cost criteria.²⁶ LEA maintains that its cost criterion was in compliance with the applicable regulations and authority, and did not prevent parents from obtaining an IEE at public expense.
- In a request for additional information, this office asked LEA to (i) provide a list of the Northern Virginia vendors that were used to establish its cost criteria, (ii) provide the vendor’s associated cost for each evaluation, (iii) provide any written guidance explaining how LEA developed its cost criteria, and (iv) provide LEA’s cost caps for the 2011-2012 school year through the 2019-2020 school year.
 - In its January 2022 emailed response, LEA stated that it did not “maintain a written document that describes [LEA’s] process for establishing its IEE cost containment criteria.” LEA argued that “the IDEA nor its implementing regulations require that [LEA] develop such a guidance document.” Furthermore, LEA noted that the USDOE and VDOE did not require local educational agencies to establish a specific process.

LEA’s Director of Diagnostic & Prevention Services assumed the responsibility of establishing LEA’s IEE cost containment criteria at the beginning of the 2020-2021 school year. First, the director reviewed LEA’s 2019-2020 IEE criteria. The director contacted Fairfax County Public Schools and Prince William County Public Schools and discussed their IEE processes and criteria. As detailed in LEA’s response, the individual who previously processed LEA’s IEE requests advised the director that LEA’s “prior IEE cost criteria was primarily established by regularly contacting each of the providers on [LEA’s] IEE provider list to inquire about the costs they charge for specific evaluations and/or affirm whether they will continue to conduct evaluations at the price previously agreed upon with the school division.” The director concluded that LEA would retain its previous IEE rates because the rates continued to be reasonable.

LEA’s IEE Guidelines revised in January 2013 revealed that its established cost criteria fees were: (i) up to \$1,150.00 for a psychological evaluation, (ii) up to \$850.00 for an educational evaluation, (iii) up to \$400.00 for a speech/language,

²⁶ LEA cited *M.V v Shenendehowa Central Sch. Dist.*, 60 IDELR 213 (N.D.N.Y 2013), which found a school division’s IEE cost criteria reasonable because the division could identify six evaluators who were willing to perform IEEs at or below the school division’s fee cap; *Shafi A. v Lewisville Indep. School Dist.*, 69 IDELR 66 (E.D. Tex. 2016), which held that a school division’s IEE cost criteria is reasonable where the division maintained a list of IEE providers that conduct evaluations at or below the District’s maximum fee schedule.

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occupational and physical therapy evaluation, and (iv) up to \$350.00 for other related service evaluations. A review of LEA's IEE Guidelines revised in January 2016, May 2017, January 2018, July 2019, and August 2020 revealed that its established cost criteria fees remained unchanged.²⁷

- As a part of the investigation, this office also contacted Northern Virginia vendors and obtained the following information:

Provider	Evaluation Type(s)	Cost
Ashburn Psychological and Psychiatric Services	Psychological and/or Educational	\$3,000.00 ²⁸
Commonwealth Psychological Associates	Psychological, Educational, Emotional, and Cognitive	\$4,000.00 ²⁹
Dr. Robert J. Verdile	Psychological	\$1,400.00 ³⁰
Dr. Barry B. Ekdome	Psychological and/or Educational	\$250.00 an hour with an average of 15 hours for testing ³¹
Dr. Karen Larson and Associates	Psychological and Educational	\$2,120.00 ³²

²⁷ Beginning in May 2017, LEA updated its evaluation types to include the following IEE cost criteria fees: up to \$350.00 for a developmental evaluation, up to \$1,000.00 for an assistive technology evaluation, and up to \$1,000.00 for a functional behavioral evaluation. Notably, the fees associated with these additional evaluations also remained unchanged.

²⁸ Ashburn Psychological and Psychiatric Services charges a fee of \$200.00 or \$250.00 as an initial meeting fee with parent(s); and the total charge for the assessment and report is either \$2,800.00 or \$2,750.00. Ashburn Psychological and Psychiatric Services noted that it just "accepts [LEA's] cap."

²⁹ Commonwealth Psychological Associates charges a flat rate of \$4,000.00, which includes psychological, educational, emotional, and cognitive assessment. Additionally, Commonwealth Psychological Associates has an IEE educational rate of \$3,200.00 that is reportedly very strict, limited, and rarely used.

³⁰ Dr. Robert Verdile charges a flat rate and only uses the Wechsler assessment. Additionally, Dr. Robert Verdile does not conduct psycho-social-emotional assessments.

³¹ Dr. Barry B. Ekdome's administrative staff stated that the average testing, parent meeting, and report costs \$3,750.00.

³² Dr. Karen Larson and Associates fee includes \$160.00 for an initial meeting and \$160.00 for feedback following the assessment.

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Children’s Speech Therapy Center	Speech and Language	\$250.00
Tiny Toes	Speech and Language	\$300.00
Progressive Speech Therapy	Speech and Language	\$400.00 - \$950.00 ³³
Behavioral Directions	Functional Behavioral Assessment	\$1,500.00 - \$1,700.00
T-Ten Services	Functional Behavioral Assessment	Hourly rate of \$175.00 - \$175.00 ³⁴

- As the above-cited OSEP Analysis and Guidance indicates, LEA correctly asserts that school divisions may establish reasonable cost criteria for IEEs. Additionally, LEA correctly asserts that regulations and OSEP have left the process of establishing a reasonable cost criteria up to the local school divisions. Notwithstanding these assertions, Complainant has alleged that LEA’s cost cap is unreasonable, thus this investigation requires this office to determine whether LEA’s cost cap is indeed reasonable.
- While OSEP has not provided direct guidance on this matter, in several guidance letters OSEP has warned school divisions that “the maximum [fee] cannot simply be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. Rather, the maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees.”³⁵
- As the record indicates, LEA has not relied upon averaging fees as a method of establishing its cost cap. In its January 2022 response to our office’s request for clarification, LEA admitted that it historically established its cost cap “by regularly contacting each of the providers on [LEA’s] IEE provider list [emphasis added] to inquire about the costs they charge for specific evaluations and/or affirm whether they will continue to conduct evaluations at the price previously agreed upon with the school division.” This office notes

³³ Progressive Speech Therapy fees for speech and language evaluations range depending on the age of the child and the scope of the evaluation.

³⁴ On December 21, 2021, T-ten emailed that it was no longer doing IEEs but had not been taken off the list. T-Ten explained that it could provide an estimate of the hours it would take to complete the assessment based on “seeing the amount of records to review, etc.”

³⁵ Letter to Thorne, 16 IDELR 606 (OSEP Feb. 5, 1990) (same); Letter to Wilson, 16 IDELR 83 (OSEP Oct. 17, 1989) (same).

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that there is case law that supports calling various education professionals throughout the geographic area and inquiring as to what those professionals charge, however, LEA failed to establish that it contacted any vendors that were not included on its approved IEE provider list.³⁶

- When establishing its cost cap, there is no evidence to support that LEA has ever eliminated unreasonably excessive fees. Instead, as evidenced by LEA's unchanged cost caps listed on its *Guidelines for Independent Educational Evaluation* from 2013 - 2021 and LEA's Special Education Services Agreements with its qualified providers, it is only logical to conclude that LEA has only allowed parents to choose from the qualified professionals on its approved list and has established its fee caps based on its negotiated rates with its qualified providers.
- This office notes that LEA is not prohibited from negotiating rates and entering into Special Education Services Agreements with qualified providers. In this instance, however, LEA failed to show that its negotiated rates are reflective of the fees customarily charged in the area.
- Finally, LEA argues that its cost cap is reasonable because it maintains a list of (currently five) qualified vendors in Loudoun County's geographical location that are willing to perform IEEs at LEA's fee cap. While maintaining a list of qualified vendors in Loudoun County's geographical location that are willing to perform IEEs at LEA's fee cap is a factor considered by some courts, it is not dispositive as to whether LEA's fee cap is reasonable. Additionally, maintaining a list of qualified evaluators does not absolve local school divisions from establishing fee caps based on the fees being charged by professionals in the relevant geographical area.
- In establishing a reasonable cost cap, OSEP has not prohibited school divisions from using the market price (rate), which is defined as the price actually given in current market dealings.³⁷ It is this office's position that the record contains several market rates quoted by evaluators who conduct IEEs in the relevant geographic location. The record also contains SEAC recommendations dating back to 2016, IEE evaluator statements and pricing, itemized bills, and LEA's statements, which collectively indicate that LEA has

³⁶ Although not binding judicial authority in Virginia, in *Abarca v. Goleta Union Sch. Dist.*, 2017 WL 700082, 69 IDELR 156, 2017 WL 700082 (C.D. Cal. 2017), explained that the district adopted cost ceilings established by the county's Special Education Local Plan Area ("SELPA"). SELPA set cost ceilings by "calling various types of education professionals throughout [the surrounding counties] and inquiring as to what those assessors charge for different types of evaluations." Importantly, when determining cost caps, SELPA "excluded outliers on both the high and low ends of the spectrum, but did not simply average the rates of the professionals polled."

