

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

LETTER OF FINDINGS

School Division Superintendent Dr. Aaron C. Spence Virginia Beach City Public Schools 2512 George Mason Drive Virginia Beach, Virginia 23456	Parent(s) Systemic
Special Education Compliance Officer Ms. Tania Sotomayor 1413 Laskin Road Virginia Beach, Virginia 23451	Student Systemic
Date Complaint Received June 12, 2018	Complainant (if other than parent) Ms. Cheryl Poe Advocating 4 Kids Inc 5900 Virginia Beach Blvd. JANAF Building, 6 th Floor, Suite 602 Norfolk, Virginia 23502
Notice of Complaint Date June 21, 2018	Findings Date October 31, 2018
Appeal Due Date November 30, 2018	Corrective Action Plan Due Date November 30, 2018
Director, Office of Dispute Resolution Patricia V. Haymes, J.D.	Complaints Department Phone # (804) 225-2013

SYSTEMIC COMPLAINT AUTHORITY

This complaint identifies eight individual students, and alleges that the actions of Virginia Beach City Public Schools (VBCPS) with regard to these students reflects systemic practices within the division. 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

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 to as *Analysis*].

²*Analysis*, at 46601. In this instance, OSEP was responding to a number of commenters, including one who stated that

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violations of special education regulations. In this specific complaint, the complainant has provided the names of eight students.

The record contains a release from the parents of each of the eight named students permitting the sharing of information between VDOE and the complainant. Because the release allows for the provision of the information to Advocating 4 Kids Inc, but not to the other parents, 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 VBCPS (local education agency or "LEA") against similarly situated students.

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:

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. Investigation Methodology

The Office of Dispute Resolution and Administrative Services (ODRAS) conducted a multi-phase, multi-focused investigation of the issues raised in the complaint submission. Following issuance of the Notice of Complaint, two individuals from ODRAS traveled to Virginia Beach for two two-day visits to interview parents who came forward with concerns regarding special education in VBCPS. The first visit took place on August 7 and 8, 2018. For the second two-day visit, conducted on September 4 and 5, 2018, a representative from the Office of Specialized Educational

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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Programs and Family Engagement joined ODRAS personnel. Staff interviewed approximately 40 families, including the families of the students specifically identified in the complaint.

As is normal procedure in any complaint investigation, ODRAS also asked for a written response from VBCPS, along with supporting documents. The complainant also had an opportunity to provide additional information following the school division's response.

During the week of September 24, 2018, a team of 11 individuals from various offices within the Division of Special Education and Student Services (SESS) at VDOE conducted an on-site document review. The ODRAS Team reviewed files of students not named in the systemic complaint but whose parent interviews surfaced allegations relevant to the systemic complaint. In addition, the ODRAS Team reviewed files of a sampling of similarly situated students (i.e., students in the same school and grade level). The remainder of the SESS Team reviewed randomly selected student files, including 39 at the elementary school level, 68 at the middle school level, and 96 at the high school level.³ In all, the VDOE Team reviewed more than 225 files. The VBCPS' data shows a total special education enrollment of 7,886 students for the most recent school year. This sampling of nearly three percent is larger than typically reviewed by VDOE in an on-site monitoring visit.

Finally, VDOE personnel interviewed a cross-section of VBCPS school psychologists to obtain information about the division's evaluation and eligibility practices and procedures. The VBCPS special education compliance and coordinating staff were available on-site throughout the week to answer questions. We thank VBCPS for its cooperation.

OVERVIEW OF BASIS FOR REVIEW AND FOR SYSTEMIC FINDINGS:

This investigation is the VDOE's first broad systemic investigation since the United States Supreme Court issued its decision in *Endrew F. v. Douglas County School District*, 580 U.S. ___, 137 S. Ct. 988 (2017), and it is in light of that case that we render our findings. Prior to the decision in *Endrew F.*, the controlling case in this area was *Board of Ed. of Hendrick Hudson Central School District, Westchester Cty. v. Rowley*, 548 U.S. 176 (1982), which held that a school district need not provide a student with a disability with an equal educational opportunity or a maximized education. Rather, the district is required to provide a student with a disability with a program that is "reasonably calculated to provide educational benefit." Further, for a student with a disability in a regular classroom, the district must offer an IEP reasonably calculated to permit the student to advance from grade to grade.

In the years following *Rowley*, courts have attempted to determine "how much" educational benefit is required for a school district to offer a free appropriate public education (FAPE). While no federal circuit court had held that a student with a disability is entitled to maximum educational

³VBCPS operates more than 80 public elementary and secondary schools. For purposes of our review, we focused, although not exclusively, on elementary and middle schools of students named in the complaint and where parent interviews had raised concerns.

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benefit, several differing formulations emerged, including the 10th Circuit's interpretation, at issue in *Andrew F.*, which held that the benefit conferred need be "merely more than de minimis."

The Supreme Court rejected the de minimis standard outright, as it did the renewed argument by the student's counsel that the child is entitled to be put in the same place as his or her non-disabled peers. Rather, it determined that IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's unique circumstances." Further, the Court found that if "progressing smoothly through the regular curriculum...is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives [emphasis added]."

Importantly, for our analysis in this case, the Court emphasized the fact-specific nature of the inquiry and reiterated long-standing precedent directing courts to defer to professional educators in determining whether a school division has offered a child FAPE. However, the Court clarified the parameters for such deference:

...deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue.... By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Andrew F.*

In VDOE's view, the true impact of *Andrew F.* is not the Court's clarification of the *Rowley* standard; rather it is its articulation of the level of expertise expected of special educators. With this background, we move to a general discussion of our findings.

The VDOE commends VBCPS with regard to the following:

- Present levels of performance and prior written notices (PWNs) were thorough and detailed;
- Progress reports were complete and in the file; and
- Eligibility worksheets were used and in the file.

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Andrew F. has made the role of special educators more difficult. It has also made our investigation process more difficult, especially in cases such as this. In the past, VDOE reviewed a statistically significant number of files, determined whether the division met the threshold for compliance, relying on Federal guidance as to whether a matter should be compliant 100 percent of the time or within some target range. While we can make a generalized finding on regulatory compliance, we cannot make a determination in this context whether each of the 225 students whose files we reviewed have programs that meet the needs of each child in light of his or her unique circumstances. Although we have more discretion in the cases of named students, even in those cases we are constrained because the complaint process is not an adversarial proceeding with all elements of Constitutional due process present, including the examination and cross-examination of witnesses and the determination of credibility.

