

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

NOTICE OF COMPLAINT

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| School Division Virginia Beach City Public Schools | Parent |
| Division Superintendent Dr. Aaron C. Spence 2512 George Mason Drive Virginia Beach, Virginia 23456 | Parent's Address N/A |
| Special Education Compliance Officer Tania Sotomayor 1413 Laskin Road Virginia Beach, Virginia 23451 | Student Systemic Complaint |
| Date Complaint Received June 8, 2018 | Complainant (if other than parent) Ms. Cheryl Poe Advocating 4 Kids Inc. 5900 East Virginia Beach Blvd JANAF Building, 6th Floor, Suite 602 Norfolk, Virginia 23502 |
| Notice of Complaint Date June 21, 2018 | Findings Due Date August 21, 2018 |
| Early Resolution Date/LEA Response to Complaint Due Date TBD | Additional Information Due Date TBD |
| Director, Office of Dispute Resolution Patricia Haymes Compliance Specialist Sabrina Gross | Complaints Department Phone # (804) 225-2013 |

The Office of Dispute Resolution and Administrative Services in the Virginia Department of Education (VDOE) has received a complaint alleging that Virginia Beach City Public Schools (VBCPS) has violated federal and state laws and regulations governing special education programs. This notice of complaint gives official notice to all parties that a formal written complaint has been filed with our office and confirms that it is sufficient pursuant to federal special education regulations.

APPLICABLE REGULATIONS:

This office will base its investigation and findings on the reauthorization of the federal *Individuals with Disabilities Education Improvement Act*, December 3, 2004 (IDEA '04), its implementing federal regulations, adopted October 13, 2006 (the 2006 implementing regulations), and the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, effective on July 7, 2009, and reissued on January 25, 2010, and on July 29, 2015, (the Virginia Regulations). The Virginia Regulations are available online at http://www.doe.virginia.gov/special_ed/regulations/state/regs_speced_disability_va.pdf.

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Release authorization.

The complaint includes a release authorization that states “this release is exclusive for filing a systemic state complaint against Virginia Beach City Public Schools (VBCPS) in 2018. The release authorizes Advocating 4 Kids to file the complaint with Virginia Department of Education (VDOE).”

Systemic Complaint Authority

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....”¹ OSEP has also stated that “the broad scope of the State complaint procedures, as permitted in the regulations, is critical to each State’s exercise of its general supervision responsibilities. The complaint procedures provide parents, organizations, and other individuals with an important means of ensuring that the educational needs of children with disabilities are met and provide the SEA [state education agency] with a powerful tool to identify and correct noncompliance....”² Accordingly, this office is authorized to investigate alleged systemic violations of special education regulations. In this specific complaint, the complainant has provided the names of eight students. Because the release referred to above allows for the provision of the information to Advocating 4 Kids, but not to the other parents, we will identify the students by number in this notice of complaint. These students have been included in this complaint to demonstrate certain alleged violations committed by VBCPS against similarly situated students.

In addition, we note that VDOE has also received verbal communication from a number of additional parents outlining concerns similar to those identified in this complaint.

ISSUE(S) AND REGULATIONS:

1. Child Find

The Complainant alleges that the LEA has failed to appropriately identify, locate, and evaluate students who need special education services.

¹U.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 as *Analysis*].

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

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Specifically, the Complainant alleges:

- VBCPS has knowledge that Student 1, Student 2 and Student 3, and other similarly situated students are students with disabilities but failed to evaluate these students. Such knowledge has been demonstrated by:
 - Student response team reports, where highly disruptive behavior was noted;
 - A pattern of disciplinary actions like out-of-school suspensions; and
 - Shortening the student's school day.

Applicable Regulations:

- The IDEA 2004 implementing regulations, at 34 C.F.R. §§ 300.102 and 300.111, and the Virginia Regulations, at 8 VAC 20-81-50.A.1, state each local school division shall maintain an active and continuing child find program designed to identify, locate and evaluate those children residing in the jurisdiction who are birth to age 21, inclusive, who are in need of special education and related services, including children who: (34 C.F.R. §§ 300.102 and 300.111) a. Are highly mobile, such as migrant and homeless children; b. Are wards of the state; c. Attend private schools, including children who are home-instructed or home-tutored; d. Are suspected of being children with disabilities under this chapter and in need of special education, even though they are advancing from grade to grade; and e. Are under age 18, who are suspected of having a disability who need special education and related services, and who are incarcerated in a regional or local jail in its jurisdiction for 10 or more days.
- The IDEA 2004 implementing regulations, at 34 C.F.R. § 300.507, and the Virginia Regulations, at 8 VAC 20-81-50.D.3, state that children may be referred through a screening process, or by school staff, the parent(s), or other individuals: a. The referral may be in written, electronic, or oral form to the principal or designee of the school the child attends, or if initially enrolling in the school division, in the school in the parent's district; b. If the referral is made to the special education administrator or designee, the administrator shall within three business days: (1) Initiate the evaluation eligibility process in accordance with 8VAC20-81-60, 8VAC20-81-70, and 8VAC20-81-80; (2) Require that the school-based team review and respond to the request; or (3) Deny the request. If the request is denied, prior written notice in accordance with 8VAC20-81-170 shall be given to the parent(s), including the parent's right to appeal the decision through the due process hearing procedures. (34 CFR 300.507).