³⁷ Merriam-Webster, *Price*, WWW.MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/market%20price> (last visited Dec. 14, 2021).

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failed to establish its cost cap based on the current market price (rate). Furthermore, a review of the record indicates that LEA has consistently failed to establish a cost cap that considers and eliminates excessive fees. Thus, the weight of the record suggests that LEA's cost cap is unreasonable as it is not reflective of the current market price (rate) and it has not properly considered fees being charged by professionals in its geographic location.

- Based on the foregoing reasoning, we find LEA in non-compliance on this Issue.

Analysis - Student 1:

- Complainant alleges that LEA's cost containment fee caps are unreasonable and far below community rates; thus, violating the right to an IEE at public expense. Complainant notes that OSEP advises against establishing "allowable maximum costs for specific tests by averaging the fees customarily charged in the area by professionals who are qualified to conduct the specific test." Instead, OSEP advises that "maximum costs must be established so that it allows parents to choose from among qualified professionals in the area and only eliminates unreasonably excessive fees."³⁸
- In support of the allegation pertaining to Student 1, Complainant submitted the following relevant information in a Chart of Fees (Chart 1):

Provider	Evaluation Type(s)	Cost
Myra Angel, Ph.D.	Psychological & Educational	\$3,500.00
Ashburn Psychological & Psychiatric Services ³⁹	Psychological & Educational	\$3,000.00
The Bethesda Group	Psychological & Educational	\$3,600.00
Child Psychological Services, LLC ⁴⁰	Psychological & Educational	\$2,800.00

³⁸ Complainant cited *Letter to Thorne*, 16 IDELR 606 (OSEP 1990) and *Letter to Anonymous*, 22 IDELR 637 (OSEP 1995).

³⁹ In March 2021, this provider was listed on LEA's representative list of qualified providers.

⁴⁰ In March 2021, this provider was listed on LEA's representative list of qualified providers.

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Commonwealth Psychological Services, LLC ⁴¹	Psychological & Educational	\$2,800.00
Commonwealth Psychological Associates ⁴²	Psychological & Educational	\$4,000.00
Rolando Diaz, Ph.D.	Psychological & Educational	\$3,800.00
Barry B. Ekdorn, Ph.D. ⁴³	Psychological & Educational	\$3,250.00
Dr. Ronald S. Federici	Psychological & Educational	\$2,500.00
Anthony Henley, Psy.D.	Psychological & Educational	\$2,500.00
In Step, PC	Psychological & Educational	\$3,500.00
Dr. Karen Larson & Associates ⁴⁴	Psychological & Educational	\$2,120.00
William D. Ling, Ph.D.	Psychological & Educational	\$3,000.00
MindWell Psychology	Psychological & Educational	\$3,000.00
Sonal Pancholi	Psychological & Educational	\$2,845.00
Laurie Smith, M.A.	Psychological & Educational	\$3,500.00
Stixrud Educational Consulting	Psychological & Educational	\$5,000.00

⁴¹ In March 2021, this provider was listed on LEA's representative list of qualified providers.

⁴² In March 2021, this provider was listed on LEA's representative list of qualified providers.

⁴³ In March 2021, this provider was listed on LEA's representative list of qualified providers.

⁴⁴ In March 2021, this provider was listed on LEA's representative list of qualified providers.

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- Using Chart 1, Complainant determined that the average IEE cost was \$3,260.00, which included Stixrud. Additionally, Complainant removed Stixrud, as a high-priced outlier, and determined that the average IEE cost was \$3,128.00. Complainant argues that Chart 1, further evidenced that “[LEA’s] payment rate of \$2,000.00 is significantly below this average.” Complainant maintains that if “[LEA] were following the methodology suggested by OSEP, throwing out the two highest fees for Stixrud and Commonwealth Psychological Associates, the maximum allowable charges should be \$3,800, which would capture most rates in our community for these assessments.” Notably, Chart 1 also showed that five of LEA’s identified providers charged more than \$2,000.00 (outside of their agreements with Loudoun for IEEs demonstrating the unreasonableness of the fee caps.
- Complainant argues that LEA’s Special Education Advisory Committee (SEAC) received several concerns regarding LEA’s IEEs. In response, LEA’s SEAC issued the Guidelines for IEEs Recommendations Summary dated May 5, 2021. Complainant argues that the SEAC’s recommendations “(i) identified the prevailing market rate in the community to range from \$2,200.00 - 3,500” and (ii) the SEAC’s data reported that “the maximum allowable rate should be \$3,500.”
 - Over the past five years, the data showed that the neighboring school districts increased their rates while LEA rates remained unchanged.⁴⁵
- In its response dated September 15, 2021, LEA asserts that its “cost criterion for psychological and educational evaluations is appropriate and does not prevent the Parent from obtaining IEEs at public expense.” LEA argues that “the [USDOE] interprets its regulations to authorize school divisions to establish reasonable limits on the expenditures for IEEs. This authority includes establishing “reasonable cost containment criteria applicable to personnel used by the agency, as well as to personnel used by parent” to ensure that “public agencies should not be required to bear the cost of unreasonably expensive IEEs.”⁴⁶

⁴⁵ Complainant noted that Fairfax County paid up to \$2,800.00 for both a psychological and educational evaluation and Prince William County paid up to \$3,000.00.

⁴⁶ LEA cited *M.V v Shenendehowa Central Sch. Dist.*, 60 IDELR 213 (N.D.N.Y 2013), which held that a school district may limit the cost of IEEs, so long as the cap does not prevent the parent from obtaining an independent assessment; *Letter to Fields*, 213 IDELR 259 (OSERS 1989), which held that a parent’s selected evaluator must meet the agency’s reasonable cost criteria; *Letter to Anonymous*, 22 IDELR 637 (OSEP 1995), which held that a district may establish maximum allowable charges for specific tests. A school division is not required to approve an IEE at public expense for an evaluation that does not meet the school division’s cost criterion unless the parent requesting a waiver of the cost criterion can demonstrate that “unique circumstances” exist to warrant waiver of the criterion Id.; see also *Letter to Kirby*, 213 IDELR 233 (OSEP 1989); *Shafi A. v. Lewisville Indep. School Dist.*, 69 IDELR 66 (E.E. Tex. 2016), which held that a school district properly denied the parents’ IEE request because the parents’ preferred evaluator’s fee surpassed the district’s cost parameters for private evaluations.

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- LEA reportedly updated its IEE Guidelines in August 2020 and “established a fee schedule that outlined the maximum dollar amounts LCPS would pay for different types of evaluations in the event that a parent requested an IEE at public expense.” LEA established its fee schedule by “reviewing fees charged by different vendors in the Northern Virginia area and finding a standard rate that appeared to reflect the current market value at that time.”⁴⁷ LEA maintains that its cost criterion was in compliance with the applicable regulations and authority, and did not prevent Parent from obtaining an IEE at public expense.
- As discussed above, the weight of the record suggests that LEA’s cost cap is unreasonable as it is not reflective of the current market price (rate) and it does not properly reflect the fees customarily charged in the area in violation of Parent’s right to an IEE at public expense. Thus, this office finds LEA in noncompliance on this issue as pertaining to Student 1.