In our file reviews, VDOE reviews as many as 79 separate compliance points, depending on the age of the student, whether the student underwent an evaluation or reevaluation during the review period, and whether the student faced disciplinary action, among other factors. Our file review identified 151 separate deficiencies in the 225 files reviewed. These deficiencies were scattered among the compliance points such that we were unable to identify any systemic patterns, save in one area: post-secondary transition. We will address that matter below.

While identification of deficiencies offers some insight, file reviews also leave an impression of quality. Interviews also help in capturing quality, but more importantly, they convey something about culture. Our file reviews and interviews strongly suggest that VBCPS, in many critical aspects, has been offering special education services on a *de minimis* basis. When our seasoned special educators and school psychologists find files that are facially compliant, but that facially do not make educational sense, we cannot help but conclude that VBCPS would face an uphill battle in convincing a hearing officer or judge that it had a “cogent and responsive explanation” for them. Specific and recurrent examples include the following:

- Virtually all triennials, except in cases where a parent was particularly knowledgeable or an advocate was involved, were based solely on a records review and, perhaps, an updated observation, even when the previous evaluations were five or more years old or were conducted by a division other than VBCPS.
- Some IEPs had only one or two goals, even when the present levels of performance indicated other areas of need. Even if there were multiple goals, they were not always aligned to the needs delineated in the present levels.
- Not one postsecondary transition plan reviewed indicated that interagency contacts had been made on behalf of the student. Further, many transition plans that did not contain courses of study, did not reflect student interests, or contained activities, goals, and services contrary to interests expressed by the student.

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- Fewer than ten students in the files reviewed qualified for extended school year services.
- Few students had related services or assistive technology included in their IEPs, even when the present levels of performance indicated a need.
- In many cases, neither behavioral intervention plans (BIPs) nor behavioral goals were included even when the record showed that the student's behavior interfered with his learning of that of others. In fact, interviews and file reviews indicate a failure to connect behavior and learning in a troubling number of cases.

We acknowledge that in some of these cases, VBCPS *may* be able to offer a cogent explanation for the program it has offered to a particular student. Accordingly, while based on statistical data, we find noncompliance in the area of postsecondary transition. Although we make compliance findings on other systemic issues, we suggest that VBCPS has a significant level of risk under *Andrew F.*, and significant work ahead if it wishes to avoid the same.

Defining a "Systemic Violation"

To address whether VBCPS has systemically violated laws, regulations, or judicial precedent relating to [child find, evaluation, and eligibility], we must first describe the nature of a systemic violation. While we consider any violation of the regulations to be a serious matter, a systemic violation requires that there be a pattern of noncompliance across populations within the school division. We may identify patterns in various ways within VDOE's oversight of special education programs through its Federal Program Monitoring (FPM) activities, through the Office of Dispute Resolution and Administrative Services (ODRAS), through its data collection, and through other activities.

The VDOE may identify a systemic violation when a pattern of similar violations occurs in a particular school, across certain grade levels (i.e., elementary, middle, or high school), in a single disability category, or more broadly across the school division. In addition, to constitute a pattern, there must be a number of violations in relation to the population being considered that would suggest that the violations are more than "random."

ISSUE(S) AND REGULATIONS:

1. Child Find

The Complainant alleged that the LEA has failed to appropriately identify, locate, and evaluate students who need special education services, with regard to Students 1, 2, and 3, and on a systemic basis.

Specifically, the Complainant alleged:

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- The VBCPS had knowledge that Student 1, and other similarly situated students were students with disabilities but failed to evaluate these students.⁴ Such knowledge was demonstrated by:
 - Student response team reports, where highly disruptive behavior was noted;
 - A pattern of disciplinary actions, such as out-of-school suspensions; and
 - Reduction of the students' 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: (i) are highly mobile, such as migrant and homeless children; (ii) are wards of the state; (iii) attend private schools, including children who are home-instructed or home-tutored; (iv) are suspected of being children with disabilities and in need of special education, even though they are advancing from grade to grade; and (v) 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 ten or more days.
- These regulations (34 C.F.R. § 300.507; 8 VAC 20-81-50.D.3) state that children may be referred for evaluation through a screening process, or by school staff, the parent(s), or other individuals. The referral may be 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. If the referral is made to the special education administrator or designee, the administrator shall within three business days: (i) initiate the evaluation eligibility process; (ii) require that the school-based team review and respond to the request; or (iii) deny the request. If the request is denied, prior written notice shall be given to the parent(s), including notice of the parent's right to appeal the decision through special education due process hearing procedures.

Findings:

The Office of Dispute Resolution finds VBCPS to be in noncompliance with regard to Student 1 on this issue. We will discuss our findings with regard to the systemic issue below.

⁴ In our Notice of Complaint, we included Student 2 and Student 3 within this issue. In that we have determined that those students were already eligible under IDEA, we address their circumstances under Issue 2 below.

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Analysis:

Student 1

• Chronology:

DATE	EVENT
5/26/2017	Parent referred Student 1 to the Special Education Committee (SEC), VBCPS' equivalent of the child study team, prior to Student 1's enrollment in kindergarten, due to parent concerns that Student 1 may have autism. Based on a number of screening instruments, the team determined that it did not suspect a disability. However, a private evaluation identified oppositional defiant disorder and antisocial behavior.
9/12/2017 10/2/2017	– Beginning in kindergarten, Student 1 (in a full-day program) had seven disciplinary referrals, including seven days of out-of-school suspension for behaviors such as throwing items, running around the classroom, hitting other students and the teacher, and drawing on walls. We note that these incidents occurred within the first month of the 2017-2018 school year.
9/21/2017	The SEC meeting held following referral of Student 1 by the teacher. Parent noted that Student 1 had been evaluated privately by another specialist, and that Parent was awaiting the report. The Team relied on two classroom observations and the data from the 5/26/2017 screening. The prior written notice (PWN) stated the following: "The team sees behavioral concerns. There has not been enough time in the year and time on task to obtain academic work to support a concern with academics. The team does not suspect a disability."
9/28/2017	The VBCPS convened a Student Response Team (a general education team within VBCPS that addresses issues with behavior) meeting to develop interventions. Interventions included consultation with the psychologist and the use of social stories and a behavior intervention chart.
10/24/2017	The VBCPS convened meeting to consider referral for a Section 504 Plan. The team noted Student 1's 12 unverified absences and seven absences due to out-of-school suspensions. Parent added a note to the meeting documentation that the unverified absences "are due to me being called to pick [Student 1] up from school for [Student 1's] behaviors." Parent also noted keeping [Student 1] home from school because Parent feared that the school would call the police or expel Student 1. The Team agreed to conduct speech/language and occupational therapy (OT) evaluations, a psychological evaluation, and a behavior rating scale. Notably, the team found Student 1 eligible under Section 504 and drafted an initial plan including 13 accommodations, to include moving Student 1 from full day to half-day kindergarten. The Team developed this plan prior to the completion of any testing. The change to half-day