2. Evaluation/Reevaluation/Eligibility

The Complainant alleges that, with regard to Student 2, Student 3, Student 5, and other similarly situated students the LEA has failed to provide evaluations that are sufficiently comprehensive to identify the entirety of a student's special education and service's needs. Specifically, these alleged

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violations have been demonstrated in the following manner:

- Student 2: while identified as a student with an Other Health Impairment (OHI), the division did not conduct additional evaluations despite the student having never passed an SOL test and despite it having knowledge that the student was performing below grade level in reading and in math.
- Student 3: student was identified as having a mood disorder, ADHD, nocturnal seizures, and a sensory processing disorder, however VBCPS did not conduct additional evaluations despite continuously disciplining the student for behaviors associated with his disability.
- Student 5: A re-eligibility was completed but the division failed to conduct an FBA to identify cause of behaviors despite the student demonstrating consistent behavioral concerns.

Applicable Regulations:

- The 2006 implementing regulations, at 34 C.F.R. §§ 300.304 and 300.310, and the Virginia Regulations, at 8 VAC 20-81-70.C.14 requires that: each child is assessed by a qualified professional in all areas relating to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, motor abilities, and adaptive behavior. This may include educational, medical, sociocultural, psychological, or developmental assessments. (a) The hearing of each child suspected of having a disability shall be screened during the eligibility process prior to initial determination of eligibility for special education and related services. (b) A complete audiological assessment, including tests that will assess inner and middle ear functioning, shall be performed on each child who is hearing impaired or deaf or who fails two hearing screening tests.
- The IDEA 2004 implementing regulations, at 34 C.F.R. § 300.323(c), and the Virginia Regulations, at 8 VAC 20-81-70.F.3, require the local education agency to conduct a reevaluation in accordance with the requirements of subsection B of this section.
- The IDEA 2004 implementing regulations, at 34 C.F.R. § 300.323(c), and the Virginia Regulations, at 8 VAC 20-81-70.B.1, state that a group that is comprised of the same individuals as an IEP team and other qualified professionals, as appropriate shall review existing evaluation data on the child, including, evaluations and information provided by the parents of the child.
- The IDEA 2004 implementing regulations, at 34 C.F.R. § 300.323(c), and the Virginia Regulations, at 8 VAC 20-81-80.D, establish the procedures for determining eligibility for educational need.

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- The IDEA 2004 implementing regulations, at 34 C.F.R. §300.323(c), and the Virginia Regulations, at 8 VAC 20-81-110.E.1., state that in developing each child's IEP, the IEP team shall consider: the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child.
- The IDEA 2004 implementing regulations, at 34 C.F.R. § 300.323(c), and the Virginia Regulations, at 8 VAC 20-81-70.H, state that if a reevaluation is conducted for purposes other than the triennial, the reevaluation process, including eligibility determination, shall be completed in 65 business days of the receipt of the referral by the special education administrator or designee for the evaluation. The parent and eligibility group may agree in writing to extend the 65-day timeline to obtain additional data that cannot be obtained within 65 business days.
- The 2006 implementing regulations, at 34 C.F.R. §§ 300.304 and 300.310, and the Virginia Regulations, at 8 VAC 20-81-70.B.3, require that a variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent(s), and information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), that may assist in determining whether the child is a child with a disability and the content of the child's IEP.
- The 2006 implementing regulations, at 34 C.F.R. §§ 300.304 and 300.310, and the Virginia Regulations, at 8 VAC 20-81-70.C.311, state no single measure or assessment is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for a child.
- The 2006 implementing regulations, at 34 C.F.R. §§ 300.304 and 300.310, and the Virginia Regulations, at 8 VAC 20-81-70.C.9, require that the evaluation is sufficiently comprehensive to identify all of the child's special education and related needs, whether or not commonly linked to the disability category in which the child has been classified.

3. Individualized Education Program (IEP) – Transfer Students Parental Participation/Meeting Notice

The Complainant alleges that, with regard to Student 4 and other similarly situated students, the LEA has failed to implement transfer IEPs by providing comparable services as mandated by law or by evaluating the student and proposing a new IEP. This conduct has been demonstrated in the following manner:

- Student 4 transferred from Massachusetts. The student's IEP contained provisions for math and reading, pull out support, and a one to one aide in the general education setting.