Analysis - Student 2

- Complainant alleges that LEA’s cost containment fee caps are unreasonable and far below the prevailing market rate in the community.
- Complainant reiterates the aforementioned LEA’s SEAC Recommendations dated May 5, 2021; and noted that LEA had not changed its rates in six years. Again, Complainant referenced LEA SEAC’s Approved Meeting Minutes dated October 5, 2016; and highlighted public comments discussing LEA’s inadequate IEE funding, and the financial burden it placed on parent(s). Complainant also references LEA’s SEAC Annual Report; and highlighted the portion discussing the prior year’s public comment themes (2015-2016) that mentioned inadequate funding for IEEs and the financial burden it placed on parents.
- Additionally, Complainant submitted Parent’s letter showing that the evaluator selected to conduct Student’s psychological and educational evaluation charged approximately \$3,200.00 but LEA only agreed to pay \$2,000.00.
- In its response dated November 19, 2021, LEA maintains that it has not violated Complainant’s right to an IEE at public expense. LEA reiterates that the USDOE authorizes school divisions to establish reasonable limits on the expenditures for IEEs. As a part of its authority, LEA argues that it established a reasonable cost containment criteria.

⁴⁷ LEA contends that Complainant “cites the IEE fee caps of other school divisions to support the Parent’s position that LCPS’ IEE cost criterion does not reflect the prevailing rate for evaluations in Loudoun County. LCPS does not agree that LCPS’ cost criterion can be evaluated based upon the criterion used by other school divisions located in other areas of the state. Notwithstanding, the Complainant fails to identify the cost criterion of all school divisions located immediately next to Loudoun County.”

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LEA notes that the reasonableness of its IEE cost criteria is “demonstrated by the fact that LCPS has identified numerous vendors in the local geographic area who are willing to complete both a psychological and educational evaluation in compliance with LCPS’ identified IEE cost criteria.”⁴⁸

- As discussed above, the weight of the record suggests that LEA’s cost cap is unreasonable as it is not reflective of the current market price (rate) and it does not properly reflect the fees customarily charged in the area in violation of Parent’s right to an IEE at public expense. Thus, this office finds LEA in noncompliance on this issue as pertaining to Student 2.

Subissue 1A(ii) IEE Cost Criteria and Scope and Unique Circumstances

Regulatory Background

- Parents may seek IEEs for evaluations not completed by the LEA. Thus, an IEE may expand the scope of the evaluation. An LEA may not deny an IEE at public expense because it expands the scope of the evaluation. If the LEA believes that it completed a comprehensive evaluation, it may deny the publicly funded IEE and pursue a due process hearing to demonstrate the appropriateness of the evaluation, but it cannot direct the evaluator as to which assessments for which it will or will not pay. This would be an impermissible condition on the IEE as it limits the scope of the IEE.⁴⁹
- As noted above, an LEA may establish cost criteria. However, in enforcing its cost containment criteria, “a public agency would need to provide a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees fall

⁴⁸ LEA cited *M.V. v. Shenendehowa Central Sch. Dist.*, 60 IDELR 213, 1:11-CV-00701(N.D.N.Y. 2013)(finding a school division’s IEE cost criteria reasonable because the division could identify six evaluators who were willing to perform IEEs at or below the school division’s fee cap.); *Shafi A. v. Lewisville Independent Sch. Dist.*, 69 IDELR 66, 4:15-CV-599 (E.D. Tex. 2016)(a school division’s IEE cost criteria is reasonable where the division maintained “a list of IEE providers that conduct evaluations at or below the District’s maximum fee schedule.”)

⁴⁹ OSEP *Differentiated Monitoring and Support Report (DMS Report)*(stating OSEP has consistently taken the position that a parent’s right to an IEE at public expense is not limited to those assessments that were part of the public agency’s evaluation. OSEP’s interpretation is supported by the plain language of the statute and regulation, which do not restrict a parent’s right to an IEE at public expense to those assessments previously conducted by the public agency. See OSEP Letter to Fisher (1995); OSEP Letter to Baus (2015), available at: <https://sites.ed.gov/idea/idea-files/policy-letter-february-23-2015-to-debbie-baus/>; and OSEP Letter to Carroll (2016), available at: <https://sites.ed.gov/idea/idea-files/policy-letter-october-22-2016-to-jennifer-carroll/>. That is, disagreement over the evaluation conducted by an LEA includes a disagreement about the appropriate scope of the assessment, such as when an LEA fails to assess suspected areas of a child’s educational needs simply because of shortages of evaluation personnel. In addition, OSEP has explained that a parent’s right to an IEE is not contingent upon the public agency being first afforded an opportunity to conduct an assessment in an area that was not part of the initial evaluation or reevaluation. See OSEP Letter to Thorne (1990) and OSEP letter to Carroll (2016)).

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outside the agency's cost containment criteria."⁵⁰ OSEP has not specifically defined "unique circumstances," but once such court has determined that the parent must demonstrate that other evaluators would not be able to provide the evaluation.⁵¹

Analysis – Systemic Issue

- This Office has reviewed the regulations, guidance documents and case law addressing cost containment criteria. The regulations prohibit an LEA from imposing criteria or conditions on IEEs that it does not impose on its own evaluators. However, OSEP has since expanded this area to allow LEA's to create cost containment criteria. In creating this cost containment criteria, OSEP has made it clear that this criteria cannot act as a barrier to a Parent obtaining a truly independent evaluation. This also means that the criteria cannot prohibit a Parent from accessing an IEE that may expand the scope of the initial evaluation prepared by the LEA. In this instance, upon reviewing the record, we find that the cost containment criteria was so restrictive that it impeded parents from obtaining an IEE from any providers other than those the LEA provider's list. An LEA may not prohibit a parent from accessing providers that are not on their preapproved provider's list. Such an imposition impacts the very independent nature of the IEE, and as it follows, impacts the scope of any IEE a parent is pursuing because a parent is limited to the five providers on LCPS' list. . In one instance, the Parent was able to demonstrate that none of the providers on the list were able to provide the evaluation to the Student at the cost containment criteria.⁵² While another Parent was able to demonstrate that LEA's cost

⁵⁰ 71 Fed. Reg. 46540, 46690 (Aug. 14, 2006) (emphasis added); see also Letter to Anonymous (OSEP Oct. 9, 2002)

⁵¹ *A.A. v. Goleta Union Sch. Dist.*, [117 LRP 6332](#) (C.D. Cal. 02/22/17).

⁵² Although, we make determination of compliance/noncompliance on Students 1 and 2 for this issue, we looked at the other parents added to this complaint for additional information only. For example, the the additional information, Student 8's Parent called all of the providers on LEA's approved list. Specifically, on October 6, 2021, Alicia McFadden with Children's Speech Therapy Center, stated they "do not have a [Speech-Language Pathologist] who would be able to evaluate a child as complex as [Student 8] and Parent was referred to Susan Morgan with Lets Play Speech Therapy, who was reportedly not taking any new clients. On October 6, 2021, the Coleman Therapy Center also advised Parent that due to Student 8's medical complexity, Student could not be evaluated by the center. On October 7, 2021, Tiny Toes advised Parent that "they did not have any [Speech Language Pathologists] qualified/experienced in working with children with vision impairments" and referred parent to INOVA. On September 30, 2021, Parent spoke with Pooja Agrawal from Progressive Speech Therapy, who advised that "they are not currently doing IEEs due to scheduling and the low rate of pay." Thus, Parent selected Little Hands that charged \$150.00 an hour for approximately 3-8 hours of testing that would range from \$450.00 to \$1,200.00 while LEA agreed to pay \$400.00.