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	kindergarten was with the parent's consent, not through the disciplinary process.
12/7/2017, 12/12/2017, and 12/17/2017	Psychological, Speech/Language, and OT assessments completed.
1/29/2018	Follow-up Section 504 meeting held to review evaluation data and complete a functional behavioral assessment (FBA).
2/15/2018	The SEC meeting conducted. The meeting notice identified the purpose as "Screening/Records Review." The Team reviewed the previously conducted evaluations, an educational report completed on 2/12/2018 and an observation conducted on 2/9/2018, as well as information from an outside provider. The Team then convened as an eligibility committee, and found Student 1 eligible for services under IDEA as a student with an other health impairment (OHI). It also proposed additional evaluations to determine whether Student 1 had autism.
2/16/2018	Section 504 Team met to review records and revise the Section 504 Plan.
3/15/2018	Initial IEP developed.
5/17/2018	The SEC met to consider additional evaluation materials. Student 1 remained eligible for an IEP as a student with OHI.

- The VBCPS' response mirrors the facts recited in the chronology.
- We understand the reluctance of a school division to label a very young child. We also understand that children come to school with widely varying degrees of readiness. We are also reluctant to second-guess professionals who work with the student, so long as their decisions are reasonably supported by student-specific facts. In this case, however, we find the record to be lacking such support, for the following reasons:
 - The record shows VBCPS was aware that Student 1 had been dis-enrolled for behavioral reasons from two different day care centers.
 - Student 1's behavior was severe enough to warrant out-of-school suspension on seven occasions during the first month of school, and the Parent was called to pick up Student 1 on a number of occasions. At the SEC meeting called after the first month, the Team was aware that Student 1 had been evaluated by one outside provider and that another evaluation report was pending.
 - The Section 504 Team, convened to consider evaluations, found Student 1 to be eligible and found Student 1 needed 13 accommodations, even without the benefit of testing, including the drastic step of removing Student 1 from full-day kindergarten.
 - Student 1 had missed significant instructional time due to behavioral issues.⁵

⁵ According the Virginia Department of Education's State Systemic Improvement Plan, students with disabilities who are suspended for four or more days graduate with a standard diploma at a much lower rate.

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- The SEC ultimately found Student 1 to be eligible under IDEA based on the same evaluations and other information previously in its possession, only four months following the finding of eligibility under Section 504.
- While we note that the applicable regulations permit the use of interventions prior to testing, interventions may not be used to delay evaluation if a disability is suspected (8 VAC 20-81-50.D.4). Here, the record indicates that the SEC had more than enough information to suspect a disability.
- The fundamental error committed by VBCPS in this instance was that it justified its October 2017 refusal to evaluate on the fact that it did not have enough academic data to suspect a disability. If a student cannot access the curriculum due to behavior – indeed cannot remain in the classroom – then there never will be any academic data.
- We also strongly caution VBCPS that any removal from instructional time – including calling a parent to retrieve a child for behavioral reasons – is a disciplinary removal and should be recorded as such. We also note that the practice of changing a student from full-day to half-day kindergarten (as is reflected elsewhere in these findings) while non-disabled peers are afforded a full-day program is suspect and could subject the school division to an action by the Office for Civil Rights within the United States Department of Education for disability discrimination under Section 504 of the *Rehabilitation Act of 1973*.
- For the foregoing reasons, we find VBCPS to be in noncompliance with regard to Student 1 on this issue.

Systemic Allegations

- At least five families other than those named in the complaint reported incidents of repeated denials of requests for evaluation. In some cases, the students had repeatedly failed Standards of Learning (SOL) assessments, but the school blamed the failures on lack of student effort. In other cases, the students were twice exceptional – academically gifted and receiving good grades, but socially isolated or experiencing behavioral instances.
 - In four cases, students had documentation of a disability from a privately obtained evaluation.
 - In two of those cases, the students were only evaluated after a significant disciplinary incident occurred and an attorney or advocate became involved. The VBCPS subsequently found both of these students to be eligible.
 - The VBCPS recommended expulsion for the third student, and it continues to refuse to evaluate despite documentation of a disability. In the fourth case, VBCPS finally found the student eligible after several years of requests and several years of

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- academic failure.
 - The VBCPS continues to refuse testing for the fifth student, who has ongoing behavioral issues.
- One parent's main concern was that VBCPS "refuses to complete evaluations for students with mental health and behavioral needs because they [the students] are making some academic progress."
 - Our review of files of comparable students revealed two additional incidents where students failed all or most SOL assessments over a number of years. The VBCPS also retained these students for a year before evaluating.
 - The random file review revealed no concerns in this area.
 - Our regulations require us to make a finding, except in cases where dismissal is appropriate. We cannot make a finding of systemic noncompliance in light of the standard articulated above; i.e., we do not have a basis to find that these cases are more than random. We would prefer to make no finding, but we are constrained by our regulations. Thus, we find VBCPS to be in compliance with regard to this issue. Nonetheless, we have grave concerns about VBCPS' practices. We strongly urge the school division to train school personnel on the interaction between behavior, mental health and learning, and to emphasize that the IDEA does not focus solely on academics. Social, emotional, and functional needs must also be addressed under IDEA, and the fact that a student is passing from grade to grade does not automatically exclude the child from eligibility (8 VAC 20-81-50.A.1.d).

2. Evaluation/Reevaluation/Eligibility.

The Complainant alleges that, with regard to Students 2, 3, and 5, and on a systemic basis, the LEA has failed to provide evaluations that are sufficiently comprehensive to identify the entirety of the student's special education and service's needs. Specifically, these alleged violations have been demonstrated in the following manner:

- **Student 2:** Although Student 2 had been identified as eligible for services as a student with OHI, VBCPS did not conduct additional evaluations despite Student 2 having never passed an SOL assessment and despite it having knowledge that Student 2 was performing below grade level in reading and in math.
- **Student 3:** Although Student 3 was identified privately as having a mood disorder, ADHD, nocturnal seizures, and a sensory processing disorder, VBCPS did not conduct additional evaluations despite continuously disciplining the student for behaviors associated with Student 3's disability.
- **Student 5:** The VBCPS completed a determination of continued eligibility but failed to conduct

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an FBA to identify cause of Student 5's consistent behavioral issues.