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- The prior written notice (PWN) from August 25, 2017, states that “VBCPS refused to implement the out of state IEP ... the IEP is not able to be implemented as written due to shared [a]ide services.”
- The IEP team did not evaluate the student before rejecting or refusing services on the out of state IEP; and
- The IEP team predetermined the student’s shared aide services.

Applicable Regulations:

- The 2006 implementing regulations, at 34 C.F.R. § 300.323(e)(f)(g), and the Virginia Regulations, at 8 VAC 20-81-120(A)(2), states the new local educational agency shall provide a free appropriate public education to the child, including ensuring that the child has available special education and related services, in consultation with the parent(s), including services comparable to those described in the child’s IEP from the previous local educational agency, until the new 8VAC20-81-110. local educational agency either: a. Adopts and implements the child’s IEP from the previous local educational agency with the parent’s consent; or b. Conducts an evaluation, if determined necessary by the local educational agency, and develops and implements a new IEP with the parent’s consent that meets the requirements in this chapter. 3. The new local educational agency may develop and implement an interim IEP with the parent’s consent while obtaining and reviewing whatever information is needed to develop a new IEP. 4. If the parent(s) and the local educational agency are unable to agree on interim services or a new IEP, the parent(s) or local educational agency may initiate the dispute resolution options of mediation or due process to resolve the dispute. During the resolution of the dispute, the local educational agency shall provide FAPE in consultation with the parent(s), including services comparable to those described in the child’s IEP from the previous local educational agency.
- The IDEA 2004 implementing regulations, at 34 C.F.R. §§ 34 C.F.R. 300.322, 300.500, and 300.501 and the Virginia Regulations, at 8 VAC 20-81-170.A.1.b, lay out the requirements for parent participation in meetings regarding identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child.

4. Individualized Education Program (IEP) – Development, Review, Revision Free Appropriate Public Education (FAPE)

The Complainant alleges that, with regard to Student 5, Student 6, Student 7, Student 8, and other similarly situated students, VBCPS failed to provide a free appropriate public education (FAPE) by improperly developing, reviewing, and revising student IEPs. This conduct has been demonstrated in the following manner:

- Student 5’s behavioral needs were not addressed in the IEP.
- The areas of need identified in the Student 6’s present levels of performance (PLOP) are not addressed by either services, goals, interventions, or accommodations in the IEP.

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- The parent concerns are not considered in the development of IEPs.
- Student 7 and Student 8's IEPs do not include a transition plan. The IEPs do not include goals to address transition and they do not identify an outside agency to assist the Students with transition planning. Additionally, VBCPS did not explain or discuss the interagency release form with the parents or the students.

Applicable Regulations:

- The 2006 implementing regulations, at 34 C.F.R. § 300.323(e)(f)(g), and the Virginia Regulations, at 8 VAC 20-81-120(A)(2), state the new local educational agency shall provide a free appropriate public education to the child, including ensuring that the child has available special education and related services, in consultation with the parent(s), including services comparable to those described in the child's IEP from the previous local educational agency, until the new local educational agency either: a. Adopts and implements the child's IEP from the previous local educational agency with the parent's consent; or b. Conducts an evaluation, if determined necessary by the local educational agency, and develops and implements a new IEP with the parent's consent that meets the requirements in this chapter. 3. The new local educational agency may develop and implement an interim IEP with the parent's consent while obtaining and reviewing whatever information is needed to develop a new IEP. 4. If the parent(s) and the local educational agency are unable to agree on interim services or a new IEP, the parent(s) or local educational agency may initiate the dispute resolution options of mediation or due process to resolve the dispute. During the resolution of the dispute, the local educational agency shall provide FAPE in consultation with the parent(s), including services comparable to those described in the child's IEP from the previous local educational agency.
- The IDEA 2004 implementing regulations, at 34 C.F.R. §§ 34 C.F.R. 300.322, 300.500, and 300.501, and the Virginia Regulations, at 8 VAC 20-81-170.A.1.b, lay out the requirements for parent participation in meetings regarding identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child.

5. Student Records

The Complainant alleges that VBCPS failed to comply with the regulatory mandates of special education pertaining to student records. Specifically, she alleges that VBCPS does allow parents or their representatives to access student records nor do they comply with the destruction of records requirements. Complainant provides specific information on this topic with regard to Student 6.

Applicable Regulations:

- The IDEA 2004 implementing regulations, at 34 C.F.R. § 300.613, and the Virginia Regulations, at 8 VAC 8 VAC 20-81-170.G.1, states the local educational agency shall permit the parent(s) to inspect and review any education records relating to their children that are collected, maintained,

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or used by the local educational agency under this chapter. The local educational agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing in accordance with 8VAC20-81-160 and 8VAC20-81-210, or resolution session in accordance with 8VAC20-81-210, and in no case more than 45 calendar days after the request has been made.