Notably, Student 7's Parent alleged that Student had "an extensive history multiple language disorders, which includes Dyslexia, written expression, auditory processing, mixed receptive-expressive language disorder, and multiple articulation deficits." A review of the record showed that Parent contacted three of the four providers on LEA's list seeking a comprehensive speech-language evaluation. Progressive Speech Therapy advised Parent that the comprehensive evaluation base cost was \$950.00 and they were not currently accepting IEEs. Children's Speech Therapy Center reportedly charged \$250.00 for one hour of basic testing; while additional testing based on concerns and areas of deficits raised during the assessment and report writing are billed at a separate hourly rate, which ranged from 3-4 hours. The Coleman Therapy Center reportedly charge \$175.00 per hour of testing, and advised that

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containment criteria did not absorb the total cost of the IEE that the LEA approved.⁵³ It also follows that LCPS' cost criteria was so limited that in order for any parent to obtain an IEE with a provider other than those on the list, with or without an expanded scope, that Parent had to demonstrate a unique circumstance and, as such, has created a circular problem where the Parent is forced to assert unique circumstances to obtain a provider who can do the evaluations they need, not because the situation is exceptional, but rather because the cost criteria was so low that the Parent could not otherwise use any provider not on the school division's list. However, because the situation was not unique, the Parent could not obtain a waiver-meaning no IEE at public expense. Thus, we find that LCPS' cost criteria was so low that it acted as barrier to both accessing non-listed providers and an expanded scope and thus rendering the process LCPS put into place allowing the Parent to prove a unique circumstance meaningless. For the foregoing reason we find LCPS in noncompliance on this issue. Similarly, LCPS is in noncompliance with any individual allegations by Students 1 and 2 pertaining to these issues because the processes they accessed were not capable of providing a truly independent opportunity to obtain an education evaluation at public expense.

B. Report Criteria

Subissue 1B(i) Amendment of Report/Recommendations

Regulatory Background and Analysis: Systemic Allegations

- The Complainants' allege that the LEA imposes conditions and criteria on the IEE providers and reports that violate the regulations by requesting that reports be amended, language revised, and that recommendations be removed from reports.⁵⁴
- The LEA contends "The IDEA's state and federal regulations state that when an IEE is requested at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that the school district uses when it initiates an evaluation. 8VAC 20-81-

the time it took for testing and writing the report could range from 3-5 hours depending on the concerns and areas of deficit raised during the assessment.

⁵³ As pertaining to Student 1, LEA approved a psychological and educational IEE at public expenses to be conducted by Neuro Behavioral Associates for \$2,000.00, which included auditory processing. After receiving a copy of the IEE report, LEA determined that Neuro Behavioral Associates' evaluation did not include an assessment of auditory processing. In emails exchanged in October 2021, Neuro Behavioral Associates advised Parent that they did not do auditory processing because it needs to be performed by an audiologist. Significantly, Neuro Behavioral Associates noted that even if LEA thought their office could perform auditory processing testing, LEA did not include an additional amount to cover the cost of the additional testing.

⁵⁴ For the purposes of clarity, this office will address evaluator recommendations on this issue and the other allegations regarding requests for amendments to the original reports will be subsumed in Subissue 1B(ii).

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170(B)(2)(f); 34 C.F.R. §300.502(b) and (e); 71 Fed. Reg. 46690 (‘An IEE must meet the agency criteria that the public agency uses when it initiates an evaluation, consistent with § 300.502(e)’). *See Seth B. v. Orleans Parish School Board*, 67 IDELR 2 (5th Cir. 2016) (Holding that IEEs must substantially comply with requirements applicable to school-conducted evaluations: ‘It would seem perverse to enforce non-substantive criteria such as those pertaining to an evaluation’s location, but wholly exempt IEEs from substantive criteria concerning, for example, valid assessment strategies and reporting methods.’); *Humble Indep. Sch. Dist.*, 55 IDELR 150 (SEA TX 2010) (finding that the school district could require IEE evaluators to hold specific licensures because they required their own evaluators to meet the same criteria). The IDEA’s regulations expressly state that a school division determines the criteria and location of the IEE and the qualifications of the examiner. 34 C.F.R. §300.502(e)(1); 8 VAC 20-81-170(B)(2)(f). The U.S. Department of Education (“USDOE”) has advised that as part of its criteria for IEEs conducted at public expense, a school division may prohibit an independent evaluator from including recommendations in his or her report, ‘if a public agency precludes its own evaluators from making recommendations...’ *Letter to LoDolce*, 50 IDELR 106 (2007). LCPS’ IEE criteria comply with the above-cited regulations and guidance.

- Further the LEA asserts, “The Complainants incorrectly allege that ‘requesting that reports be amended, language revised, and that recommendations be removed from reports’ prevents Parents from obtaining independent evaluations. The criteria LCPS imposes on IEE providers is consistent with the criteria they use for their own evaluations. As discussed above, when an IEE is requested at public expense, the criteria under which the evaluation is obtained shall be the same as the criteria that LCPS uses when it initiates an evaluation. 8 VAC 20-81-170(B)(2)(f); 34 C.F.R. § 300.502(b) and (e). *See Seth B. v. Orleans Parish School Board*, 67 IDELR 2 (5th Cir. 2016) (‘To be eligible for public funding, an IEE must meet the same criteria used by the school district in its evaluation.’). The IEE criteria established by LCPS indeed reflects the same criteria LCPS evaluators use when conducting their own evaluations. In the unusual event that LCPS receives an IEE report that does not comply with LCPS’ IEE criteria, LCPS may request that the evaluator update his or her evaluation to bring the evaluation into compliance with the division’s criteria prior to LCPS facilitating payment for the evaluation. For example, LCPS does not permit its own evaluators to make recommendations with respect to a student’s educational placement or eligibility because these determinations are to be made by an eligibility or IEP team after reviewing information from multiple sources. 8 VAC 20-81-80(C); 8 VAC 20-81-110; 34 CFR § 300.306. As a result, LCPS may impose this same criterion for IEEs obtained at public expense.”
- The IDEA and Virginia Special education regulations contain specific procedures and requirements applicable to conducting evaluations.⁵⁵

⁵⁵ 34 C.F.R. §300.304.

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- IEE providers must meet the same evaluation criteria requirements as the public agency, including – performing a review of existing evaluation data, – obtaining input for the child’s parents, and – use of a variety of assessment tools and strategies.⁵⁶
- Under the IDEA regulations, agency criteria “includ[e] ... the location of the evaluation and the qualifications of the examiner.”⁵⁷ Use of the term “include” implies that the specifically enumerated criteria are not exclusive, and schools may adopt other criteria “to the extent those criteria are consistent with the parent’s right to an independent educational evaluation.”⁵⁸
- In adopting any criteria applicable to IEE evaluators, the school must ensure that such criteria are “the same as the criteria that the public agency uses when it initiates an evaluation.”⁵⁹
- Likewise, the United States Department of Education, Office of Special Education has recognized schools’ ability to adopt criteria to preclude evaluators from making recommendations regarding specific methodologies or materials.⁶⁰
- According to LCPS IEE guidelines IV.D, “Loudoun County Public School has established the following criteria regarding submission of the evaluation report: Evaluators are expected to maintain objectivity in reporting their and shall refrain from drawing conclusions for placement or eligibility.”
- Further, both LEA’s Educational Evaluation and Psychological evaluation standards state, “... recommendations regarding the IEP program, placement decisions, or specific reading programs are not to be offered, as only the IEP team can decide special education and related services.”
- In addition, Virginia's *Evaluation and Eligibility for Special Education and Related Services: Guidance Document* provides: “[Evaluation r]eports should include a summary of the assessment activities, descriptions of the student’s performance, observation notes, data and norm-referenced scores, a summary of strengths and weaknesses, and recommendations for those working with the student. **Evaluators may provide recommendations, but they may not determine eligibility or related services for**

⁵⁶ 71 Fed. Reg. 46,690 (2006);

⁵⁷ 34 C.F.R. § 300.502(e)

⁵⁸ *Id.*; see also 34 C.F.R. § 300.20 (“Include means that the items names are not all of the possible items that are covered, whether like or unlike the ones named.”); *Letter to LoDolce*, 50 IDELR 106 (OSEP, Dec. 21, 2007) (confirming that section 300.502 contains “examples of agency criteria” and “not necessarily the only criteria”).