Applicable Regulations:

- Special education regulations (34 C.F.R. §§ 300.303 and 300.304; 8 VAC 20-81-70) set forth procedures and requirements governing the evaluation and reevaluation of students with disabilities.
- More specifically, these regulations (34 C.F.R. §§ 300.304 and 300.310; 8 VAC 20-81-70.C.14) specify that students are to be 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.
- 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.
- Special education regulations (34 C.F.R. §§ 300.304 and 300.310; 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.
- Further, 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 (34 C.F.R. §§ 300.304 and 300.310; Virginia Regulations, at 8 VAC 20-81-70.C.11).
- Special education regulations (34 C.F.R. §§ 300.304 and 300.310; 8 VAC 20-81-70.C.9), direct school divisions to establish policies and procedures to ensure that evaluations are 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.

Findings:

The Office of Dispute Resolution and Administrative Services finds VBCPS to be in compliance with regard to Students 2 and 3. For the reasons set forth below, we will issue separate

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findings with regard to Student 5.⁶ In addition, the Office of Dispute Resolution and Administrative will address its findings on the systemic issue below.

Analysis:

Student 2

- Chronology

DATE	EVENT
3/21/2017	The SEC found Student 2 remained eligible under the disability category of OHI, based upon a private psychological evaluation, a social history, and psychological evaluation conducted by another school division, all completed in 2012 and 2013, as well as an educational report completed on March 15, 2017.
10/9/2017, 2/15/2018	The IEP meetings conducted.
2/20/2018	Student 2 was physically assaulted by other students and did not return to school.
3/1/2018	Parent submitted medical certification for homebound instruction due to Student 2's anxiety.
3/9/2018	The VBCPS denied request for homebound instruction.
4/23/2018	The IEP meeting held, placing Student 2 in home-based services. Parents requested additional assessments.
4/30/2018	Parent submitted second medical certification for homebound instruction.
5/8/2018	The IEP meeting held; LEA proposed updated psychological, speech and language, occupational therapy and socio-cultural evaluations.
5/10/2018	The VBCPS' homebound office approved second application for homebound services.
5/23/2018	The IEP Team met to address homebound services and proposed transition back to school setting.
7/10/2018	The SEC met to consider new speech-language, OT, social history, psychological, and educational evaluations.

- In its response, VBCPS states that Student 2's reevaluation meeting occurred on 3/21/2017. The student had received evaluations in 2012 and 2013. Student 2's cognitive profile suggested "considerable cognitive challenges" as noted in the 2013 evaluation. The Team determined no additional information was needed to determine continuing eligibility, as Student 2's "profile remained consistent across all previous evaluations and the presence of an Other Health

⁶ The regulations allow this office to extend the timeline for issuance of findings in extraordinary circumstances. We find that such exceptional circumstances exist in this case. We will inform the parties of the ongoing parameters of the investigation under separate cover.

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Impairment remained.”

- As reflected above, Parent applied for homebound services following student’s assault, due to the student’s anxiety. The VBCPS rejected Parent’s initial application for homebound services following Student 2’s assault, stating that it had contacted the doctor, who agreed that VBCPS could serve Student 2 appropriately in the school setting. Parent provided documentation to indicate that Student 2 did not feel safe. Two months later, the IEP Team met to propose home-based services and a short time after, VBCPS approved a homebound application.⁷
- The VBCPS stated that, “[T]he parent requested updated evaluations in April 2018. On 5/8/2018 VBCPS proposed updated evaluations to include psychological, speech and language, occupational therapy and socio-cultural.” The results of the VBCPS psychological evaluation were consistent with previous evaluations.

⁷ The Virginia Regulations (8 VAC 20-81-10) define “homebound instruction” as “academic instruction provided to students who are confined at home or in a health care facility for periods that would prevent normal school attendance based upon certification of need by a licensed physician or licensed clinical psychologist. For a child with a disability, the IEP Team shall determine the delivery of services, including the number of hours of services.” Similarly, the *Regulations Establishing Standards for Accrediting Public Schools in Virginia* (the Standards of Accreditation or SOA), at 8 VAC 20-131-180, provide that homebound instruction “shall be made available to students who are confined at home or in a health care facility for periods that would prevent normal school attendance based upon certification of need by a licensed physician or licensed clinical psychologist. For students eligible for special education or related services, the Individualized Education Program committee must revise the IEP, as appropriate.” We note that, in its *Homebound Instruction Services Guidelines*, the Virginia Department of Education (VDOE) has recommended that local school divisions adopt policies and procedures governing homebound instruction—for all students, regardless of special education eligibility status—including provisions addressing required documentation, timelines for services, and other matters. The *Guidelines* state that “[e]ligibility for homebound instructional services should be a collaborative decision between the treating health care provider, parent/guardian, and school personnel.... If homebound services are needed, approval of services is based upon a completed [emphasis added] medical certification of need.” The *Guidelines* further state that “the certification [or application] must be fully completed, including [emphasis in original] parental permission to contact the treating physician or licensed clinical psychologist, in order for the student to be considered for homebound services. The school division [emphasis added] reviews all requests for completeness of information and appropriateness of the request and will follow up with the treating physician or licensed clinical psychologist to clarify the need for homebound instruction versus school-based instruction with appropriate accommodations, as necessary.” Pursuant to the *Guidelines*, consideration of requested homebound instruction for students receiving special education services is the responsibility of the IEP Team. Specifically, the *Guidelines* state that, “[a]s part of its review and determination of a change in placement, the IEP Team must review the approved [emphasis added] medical certification of need for homebound instruction and determine the appropriate placement for the student based on the student’s educational needs.

Parental consent must be obtained to amend the IEP, prior to initiation of homebound services.... If the IEP Team determines that homebound services are appropriate [emphasis added], the team must include language in the IEP that clearly defines the time period for the frequency and duration of the homebound services.” Significantly, neither special education regulations nor VDOE’s *Guidelines* vest the IEP Team with responsibility for the initial “approval” of the sufficiency of the submitted application form; local school divisions may establish procedures—including provisions addressing mode of transmission as well as required signatures and content, and identifying the entity responsible for determining the sufficiency of the submitted application. The IEP Team is responsible for determining the appropriateness of homebound instruction, once the school division has approved the application for sufficiency.

Virginia Department of Education, Homebound Instruction Services Guidelines (February 2012)

< http://www.doe.virginia.gov/instruction/homebound/homebound_instructional_services.pdf >

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- The record in this case reflects that Student 2 was the target of bullying, as we will discuss in Issue 6. However, in spite of our global concern, nothing in the record suggests that the eligibility team’s decision was not reasonably supported by student-specific data. We note that Student 2 was not passing SOLs, but that the record reflects cognitive challenges and subsequent testing indicates the same outcome. As a result, we find VBCPS to be in compliance with regard to Student 2 on this issue.
 - In reaching this finding, we do not determine whether: (i) Student 2 should have received a full re-evaluation at an earlier stage; or (ii) in a due process hearing, the school division’s explanation for its decisions would be sufficiently cogent to prove that its decisions informed its offer of FAPE. We caution VBCPS accordingly.