- Destruction of information. (34 C.F.R. § 300.624) a. The local educational agency shall inform parents when personally identifiable information collected, maintained, or used under this chapter is no longer needed to provide educational services to the child. b. This information shall be destroyed at the request of the parents. However, a permanent record of a student's name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed shall be maintained without time limitation. c. The local educational agency shall comply with the Records Retention and Destruction Schedule of the Library of Virginia.

6. Free Appropriate Public Education (FAPE)-Safe and Secure Environment

The Complainant alleges that VBCPS failed to comply with the regulatory mandates of special education pertaining to the safety and security of the students. Specifically, she alleges that Student 2 was assaulted by a group of students on February 20, 2018, around 12:30 p.m. In addition:

- The parent was not notified of the assault.
- The student did not receive any medical attention from the school.
- The parent was not given a copy of the incident report.
- The student was unable to return to school due to his injuries.
- VBCPS denied the parent's request for homebound/homebased services.
- Due to the LEA's failure to keep the student safe at the school, he is not receiving any of his IEP services.

Applicable Regulations:

- The Virginia Regulations, at 8 VAC 20-81-10, define FAPE as meaning "special education and related services that ... meet the standards of the Virginia Board of Education." In that context, the Regulations Establishing Standards for Accrediting Public Schools in Virginia, effective September 7, 2006, (Accrediting Regulations), at 8 VAC 20-131-210, state in part, "The principal shall be responsible for ... a safe and secure environment in which to teach and learn." The Accrediting Regulations also indicate that a principal has the "maximum authority under law in all matters affecting the school, including, but not limited to, instruction and personnel, in a manner that allows the principal to be held accountable ... for matters under his direct control."

OTHER ISSUES:

Failure to allege violation of special education regulations. The complaint submission includes

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the following issues that fail to address an alleged violation of special education regulations and, accordingly, will not be included in this Notice of Complaint:

- VBCPS has engaged in harassing behaviors such as having their attorney attend and participate in IEP meetings although the parents are not represented; and
- VBCPS has engaged in retaliatory behaviors against parents.

Retaliation allegations should be addressed to:

Washington DC (Metro)
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-1475
Telephone: 202-453-6020 FAX: 202-453-6021; TDD: 877-521-2172
Email: OCR.DC@ed.gov

The following issues are not addressable via the complaints process:

With regard to Student 9 listed in the complaint, the Complainant alleges that:

- VBCPS did not provide documents and exhibits necessary for the due process hearing within the required timelines.
- VBCPS did not file a motion for leave to alter or amend the order, “they acted as if they were entitled to do so without seeking permission of the hearing officer.”

Matters regarding the management of a due process hearing are properly addressed through motions in the hearing, through application to the Office of the Executive Secretary of the Supreme Court of Virginia, or through the exercise of a legal appeal.

Insufficient Facts:

- The complaint alleges that VBCPS failed to provide Student 2 with a FAPE due to disability harassment; however, while the facts allege a single incident where the student was attacked, they do not provide a basis for the attack or that this occurrence happened on more than one occasion. Additionally, complainants have not provided any additional facts to clarify the allegation of harassment based on disability. Please note, however, that these facts have been opened under the category of Safe and Secure Environment.

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EARLY RESOLUTION REQUIREMENTS:

Our complaint system has an Early Resolution System that supports both parties working cooperatively to resolve this matter prior to the due date for the school division's response without formal investigation by our office. We believe early resolution will benefit both parties and that it is in the best interest of students. Early resolution may include use of the statewide special education mediation system. We have enclosed a brochure for the complainant that describes mediation that is voluntary on the part of both parties. Both parties are asked to keep our office informed of changes in the status of this complaint.

If this complaint is resolved, the school division must furnish a written response, including the following:

1. A record of contacts with the complainant;
2. A statement of the proposed resolution;
3. A signed statement indicating that the complainant has agreed to the resolution and the details of the resolution.

For technical assistance in resolving the complaint, please contact your VDOE Regional School Division Technical Assistance Specialist or one of the VDOE Training and Technical Assistance Centers (T/TACs).

INFORMATION/DOCUMENTATION REQUESTED:

Because of the broad nature and scope of the investigation, we anticipate that an on-site investigation will be required. We will contact the school division in order to schedule the same. We will also establish a timeline for written responses to the allegations in this complaint and to other specific students who may be identified in the course of this investigation.

The parties are instructed to copy *all* response and additional information submissions to each other.


Sabrina J. Gross, J.D.
Compliance Specialist


Date

SJG/stg

c: Dr. Veleka Gatling

Ms. Tania Sotomayor

Attachments - Complaint Resolution Procedures
Mediation Brochure