⁵⁹ 34 C.F.R. § 300.502(e); *Letter to Savit*, 64 IDELR 250 (OSEP Jan. 19, 2016)

⁶⁰ See *Letter to LoDolce*, 50 IDELR 106 (OSEP, Dec. 21, 2007) (pointing out that if such criteria are adopted, they must be applied equally to school evaluators and IEE evaluators, alike).

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students.”

- Therefore, independent evaluators **can** provide recommendations as long they are not recommendations on placement or eligibility.
- LCPS guidelines at IV. D. does not violate the IDEA nor does it impose an additional condition on the independent evaluator.
 - However, we do caution LCPS that independent evaluators are allowed to provide other recommendations as long as they are not making placement or eligibility recommendations. If the LEA feels that IEE report does not meet their criteria, LEA needs to demonstrate in a during process hearing the IEE obtained by the parent(s) does not meet the LEA criteria.
 - As discussed above this complaint will discuss the amending or revising the original IEE report in subissue 1B(ii).
- Based on the foregoing, we find LEA in compliance on this subissue.

Regulatory Background and Analysis: Student 1

- Complainant alleged LCPS’s IEE criteria requiring IEE providers to refrain from making recommendations for placement or eligibility decisions imposes impermissible criteria that infer with parents’ right to truly independent IEE.
- LEA asserts, “The IDEA's state and federal regulations state that when an IEE is requested at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that LCPS uses when it initiates an evaluation. 8VAC 20-81-170(B)(f); 34 C.F.R. §300.502(b) and (e) (emphasis added). The IEE criteria established by LCPS indeed reflects the same criteria LCPS evaluators use when conducting their own evaluations. LCPS does not permit its own evaluators to make recommendations with respect to a student's educational placement or eligibility because these determinations are to be made by an eligibility or IEP team after reviewing information from multiple sources. 8 VAC 20-81-80(C); 8 VAC 20-81-1 10. As a result, LCPS may impose this same criterion for IEEs obtained at public expense.”
- As the LEA stated above, if an IEE is at public expense, the criteria, including evaluation location and examiner qualifications, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent’s right to an IEE. Additionally, a public agency may not impose conditions or

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timelines related to obtaining an IEE at public expense.⁶¹

- The Complainant argues Dr. Culotta's inability "to make recommendations regarding eligibility directly interferes with the parent's right to request an independent evaluation of whether or not [Student] truly meets the criteria for eligibility in the category of Intellectual Disability, and why or why not. The inability to make recommendations regarding placement also interferes with the parent's right to an independent determination of what an appropriate education would look like for a child with [Student's] learning profile."
- This office disagrees with the Complainant. The IEE criterion still allow for recommendations. Recommendations offered should be realistic and practical but moreover based on the presence of significant findings and educational need.
- IEE providers must meet the same evaluation criteria requirements as the public agency, including – performing a review of existing evaluation data, – obtaining input for the child's parents, and – using of a variety of assessment tools and strategies.⁶²
- Under the IDEA regulations, agency criteria "includ[e] ... the location of the evaluation and the qualifications of the examiner."⁶³ Use of the term "include" implies that the specifically enumerated criteria are not exclusive, and schools may adopt other criteria "to the extent those criteria are consisted with the parent's right to an independent educational evaluation."⁶⁴
- In adopting any criteria applicable to IEE evaluators, the school must ensure that such criteria are "the same as the criteria that the public agency uses when it initiates an evaluation."⁶⁵
- Likewise, the United States Department of Education, Office of Special Education has recognized schools' ability to adopt criteria to preclude evaluators from making recommendations regarding specific methodologies or materials.⁶⁶
- Both LEA's Educational Evaluation and Psychological evaluation standards state, "... recommendations regarding the IEP program, placement decisions, or specific reading programs are not to be offered, as only the IEP team can decide special education and

⁶¹ 34 C.F.R. §300.502(e). 8 VAC 20-81-170(B)(2)(f).

⁶² 71 Fed. Reg. 46,690 (2006);

⁶³ 34 C.F.R. § 300.502(e)

⁶⁴ *Id.*; see also 34 C.F.R. § 300.20 ("Include means that the items names are not all of the possible items that are covered, whether like or unlike the ones named."); *Letter to LoDolce*, 50 IDELR 106 (OSEP, Dec. 21, 2007) (confirming that section 300.502 contains "examples of agency criteria" and "not necessarily the only criteria").

⁶⁵ 34 C.F.R. § 300.502(e); *Letter to Savit*, 64 IDELR 250 (OSEP Jan. 19, 2016)

⁶⁶ See *Letter to LoDolce*, 50 IDELR 106 (OSEP, Dec. 21, 2007) (pointing out that if such criteria are adopted, they must be applied equally to school evaluators and IEE evaluators, alike).

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related services.”

- In addition, Virginia's *Evaluation and Eligibility for Special Education and Related Services: Guidance Document* provides: “[Evaluation r]eports should include a summary of the assessment activities, descriptions of the student’s performance, observation notes, data and norm-referenced scores, a summary of strengths and weaknesses, and recommendations for those working with the student. **Evaluators may provide recommendations, but they may not determine eligibility or related services for students.**”
- The IDEA and the Virginia Special Education Regulation provides who will make the determination for eligibility and placement. The regulations require “a group of qualified professionals and the parent(s) of the child shall determine whether the child is, or continues to be, a child with a disability and the educational needs of the child.”
- Parents have a right to invite the provider to the eligibility meeting if they chose to.
- We acknowledge Parents’ sincere concerns and, in reaching our decision, we found the LCPS’s Guidelines requiring IEE providers to refrain from making recommendations for placement or eligibility decisions is a permissible for IEE’s.
- Based on the foregoing, we find LEA in compliance on this subissue.

Regulatory Background and Analysis - Student 2

- Complainant alleged Parent requested a “waiver” from LCPS’s IEE criteria requiring IEE providers to refrain from making recommendations for placement or eligibility decisions. LCPS denied the request stating that the LCPS evaluators are not allowed to make recommendations regarding eligibility and placement as that is a decision for the team.
- Specifically, the Parents stated that “the inability to make recommendations regarding placement also interferes with the parent’s right to an independent determination of what an appropriate education would look like for a child with a complex learning profile,” and “the inability of Dr. Simpson (IEE provider) to make recommendations regarding eligibility directly interferes with the parent’s right to request an independent evaluation of whether or not [Student 2] might meet criteria for eligibility under another category and why or why not.”

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- According to both Federal and State regulations⁶⁷, when an IEE is requested at public expense, the criteria under which the evaluation is obtained shall be the same as the criteria that LEA uses when it initiates an evaluation. LCPS IEE criteria does not permit its own evaluators to make recommendations with respect to a student's educational placement or eligibility because these determinations are to be made by an eligibility or IEP team after reviewing information from multiple sources⁶⁸.
- This means LCPS must impose this same criterion for IEEs obtained at public expense⁶⁹.
- Both federal and state evaluation procedures do not require that an evaluator make recommendations pertaining to specific methodologies and/or use of materials. Any decisions made regarding the content of the IEP on the basis of an evaluation, including methodologies or use of materials, would be made by the IEP Team, as a result of considering the information presented, including the results of the evaluation and the unique individual needs of the child.
- As *Letter to LoDolce*, states "If a public agency precludes its own evaluators from making recommendations, it may preclude an independent evaluator from making a recommendation. The converse is also true. If a public agency does not preclude its evaluators from making recommendations, it may not preclude independent evaluators from making recommendations.
- Therefore, we find LCPS's Guidelines requiring IEE providers to refrain from making recommendations for placement or eligibility decisions is a permissible IEE criteria and does not limit Parents rights to an independent IEE.
- Based on the foregoing, we find LEA in compliance on this subissue.