Student 3

- Chronology

DATE	EVENT
10/18/2017	The IEP meeting held.
2/5/2018	The IEP meeting held; FBA proposed; behavioral supports discussed.
2/19/2018	The IEP meeting held. Team reviewed outside evaluation, added behavior goals, amended services.
3/15/2018	The IEP meeting held; BIP proposed; OT observation proposed.
3/22/2018	The IEP Team revised BIP.
4/11/2018	The SEC meeting held. No new data collected.
4/26/2018	The IEP meeting held; annual IEP proposed.

- Our interview with the parent reflects that Student 3: (i) was referred for a special education four times between kindergarten and third grade; (ii) never passed an SOL assessment (scores were in the 200s); and (iii) parents were called repeatedly regarding Student 3’s disruptions in the classroom and were asked to pick Student 3 up.
- Student 3 received eight discipline referrals in the 2017-2018 school year. These included a cell phone violation, two tardies, three disruptive demonstrations, one minor altercation, and one incident of disrespect. These resulted in 2¾ days of in-school suspension (ISS).
- The VBCPS stated that it held multiple IEP meetings for Student 3 to address behavioral needs. In addition, VBCPS stated that at the April 11, 2018, reevaluation meeting, it determined additional evaluations were unnecessary, as (i) the team had an October 2017 evaluation from Student 3’s private provider; and (ii) VBCPS had conducted a full evaluation in 2015.
- We reiterate our concerns about the practice regarding triennial reevaluations outlined above.

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When VBCPS relies on another school division or on an outside provider for evaluation results, it must be able to defend those results.

- While this office notes the parent’s frustrations regarding Student 3’s earlier experiences in VBCPS, we are constrained by a one-year statute of limitations (8 VAC 20-81-200.B.6). Because we find nothing to suggest that VBCPS’ decision with regard to the evaluation failed to be reasonably based on student-specific data, again we find VBCPS in compliance with regard to this Student 3 on this Issue.

Student 5

- Chronology

DATE	EVENT
10/19/2017	The IEP Team met to discuss strategies provided by the parent.
2/7/2018	The IEP Team proposed FBA, OT evaluation.
3/14/2018	The IEP meeting held to review FBA data; IEP team development of BIP.
4/11/2018	The IEP Team developed BIP, proposed updated psychological evaluation.
5/24/2018	The IEP Team reviewed OT evaluation results.
6/12/2018	The IEP Team reviewed psychological evaluation results; proposed additional accommodations.

- After reviewing the file and conducting interviews, in light of the disturbing and complex nature of the parents’ allegations, we believe that it would be a disservice to both parties to render findings without additional information. As a result, we will sever this issue from this Letter of Findings and will deliver separate findings with regard to Student 5.⁸

Systemic Issue

- Interviews of parents of seven students not named in the complaint revealed shared concerns that re-evaluations consisted of records reviews only.
- We reiterate our deep concern that in the overwhelming number of cases reviewed, VBCPS relied on past records reviews to determine continued eligibility. Here, it is extremely troubling that VBCPS has never conducted its own evaluations for Student 2; re-evaluations not only determine whether a student continues to be eligible, but also provide important information that informs and supports the required individualized educational programming. Interviews with

⁸The regulations allow this office to extend the timeline for issuance of findings in extraordinary circumstances. We find that such exceptional circumstances exist in this case. We will inform the parties of the ongoing parameters of the investigation under separate cover.

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VBCPS school psychologists indicated a shared belief that re-evaluations were not useful, and, in fact, could be harmful, if the school did not suspect a change in disability category. Special education regulations dictate another practice: again, evaluations not only identify whether the child has a disability, they also inform the development of the content of the IEP. Evaluations are to be “sufficiently comprehensive to identify all of the student’s special education and related needs, whether or not commonly linked to the disability category in which the child has been identified” (8 VAC 20-81-70.C.9).

- As stated above, file reviews for comparably situated students and random file reviews indicated VBCPS updated student testing at triennial re-evaluations only if an advocate was involved, except in one case. Significantly, in that case, the parent was an administrator at another special education program.
- As stated above, our regulations require us to make a finding, except in cases where dismissal is appropriate. We cannot make a finding of systemic noncompliance in light of the standard articulated above. We would prefer to make no finding, but we are constrained by our regulations. Thus, we find VBCPS to be in compliance with regard to this Issue. Again, we have grave concerns in this matter as outlined above, and we urge VBCPS to promptly address these matters. We refer VBCPS to the discussion above.

3. Individualized Education Program (IEP) – Transfer IEP; 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 or by evaluating the student and proposing a new IEP. This conduct has been demonstrated in the following manner:

- Student 4 transferred to VBCPS from another state/school division with an IEP providing for specialized instruction in math and reading, pull-out support, and a one-to-one aide in the general education setting.
 - The prior written notice (PWN) from an August 25, 2017, IEP meeting states “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 Student 4 before rejecting or refusing services on the out-of-state IEP; and
 - The IEP Team predetermined Student 4’s shared aide services.

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Applicable Regulations:

- The special education regulations (34 C.F.R. § 300.323(e),(f), and (g); 8 VAC 20-81-120) set forth requirements regarding the provision of special education and related services for students who transfer between school divisions in Virginia or from a division outside Virginia.
- The Virginia Regulations, at 8 VAC 20-81-120.A.2, direct the new school division to provide a free appropriate public education (FAPE) to the student, including ensuring that the student has available special education and related services, in consultation with the parent(s), including services comparable to those described in the student's IEP from the previous school division, until the new school division either: (i) adopts and implements the student's IEP from the previous school division with the parent's consent; or (ii) conducts an evaluation, if determined necessary by the local educational agency, and develops and implements a new IEP with the parent's consent.
- Further, the Virginia Regulations (8 VAC 20-81-120.A.3 and 4) authorize the new school division to develop and implement an interim IEP with the parent's consent while obtaining and reviewing whatever information is needed to develop a new IEP. If the parent and the school division are unable to agree on interim services or a new IEP, the parent or school division may initiate the dispute resolution options of mediation or due process to resolve the dispute. During the resolution of the dispute, the school division must provide FAPE in consultation with the parent, including services comparable to those described in the student's IEP from the previous local school division.
- If the school division determines that it is necessary to conduct an evaluation of the student, the school division must provide proper notice, initiate evaluation procedures, conduct the evaluation, determine eligibility, and develop an IEP in accordance with special education regulations. During the evaluation period, the student is to receive services in accordance with the existing IEP, excluding any portions that are inconsistent with the Virginia Regulations. The school division must inform the parent of any such inconsistent provisions (8 VAC 20-81-120.C).
- Special education regulations (34 C.F.R. §§ 300.322, 300.500, and 300.501; 8 VAC 20-81-170.A.1.b) set forth 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.

Findings:

The Office of Dispute Resolution and Administrative Services find VBCPS to be in noncompliance with regard to Student 4 on this Issue. In addition, we find VBCPS to be in compliance on a systemic basis on this Issue.

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Analysis:

Student 4

- Chronology

DATE	EVENT
8/9/2017	The VBCPS received Student 4's out-of-state IEP providing for a "shared aide."
8/25/2017	The IEP Team reviewed transfer IEP. Prior written notice from the meeting stated that VBCPS refuses to implement the transfer IEP because it "is not able to be implemented due to the shared aide services." Further, it stated that, "The IEP services include a "shared aide," a teacher assistant who is shared between specific students per class. VBCPS assigns one or more teacher assistants to the classroom, and the assistants are available to all of the children in the classroom."
9/1/2017	The IEP Team proposed annual IEP that did not include a shared aide.
9/21/2017	The IEP Team met to address parental concerns.
10/11/2017	Parent consented to proposed annual IEP.

- The VBCPS contends that, because there was an aide available in the classroom for all students, it offered comparable services.
- As all parties agree, a "shared aide" is an aide assigned, not to a single student, but to more than one, but less than all students in the classroom. The VBCPS' assertion that an assistant assigned to the entire classroom is a "comparable service" is without merit. Clearly, a classroom aide is a reduced service and not comparable to a "shared aide." Accordingly, we find VBCPS in noncompliance with regard to Student 4 on this Issue.

Systemic Issue

- Two military families not included among students identified by the Complainant alleged in interviews that VBCPS rejected their students' out-of-state IEPs and failed to provide comparable services. In one case, the transfer student had an IEP for private day services. In the other case, the parent stated that the school division implied that it had the right to refuse to provide comparable services. We note that these incidents are several years old.
- Our review of comparable files identified eight additional students with transfer IEPs. In five cases, the transfer IEPs were implemented as written. In the others, VBCPS developed its own IEP. The random file review did not reveal any additional issues.
- Based on the foregoing, we find no systemic violation with regard to this issue.

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

The Complainant alleged that, with regard to Students 5, 6, 7, and 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 Student 6's present levels of performance (PLOP) are not addressed by either services, goals, interventions, or accommodations in the IEP.
- The parent concerns are not considered in the development of IEPs.
- The IEPs for Students 7 and 8 do not include transition plans. The respective IEPs do not (i) include goals to address transition and (ii) identify an outside agency to assist with transition planning. Additionally, VBCPS did not explain or discuss the interagency release form with Students 7 or 8 or their parents.

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. 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. 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. §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.

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Findings:

For the reasons set forth below, the Office of Dispute Resolution and Administrative Services will issue separate finding with regard to Student 5 and Student 6.⁹ The Office of Dispute Resolution and Administrative Services find VBCPS to be in compliance with regard to Student 7 and Student 8. The Office of Dispute Resolution and Administrative Services find VBCPS to be in noncompliance on a systemic basis with regard to Issue 4 in the area of post-secondary transition services, and will address the other portions of the systemic issue below.

Analysis:

Student 5

- See Issue 2 above for Chronology.
- The VBCPS states that Student 5's IEP addressed his behavioral needs through goals, services and accommodations. The VBCPS also states that it conducted an FBA and developed a BIP for Student 5.
- As noted above, after reviewing the file and conducting interviews, and in light of the disturbing and complex nature of the parents' allegations, we believe that it would be a disservice to both parties to render findings without additional information. As a result, we will sever this issue and deliver separate findings with regard to Student 5.

Student 6

- Chronology

DATE	EVENT
8/2/2017	The IEP Team met to amend Student 6's IEP.
11/3/2017	The IEP Team met and increased Student 6's services in the special education setting and added goals.
2/3/2018	The IEP Team met to discuss Student 6's behavior and to propose an FBA.
2/28/2018	The IEP Team met and changed student's schedule to half-day kindergarten. Prior written notice indicates that most problem behaviors were occurring in the afternoon. Parent consented to the change.

⁹ The regulations allow this office to extend the timeline for issuance of findings in extraordinary circumstances. We find that such exceptional circumstances exist in these cases. We will inform the parties of the ongoing parameters of the investigation under separate cover.

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3/19/2018	The IEP meeting held to propose annual IEP. Parent requested that the meeting be reconvened, as she was not able to be physically present.
4/30/2018	The IEP meeting held. The VBCPS proposed a psychological evaluation, an FBA and an OT evaluation.
6/4/2018	The IEP meeting held to propose BIP.

- Our interviews with the Parent indicate that once or more a week, she or Student 6’s father were called to pick up the student. She indicates that this occurred with such frequency Student 6’s father lost his job.
- The record contains a copy of a video recorded by the classroom teacher.
- The VBCPS’ response states that, on 11/3/2017, the IEP Team modified Student 6’s IEP to reflect his social/emotional needs and proposed and developed an FBA and a BIP.
- The VBCPS’ further states that Parent’s concerns are noted in the IEP and are reflected in the prior written notice.
- After reviewing the file and conducting interviews, we conclude that the parent’s allegations are disturbing and complex, so much so that we believe that it would be a disservice to both parties to render findings without additional information. As a result, we will sever this issue and deliver separate findings with regard to Student 6.

Student 7

- Chronology

DATE	EVENT
3/9/2018	Annual IEP meeting held.
3/16/2018	The IEP meeting held to continue discussion from 3/9/2018.
5/9/2018	The IEP meeting held and IEP amended.

- In its complaint response, VBCPS states that Student 7’s IEP contains a transition plan with goals, based in part on a Parent interview. It states that no outside agency is identified at this time because VBCPS is assuming the responsibility for supporting transition goals through transition activities.
- Student 7’s IEP relies on Student and Parent interviews for the age-appropriate transition assessments. The IEP then sets forth measurable post-secondary goals related to education, employment, independent living skills, and training tied to Student 7’s and Parent’s information. It then addresses coordinated activities in the area of education, training, independent living and

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employment, again, tied to the student and parent interviews. Finally, it includes a projected course of studies as the curriculum for the advanced studies or standard diploma. Thus, the IEP meets the bare minimum regulatory standards for a transition plan, and thus, we find VBCPS to be in compliance with regard to this issue. Because of the weakness of the plan, however, we offer the following:

- We note that by the end of eighth grade, a student should have an academic and career plan. The VBCPS did not address this in the transition assessment area of the IEP. This could provide vital information for the development of a more robust transition plan.
- The independent living skills goal recites that, “After five months of securing employment, [Student 7] will live at home while she accesses community resources.” This goal should be significantly more specific and clear.
- The coordinated activity for education does not address exploration of college opportunities and programs in creative writing.
- While we note that Student 7 is an eighth grader and interagency connections might be premature at this time, in her interview, the Parent expressed extreme frustration about obtaining information from VBCPS about outside agencies and resources. The VBCPS should be ready to provide the Parent with this information.