Subissue 1B(ii) – Submission of Report

Regulatory Background and Analysis - Systemic Allegation

- The Complainants' allege that the LEA imposes conditions and criteria on the IEE providers and reports that violate the regulations by requiring IEE providers to submit their reports to the LEA for review and for potential modifications before providing a copy to

⁶⁷ 8 VAC 20-81-170(B)(2)(f); 34 C.F.R. § 300.502(b) and (e). See also, *Letter to LoDolce*, 50 IDELR 106 (OSEP, Dec. 21, 2007) (pointing out that if such criteria are adopted, they must be applied equally to school evaluators and IEE evaluators, alike).

⁶⁸ 8 VAC 20-81-80(C); 8 VAC 20-81-110; 34 CFR § 300.306.

⁶⁹ Note, a LEA may establish maximum allowable charges for specific tests; however, the LEA must allow parents the opportunity to demonstrate that "unique circumstances justify an IEE that does not fall within the [LEA's] criteria..." See *Letter to Fields*, IDELR 213:259 (OSEP), citing *Letter to Kirby* (OSEP 1989).

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the Parent(s).

- LEA's guidelines state that, "the original evaluation report shall be sent to the Supervisor of Special Education Procedural Support, Loudoun County Public Schools, Round Hill Center, 20 High St, Round Hill, VA 20141, who will, in turn, provide a copy to the parent."
- The LEA asserts, "the allegation that LCPS requires IEE providers to submit their reports to the LEA for review and potential modifications before providing a copy to the parents fails to state a violation of the IDEA. As discussed above, the IDEA permits school divisions to establish criteria for IEEs conducted at public expense. 34 C.F.R. § 300.502(e)(1); 8 VAC 20-81-170(B)(2)(f). A division's right to establish criteria for IEEs at public expense would be meaningless if the division were unable to enforce its criteria. In LCPS, when an evaluator is selected by a parent to conduct an IEE at public expense, LCPS provides the chosen evaluator a copy of the division's IEE criteria guidelines. These guidelines expressly state: 'The following criteria must be agreed to and followed by the evaluator when conducting an independent educational evaluation.' The guidelines further state that, '[p]ayment for the evaluation will not be made until the school division receives the original report meeting the agreed upon criteria set forth and an accompanying invoice.' LCPS provides this information to ensure that any evaluator approved to complete an IEE at public expense is informed at the outset of the evaluation process that an IEE conducted at public expense must comply with LCPS' IEE criteria.
- LEA further responded "as discussed above, if LCPS receives an IEE report that does not comply with the division's criteria, LCPS may request that the evaluator update the report. If the evaluator declines to update his or her evaluation, LCPS reserves the right to withhold funding for the evaluation. In the event that an evaluator will not update his or her evaluation, a parent is not prevented from obtaining an IEE at public expense. At the time of approving an IEE, LCPS provides parents with the names of multiple providers who are willing and able to conduct IEEs in accordance with the school division's IEE criteria. If a parent's chosen evaluator will not comply with the division's criteria, the parent may select one of the evaluators identified by LCPS. Additionally, LCPS' criteria do not prevent the Parent from consulting with the evaluator outside of the IEE process to obtain additional recommendations and/or findings beyond the scope of the IEE funded by LCPS."
- The LEA can require that an IEE at public expense complies with LCPS' criteria. However, the LEA cannot impose additional conditions as related to the delivery of the IEE report to the Parent. In addition, LCPS cannot require that the evaluator update the report as a prerequisite to funding the IEE at public expense.
- According to the Virginia Regulation at 8VAC20-81-170.B.2.b., If the parent(s) requests an independent educational evaluation at public expense, the local educational agency shall, without unnecessary delay, either: (1) Initiate a due process hearing to show that its

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evaluation is appropriate; or (2) Ensure that an independent educational evaluation is provided at public expense, unless the local educational agency demonstrates in a due process hearing that the evaluation obtained by the parent(s) does not meet the local educational agency's criteria.

- Therefore, if the LEA receives an IEE that does not meet the LEA criteria, they have two options: (i) initiate a due process to demonstrate the IEE does not meet the local educational agency's criteria, or (ii) pay for the IEE.
- Additionally, we note that this office reviewed the LEA's guidelines for their own evaluators. Delivery of the report is not a requirement of LCPS Psychological or Educational assessments. Given that neither the regulations, nor LCPS' evaluation guidelines require their evaluators submit a copy of their reports to the LEA prior to submission to the parent, then such a requirement for IEE's creates additional conditions.
- According to LEA's own guidelines they are required to provide the *original report* to the Parent(s). Additionally, according to the regulation they must, without unnecessary delay ensure an IEE is provided at public expense, unless the LEA demonstrates in a Due Process hearing the IEE obtained by the parent(s) does not meet the LEA criteria.
- Nevertheless, requiring that the LEA receive the original report prior to the Parent receiving a copy, or prohibiting an outside evaluator from providing a copy of the report directly to the Parent impacts the independence of the report. It is reasonable for the LEA to establish criteria to ensure that they receive complete and accurate reports. We believe this can be accomplished by requiring that the evaluator simultaneously submit a copy of the report to both LEA and Parent. Once the original report is submitted to both parties and if LEA believes that the IEE obtained did not meet the LEA criteria, then LEA would need to demonstrate in a due process hearing that the IEE did not meet LEA criteria, therefore LEA is not required to pay for that IEE at public expense.
- Thus, we find that LCPS process of requesting that it control the release of the report to the parent and requesting amendments on the original IEE report imposes an additional impermissible condition that interferes with Parent's right to an independent IEE.

Student 1

- Complainant alleged LCPS's IEE criteria that the original evaluation report shall be sent to the Director of Diagnostic and Prevention Services, who will, in turn, provide a copy to the parent, imposes impermissible criteria that infer with parents' right to truly independent IEE.

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- The LEA asserts “the Complainant inaccurately alleges that ‘Certain provisions in LCPS's Guidelines interfere with parents' right to truly independent IEE and impose impermissible conditions IEE's.’ Specifically, requiring IEE providers to submit their reports to the LEA for review before providing a copy to the Parent(s). As a preliminary matter, the Parent's complaint is premature. LCPS has not been presented with an independent evaluation of the Student that does not comply with the Division's IEE criteria. LCPS has therefore not asked any evaluator who has conducted an evaluation of the Student to update or modify an evaluation report of the Student. The Parents' complaint is therefore not a live dispute and should be dismissed by the VDOE.
- This office agrees with LEA, that this subissue is **premature** since LEA has not been provided with IEE for Student 1.
- This office dismisses this subissue.

Student 2

- Complainant alleged Parent “requested a waiver of the Guideline that the original report be sent to the school first so they could review and potentially revise it before sending it to her. She stated that any review of the report, and certainly requiring changes to the report, prior to her receiving it violates her right to an independent IEE.”
- Again, the LEA asserts that, “The IDEA permits school divisions to establish criteria for IEEs conducted at public expense. 34 C.F.R. § 300.502(e)(1); 8 VAC 20-81-170(B)(2)(f). A division’s right to establish criteria for IEEs at public expense would be meaningless if the division were unable to enforce its criteria. The reports are sent to LCPS to ensure conformity with their guidelines, not to alter the independent nature of the reports.”
- Further, the LEA stresses, “The Parent has not identified any additional facts distinguishing the application of LCPS’ criteria to the independent evaluation of Student 2 from the application of LCPS’ criteria to all IEEs. Therefore, as discussed above, LCPS’ IEE criteria and process for facilitating IEEs at public expense as applied to Student 2 is in compliance with the IDEA and its implementing regulations.”
- LCPS does not deny that they required Student 2’s IEE provider to submit a copy of the original report solely to the LEA, prohibiting direct dissemination to the Parent. Imposing the additional dissemination criteria prohibiting parental receipt of the original report creates an impermissible condition.⁷⁰

⁷⁰ We note that Parent has concerns that the purpose of the LEA receiving the report prior to the Parent was to make revisions. As discussed above, it is permissible for the LEA to request an original copy of the report in order to ensure

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- For the foregoing reason, we find LCPS in noncompliance on this issue.