Student 8

- Chronology

DATE	EVENT
5/9/2018	Student 8’s annual IEP was proposed.

- In its complaint response, VBCPS states that Student 8’s IEP contains a transition plan with goals, based in part on a Parent interview. No outside agency is identified at this time because VBCPS is assuming the responsibility for supporting transition goals through transition activities.
- Student 8’s IEP relies on Student and Parent interviews for the age-appropriate transition assessments. The IEP then sets forth measurable post-secondary goals related to education, employment, independent living skills, and training tied to Student 8’s and Parent’s information. It then addresses coordinated activities in the area of education, training, independent living and employment, again, tied to the student and parent interviews. Finally, it includes a projected course of studies as the curriculum for the Advanced Studies or Standard Diploma. Thus, the IEP meets the bare minimum regulatory standards for a transition plan, and we find VBCPS to be in compliance with regard to this Issue. Because of the weakness of the plan, however, we offer the following:

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- The coordinated activities are vague and some address subjects not mentioned as needs elsewhere in the IEP. The coordinated activities do not address learning about college opportunities.
- In her interview, the Parent expressed extreme frustration about obtaining information from VBCPS about outside agencies and resources. The VBCPS should be ready to provide the Parent with this information.

Systemic Issue

- Post-Secondary Transition
 - While a few of our parent interviews for students not named in the IEP reflected concern with transition programs, the problems with post-secondary transition surfaced primarily through our review of similarly situated students and through the random file review.
 - Of 104 relevant files, 8 did not reflect that the student had been invited for transition purposes.
 - Of 14 relevant files, 1 did not include consideration of the student's preferences and interests when the student did not attend.
 - Of 14 relevant files, 1 did not include age appropriate measureable post-secondary goals based on assessments.
 - Of 93 relevant files, 21 failed to identify courses of study for to reach transition goals. More specifically, for students not pursuing a standard or advanced studies diploma, the IEP failed to address the nature of their coursework/curriculum.
 - Of 93 relevant files, 5 did not contain annual goals related to student's transition needs.
 - Of 73 relevant files, 11 did not contain a statement of interagency responsibilities or linkages.
 - None of the files reviewed reflected that any interagency connection had been made.
 - Of 65 relevant files, 6 did not contain the required notice concerning age of majority.
 - The number of instances of noncompliance in the area of post-secondary goals – 53 – accounts for more than a third of the total noncompliance findings in this review. Accordingly, we find VBCPS to be in noncompliance on a systemic basis with regard to this Issue.
- Other IEP Development Issues
 - Each parent interviewed who had an eligible student expressed concerns with regard to the content of their student's IEP. These concerns encompass those identified by the random file review.
 - In addition, review of files of similarly situated students revealed some of the same concerns outlined below.
 - As stated above, the random file review raised the following specific concerns:

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- Some IEPs had only one or two goals, even when the present levels of performance indicated other areas of need. Even if there were multiple goals, they were not always aligned to the needs delineated in the present levels. This was a common theme in parent interviews.
 - Fewer than ten students in the files reviewed qualified for extended school year services.
 - Few students had related services or assistive technology included in their IEPs, even when the present levels of performance indicated a need.
 - In many cases, neither behavioral intervention plans (BIPs) nor behavioral goals were included even when the record showed a need for behavioral supports. In some cases, there were accommodations for behavior, but they were not clear enough to be implemented. In fact, interviews and file reviews indicate a failure to connect behavior and learning in a troubling number of cases.
 - Explanations of evaluation data were often weak.
 - Many IEPs were similar, suggesting a less-than-individualized approach.
 - Several IEPs had the same goals over a course of years.
- In sum, far too many IEPs failed to connect their various elements. The IEPs are intended to be documents that address a student's needs in a coherent, connected manner. The Present Levels should drive the goals, the Present Levels and goals should drive the accommodations and services, and all of these elements should lead to a logical conclusion about the least restrictive environment. If an IEP fails to do this, it will likely not meet the *Andrew F.* standard.
- As stated above, our regulations require us to make a finding, except in cases where dismissal is appropriate. We cannot make a finding of systemic noncompliance in light of the standard articulated above. We would prefer to make no finding, but that is not a choice, we find VBCPS to be in compliance with regard to this Issue. Again, we have grave concerns about this matter as outlined above, and we urge VBCPS to promptly address these issues. We refer VBCPS to the discussion above.

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 not 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 implementing regulations, at 34 C.F.R. § 300.613, and the Virginia Regulations, at

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8 VAC 20-81-170.G.1, state the local educational agency shall permit the parent(s) to inspect and review any education records relating to their children that are collected, maintained, or used by the local educational agency. 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 8 VAC 20-81-160 and 8 VAC 20-81-210, or resolution session in accordance with VAC 20-81-210, and in no case more than 45 calendar days after the request has been made.

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. 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.

Findings:

The Office of Dispute Resolution and Administrative Services find VBCPS to be in noncompliance with regard to Student 6. In addition, the Office of Dispute Resolution and Administrative Services find VBCPS to be in compliance on a systemic basis with regard to Issue 5.

Analysis:

Student 6

- The VBCPS contends that it provided Student 6's Parents with all educational records. It included a statement from the principal of Student 6's elementary school stating that she provided the records on an unspecified date in June, 2018.
- However, the record also contains the parent's request for records dated April 23, 2018. We note that the chronology indicates that an IEP meeting occurred on April 30, 2018. In that there is no evidence that VBCPS made the records available to the parent prior to the IEP meeting, we find VBCPS to be in noncompliance with regard to this issue.

Systemic Issue

- Interviews with four parents not named in the complaint expressed frustration with the length of time it took for VBCPS to respond to requests for records. However, neither our reviews of similarly situated students nor the file reviews suggested significant issues with regard to student records. We note that the school division has adopted a compliant student records policy, and that it provides the required notices under the *Family Educational Rights and Privacy Act* (FERPA). As a result, we find VBCPS to be in compliance on a systemic basis with regard to this issue. However, because of the individual finding and expressed parental concerns, we strongly caution VBCPS to ensure that it is providing access to student records in a timely manner.