Student 3

- Complainant alleged Parent's outside evaluator, Dr. Ling submitted a 22 page report to LCPS per their guidelines. LCPS followed up with Dr. Ling requiring amendments to the report in order to continue the process and to process the invoice for payment. The final report Parent received from LCPS was 19 pages with the requested amendments. LCPS does not provide authority or criteria confirming the requested amendments of Dr. Ling were required or contingent for payment. The required changes are not consistent with LCPS' criteria as outlined in their IEP guidelines.
- The LEA asserts "the Complainant inaccurately alleges that the requested changes to Dr. Ling's report requested by LCPS violated the IDEA. The IEE criteria established by LCPS reflects the same criteria LCPS evaluators use when conducting their own evaluations. LCPS does not permit its own evaluators to make recommendations with respect to a student's education placement or eligibility because these determinations are to be made by an eligibility or IEP team after reviewing information from multiple sources. LCPS' Guidelines for Independent Education Evaluations state that 'evaluators are expected to maintain objectivity in reporting their findings and shall refrain from making specific recommendations for placement or eligibility, as federal and state regulations stipulate that these decisions are to be made by multidisciplinary teams.' As discussed above, if a public agency precludes its own evaluators from making recommendations, it may preclude an independent evaluator from making a recommendation. Letter to LoDolce, 50 IDELR 106 (2007)."
 - Furthermore, LEA contends. "Upon their receipt of Dr. Ling's independent evaluation, LCPS requested that the evaluation be amended to comply with their criteria. Although LCPS requests that their own evaluators refrain from making any recommendations regarding placement or eligibility, LCPS only requested that Dr. Ling amend his recommendations to comply with their guidelines by making clear in his evaluation that the Student 'may' benefit from the included recommendations, not that the Student 'should' or 'would benefit' from those recommendations, as those determinations are reserved for the Student's IEP team. Dr. Ling ultimately elected to remove his recommendations, although not required by LCPS. Additionally, LCPS requested that Dr. Ling remove his statement, listed under recommendations, that 'current evaluation questions the appropriateness of

that it complies with the criteria. Additionally, upon review of the record, we find that LCPS has no criteria requiring the LEA to make any alterations or modifications to the original report and thus has complied with the regulations.

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the identification of eligibility based on Emotional Disability,' as the statement was not a recommendation and it pertained to specific eligibility decisions and identification categories, which are a result of a consensus of an eligibility team. LCPS' requested changes were in line with their Guidelines for Independent Education Evaluations that were given to Dr. Ling before he completed his evaluation, as well as their evaluation criteria for their own evaluations."

- We disagree with the school division assessment. There are no guidelines/criteria that allows LCPS to make or request amendments to IEE reports.
- It is noted the regulations further state, "Except for the criteria, a local educational agency **may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.**"
- Additionally, based on their on IEE guidelines at Section V.A "the original evaluation report shall be sent to the Supervisor of Special Education Procedural Support, Loudoun County Public Schools, Round Hill Center, 20 High St, Round Hill, VA 20141, who will, in turn, provide a copy to the parent."
- The regulations set forth, if a public agency believes that the IEE obtained by the parent did not meet its criteria, then the LEA has two choices: LEA must either initiate a due process hearing to show that the IEE did not meet its criteria, or otherwise pay for the IEE.
- The record (Appendix C) reflects the LEA imposed an additional condition to amend the original IEE report and failed to provide the parent the original evaluation report as required by their own criteria.
- Based on the foregoing, we find LEA in noncompliance on this subissue.

Subissue 1B(iii) - Pre-evaluation Discussion

Regulatory Background and Analysis: Systemic Allegation

- Complainant alleges that LEA imposes conditions and criteria on the IEE providers and reports that violate the regulations by requiring a pre-evaluation discussion between the IEE provider and [LEA] to limit the scope of the evaluation to that of the evaluation conducted by [LEA].
- LEA contends, "the allegation that LCPS requires a pre-evaluation discussion between independent evaluators and the LEA to limit the scope of the evaluation is factually incorrect. LCPS does not require independent evaluators to meet with the school staff before they conduct their evaluation. LCPS offers an optional pre-evaluation discussion with all IEE

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providers to review LCPS' IEE criteria and to review what evaluations have already been administered to the Student. Most IEE providers do not request such a meeting. As required in federal and state regulations, when an IEE is requested at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that LCPS uses when it initiates an evaluation. 8 VAC 20-81-170(B)(2)(f); 34 C.F.R. § 300.502(b) and (e). LCPS proposes speaking with IEE providers prior to conducting their evaluation to ensure they are informed of these criteria, and to avoid having the provider inappropriately repeat testing done by LCPS, invalidating the IEE results. LCPS does not place limitations on the evaluation that has been approved at public expense. It is expected that the private evaluator assesses all areas of educational need related to the approved evaluation.”

- The Complainant cites the Oregon State Educational Agency (“OR SEA”) special education complaint in 2013. OR SEA “substantiated a parent’s allegation that a District impeded the parent’s access to an IEE in violation of the IDEA by imposing conditions on access to the IEE and limiting the scope of the IEE.⁷¹ Specifically, the district required that the parent participate in an assessment planning meeting for the IEE with district staff.⁷² The district also engaged in ongoing communication with the evaluator before and after the evaluation.⁷³ The OR SEA noted that nothing in the IDEA prevents a district from helping a parent arrange an IEE when the parent so chooses but determined that ‘. . . the IDEA does not authorize District personnel to broker an IEE or limit the scope of an IEE against the parent’s wishes.⁷⁴”
- LCPS’ IEE guidelines at section III.A. state, “the following criteria must be agreed to and followed by the evaluator when conducting an independent education evaluation: Prior to evaluating the student, evaluators are required to discuss the selection of tests with the LCPS Procedural Support Supervisor if copies of LCPS evaluations are not sent to evaluator to ensure that tests are not inappropriately repeated and that the scope of the evaluation does not exceed that of the evaluation in question.”
- The IDEA does not authorize school division personnel to broker an IEE or limit the scope of an IEE against the parent’s wishes. While we understand that the school division asserts that is not their practice, but it is still specified in their criteria.

⁷¹ *Gresham-Barlow Sch. Dist.*, 64 IDELR 93, at 8 (OR SEA May 10, 2013)

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

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- According to the IDEA's procedural safeguards,⁷⁵ an IEE is a parental right, and the defining characteristic of an IEE is independence. Parents have the right to decide what kind of an IEE their child needs and to make their own arrangements with an independent evaluator, consistent with LEA's criteria they are allowed to establish. The criteria of LCPS in determining the scope and conduct of an IEE defeats the Parent's opportunity to access an independent evaluation to which they are entitled and violated both IDEA and Virginia's Special Education regulations.
- Based on the foregoing, we find LEA in noncompliance on this subissue.

CORRECTIVE ACTION PLAN:

This office found the LEA to be in noncompliance with regard to cost containment criteria, submission of reports, and pre-evaluation discussion. We request that LCPS take the following corrective actions:

- Review its cost containment criteria and align its funding limits with the market rate. Review this criteria annually and submit a copy of the criteria to the VDOE for the following school years: 2021/2022, 2022/2023, and 2023/2024.
- Establish a process to reimburse parents who have paid out of pocket for IEEs due to the unreasonable cost containment criteria.
- Review and revise its IEE policies/procedures/guidelines prohibiting IEE providers from providing IEE reports directly to parents.
- Review and revise its IEE policies/procedures/guidelines requiring pre-evaluation discussions.
- VDOE will review policy changes for approval.
 - Upon VDOE's approval of updated changes. LCPS shall provide training on the IEE information to all school division staff and administrators who may respond to request for an IEE.
- Please maintain documentation of the actions taken as required in this Corrective Action Plan (CAP), including the documentation referenced in the CAP, as this information may be requested during our CAP implementation follow-up process on a later date.

Please submit this corrective action to our office by February 28, 2022.

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.

⁷⁵ 20 USC § 1415(b)(1).

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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 **February 28, 2022**.

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.

Attachment - Appeal Procedures, Appendices A-C

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Appendix A

Chronology for Student 1

A review of the record indicates the following chronology:

Date	Event
Events Occurring Within 365 Days of August 12, 2021	
April 8, 2021	<ul style="list-style-type: none">• Reevaluation meeting conducted; Parent consented to the evaluations.
May 27, 2021 - June 1, 2021	<ul style="list-style-type: none">• LEA generated Educational and Psychological Evaluation Reports.
June 8, 2021	<ul style="list-style-type: none">• During an Eligibility Meeting, Parent requested an IEE for a psychological, educational, and auditory processing evaluation.
June 9, 2021	<ul style="list-style-type: none">• Parent emailed LEA and requested an IEE for psychological, educational, and auditory processing disorder.
June 14, 2021	<ul style="list-style-type: none">• In a follow-up eligibility meeting, Parent disagreed with the IEP team's decision to find [Student] eligible in the disability category of Intellectual Disability.
June 22, 2021	<ul style="list-style-type: none">• LEA approved Parent's request for an IEE. LEA provided Parent with the Guidelines for IEEs, a representative list of qualified evaluators, and an Exchange/Release of Confidential Information form. LEA asked Parent to provide documentation for consideration by LEA if Parent believed their child's unique circumstances justified a waiver of LEA's IEE criteria.
July 27, 2021	<ul style="list-style-type: none">• On July 27, 2021, Parent emailed LEA and NBA requesting a status update.• On July 27, 2021, NBA replied to Parent email, informing her; (i) a packet of documents were sent to the parent that should be completed, (ii) NBA has not evaluated a child from Loudoun County, and had to wait for the doctor to come into the office to review the LEA IEE contract, and (iii) LEA agreed to pay the \$2,000.00 of the evaluation and the parent would be responsible for the rest (\$1,450.00).
August 4, 2021	<ul style="list-style-type: none">• Parent confirmed receipt of LEA's approval letter dated June 22, 2021. Parent informed LEA that Dr. Culotta was selected to conduct Student's psychological and educational evaluations at a rate of \$3,450.00. Parent requested a waiver of LEA's \$2,000.00 cap. Parent alleged that LEA's cap was below the prevailing market rate and violated her right to an IEE.. Parent indicated that Dr. Culotta was recommended due to his background in evaluating children with complicated learning profiles and multiple disabilities.

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August 5, 2021	<ul style="list-style-type: none">On August 5, 2021, LEA mailed a letter explaining maximum allowable charges for IEEs and requested documentation of the Student's unique circumstances. LEA advised Parent that the same criteria LCPS uses must be used when it initiates an IEE.
August 12, 2021	<ul style="list-style-type: none">ODRAS received complaint submission.
August 23, 2021	<ul style="list-style-type: none">ODRAS issued an Amended Notice of Complaint.
October 18, 2021	<ul style="list-style-type: none">LEA emailed Parent regarding Auditory Processing Disorder assessment.
October 19, 2021	<ul style="list-style-type: none">ODRAS issued a Systemic Notice of Complaint.Parent emailed LEA clarifying the IEE request to include Auditory Processing Disorder Assessment by an audiologist.
October 25, 2021	<ul style="list-style-type: none">LEA mailed Parented approval letter for the IEE for APD assessment.
October 28, 2021	<ul style="list-style-type: none">Parent emailed LEA requesting if the IEE for APD assessment as approved.
October 29, 2021	<ul style="list-style-type: none">Parent received the IEE APD assessment approval letter.

Appendix B

Chronology for Student 2

A review of the record indicates the following chronology:

Date	Event
Events Occurring Within 365 Days of September 30, 2021	
February 10, 2021	<ul style="list-style-type: none">IEP meeting conducted; eligibility team determined that Student remained eligible for special education services.
February 19, 2021	<ul style="list-style-type: none">Parent informed LEA that Parent disagreed with LEA's Educational and Psychological Evaluation and requested an IEE
February 22, 2021	<ul style="list-style-type: none">LEA approved Parent's IEE request.LEA provided Parent with its <i>Guidelines for Independent Educational Evaluations</i>, a representative list of qualified evaluators, and an <i>Exchange/Release of Confidential Information</i> form.
February 23, 2021	<ul style="list-style-type: none">Parent electronically signed the Summary of Eligibility Deliberations indicating that Parent did not consent to the change in Student's categorical identification from Developmental Delay (DD) to Specific Learning Disability (SLD) and Other Health Impairment (OHI).
February 28, 2021	<ul style="list-style-type: none">Parent signed an <i>Exchange/Release of Confidential Information</i> form and selected Mindwell Psychology to conduct Student's IEE.

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March 8, 2021	<ul style="list-style-type: none"> LEA acknowledged receipt of Parent’s <i>Exchange/Release of Confidential Information</i> form and advised Parent that Mindwell Psychology did not meet LEA’s established IEE criteria. LEA advised Parent that it would pay up to \$1,150.00 for the psychological evaluation and up to \$850.00 for the educational evaluation. LEA indicated Parent would be responsible for the remaining charges if Parent chose to use Mindwell Psychology.
September 1, 2021	<ul style="list-style-type: none"> Parent emailed LEA and requested an IEE waiver.
September 7, 2021	<ul style="list-style-type: none"> LEA denied Parent’s request for a waiver of IEE criteria.
September 30, 2021	<ul style="list-style-type: none"> ODRAS received Parent’s complaint submission.

Appendix C

Chronology for Student 3

A review of the record indicates the following chronology:

Date	Event
Events Occurring More Than 365 Days Before October 8, 2020	
December 3, 2019	<ul style="list-style-type: none"> The eligibility team determined that Student remained eligible for special education services.
December 5, 2019	<ul style="list-style-type: none"> Parent requested IEE at public expense LEA approved parent’s request for an IEE at public expense.
February 11 and 25, 2020	<ul style="list-style-type: none"> Dr. Ling conducted the interview portion of the evaluation.
September 25, 2020	<ul style="list-style-type: none"> Dr. Ling conducted Student’s evaluation day 1
September 29, 2020	<ul style="list-style-type: none"> LEA sent Dr. Ling their Guidelines for IEE and letter. <ul style="list-style-type: none"> The letter stated in part, “LCPS will provide a copy of the original report to the parents and to the child’s school for review and inclusion in the child’s scholastic record.”
Events Occurring Within 365 Days of October 8, 2020	
November 4, 2020	<ul style="list-style-type: none"> Dr. Ling conducted Student’s evaluation day 2
December 1, 2020	<ul style="list-style-type: none"> LEA received Dr. Ling’s original 22-page report.
December 9, 2020	<ul style="list-style-type: none"> LEA requested Dr. Ling to make four (4) amendments to his evaluation report in order to provide the “evaluation to the parents and school and processing the invoice for payment.” Dr. Ling sent LEA amended report 1.

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December 10, 2020	<ul style="list-style-type: none">• LEA received Dr. Ling's amended report and then requested further amendments to amend report 1.• Dr. Ling sent LEA amended report 2.
December 16, 2021	<ul style="list-style-type: none">• LEA sent Parent amended report 2.
December 28, 2021 - January 12, 2021	<ul style="list-style-type: none">• Parent and LEA email conversations about Dr. Ling's amended report 2 including explanation of why LEA requested an amendments.
January 25, 2021	<ul style="list-style-type: none">• Complainant issued a freedom of information act request to LEA. FOIA requested all communication between LEA and Dr. Ling regarding Student's IEE and LEA's polices, regulations, practices and procedure for the requirement for IEE provide related to report contents and recommendations.
February 11 and 16 , 2021	<ul style="list-style-type: none">• LEA responded to the FOIA.
February 17, 2021 and March 4, 2021	<ul style="list-style-type: none">• The eligibility team determined that Student remained eligible for Specific learning disability, emotional disability, and speech or language impairment.
October 8, 2021	<ul style="list-style-type: none">• ODRAS received Complainant's complaint submission.