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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 a group of students assaulted Student 2 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.
- The 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."

Findings:

The Office of Dispute Resolution and Administrative Services find VBCPS to be in noncompliance with regard to Student 2. We will address our findings with regard to the systemic issue below.

Analysis:

Student 2

- See Issue 2 above for Chronology.
- While the facts are in dispute with regard to certain events, the record contains documentation that, at least as early as November 11, 2017, the Parent communicated with the school regarding concerns about Student 2 being subjected to bullying by a particular group of students. Most concerning is a text message between the Parent and one of Student 2's teachers on the day of the

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incident. After hearing about the altercation from the Parent, the teacher replied, "Oh no. I knew I should have made [Student 2] stay with me today, but [Student 2] wanted to walk around. I'm so sorry."

- The record shows that Student 2 has not returned to school since the February 20, 2017, incident. While school divisions are not guarantors of a student's safety, when they learn of bullying, they must address the issue. In this instance, there is clear evidence that the teacher was aware of potential issues, but nonetheless, allowed Student 2 to leave the classroom. As a result, we find VBCPS to be in noncompliance with regard to this issue.

Systemic Issue

- Almost two thirds of the parents interviewed reported that their child had been bullied, either by other students or, more alarmingly, by a teacher or administrator. Record reviews shed little light on this subject. Particularly disturbing were accounts of students who had been pushed to the point that they retaliated, and suffered disciplinary consequences. This further supports our conclusion that far too many teachers and administrators in VBCPS fail to understand the relationship between behavior and learning, the effect of trauma on learning, and the ways in which a disability can affect behavior. The posture of this case does not permit us to find VBCPS to be in noncompliance with regard to this issue. As stated above, our regulations require us to make a finding, except in cases where dismissal is appropriate. We cannot make a finding of systemic noncompliance in light of the standard articulated above. We would prefer to make no finding, but we are constrained by our regulations. Thus, we find VBCPS to be in compliance with regard to this issue. Again, we have grave concerns about this matter as outlined above, and we urge VBCPS to promptly address the issue. We refer VBCPS to the discussion above.

CORRECTIVE ACTION PLAN:

Exhibits A, B, and C include information on elements of noncompliance identified through the random file review. Such incidents should be corrected as directed in the exhibit. This office found VBCPS to be in noncompliance on student-specific issues with regard to Student 1 under Issue 1, with regard to Student 4 under Issue 3, with regard to Student 6 under Issue 5, and with regard to Student 2 under Issue 6. Accordingly, this office directs VBCPS to complete the following corrective actions no later than November 20, 2018.

1. Promptly convene a properly comprised meeting of the IEP Teams for each of Student 1, Student 4, and Student 6 to discuss what compensatory services, if any, should be provided to each student because of VBCPS' noncompliance.

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- If the Team determines that compensatory services are required, submit an IEP Addendum, as developed at the above-referenced meeting, which has been signed and consented to by the Parent and which outlines the IEP Team's plan to ensure that the student receives any compensatory services to which the Student is entitled. **If, however, an agreement is not reached via the IEP process, the parties are urged to consider the options of either due process or mediation to resolve this matter.**
- 2. Provide to this office and to the parent a copy of the prior written notice (displaying all required regulatory components) issued in connection with the IEP meeting convened pursuant to this CAP.
- 3. With regard to Student 6, provide an instructional memorandum to building administrators reminding them of the required timelines for making student records available following a parent request. Provide a copy of such memorandum to this office no later than November 30, 2018.

We also found VBCPS to be in noncompliance on a systemic basis with regard to post-secondary transition. Accordingly, we direct VBCPS to contact this office to schedule mandatory training for secondary school special education teachers and administrators on post-secondary transition. In addition, we direct VBCPS to review all IEPs for students for whom post-secondary transition services are provided, and to hold an IEP meeting to correct any deficiencies identified.

The VBCPS should retain copies of all documentation related to its corrective action for subsequent follow-up by this office.

OTHER ISSUES:

In our investigation, we saw common themes unrelated to compliance or noncompliance, but that were disturbing enough that we feel compelled to call to the attention of the division.

Cultural Issues

The parents we interviewed universally reported negative experiences with the school division. These range from feeling as though they are "talked down to," that their time is not valuable, and that their concerns are belittled or dismissed. They feel that the school division provides the minimum that they can for students with disabilities, and that they are in fact, discriminated against. For instance, one parent reported that she requested that her daughter be allowed to go to school for "zero bell," a program that is offered to allow students to complete their physical education requirements before school so that they can participate in activities such as band, along with taking a full academic load. In this case, the student had a resource class to assist with her special education needs, and the parent wanted her student to be able to participate in Chorus. Transportation is provided for students for this program, and the bus passed by her house. Her

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request was refused, as “that’s a program for gifted students.”

Parents further reported that if they pushed for more services or complained in any way, they felt as if they were the subject of retaliation. Most disturbing was the treatment reported by military families. We heard a common theme that they felt that the schools were simply trying to delay until they were transferred.

Organizational Issues

We were disturbed by the fact that building level administrators have limited accountability to central office special education administration. More than one parent reported that central office personnel had attempted to intervene in a situation, but they were disregarded by building level personnel.

In addition, we are concerned that psychological and social work services have limited accountability to special education administration. For instance, central office special education administration is quite aware of the problem with failure to re-evaluate at the triennial. They report, however, that they have no authority to address the situation.

Finally, parents expressed frustration at the level of decentralization that exists in VBCPS. They felt as if there were different rules at every school on things that should be standard across the division.

APPEAL INFORMATION:

Please note that the findings in this Letter of Findings are specific to this case. While general rules are cited, findings in other cases may differ due to distinctions in the specific facts and issues in each case.

Either party to this complaint has the right to appeal these findings within 30 calendar days of our office’s issuance of the Letter of Findings. Any appeal must be received by our office no later than November 30, 2018. **Please be advised that an appeal request from either party does not relieve the school division of its obligation to submit the above-referenced Corrective Action Plan, which is due on November 30, 2018.**

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

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Dr. Aaron C. Spence

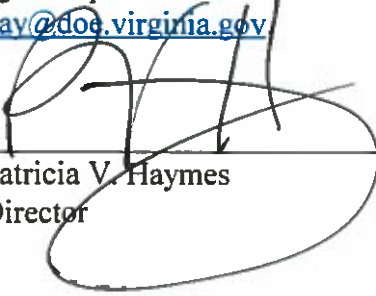
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Or via Email: ODRAS@doe.virginia.gov

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 email at: Sheila.Gray@doe.virginia.gov



Patricia V. Haymes
Director

Attachment - Appeal Procedures