V I R G I N I A :

IN THE OFFICE OF THE ATTORNEY GENERAL
OFFICE OF CIVIL RIGHTS

In re:	**Hear Our Voices, Inc., Trevor and Vivian Chaplick, and James and Sheila Bingham, Petitioners.**	**2023-_____**

COMPLAINT

1. Petitioners file this Complaint pursuant to the Virginia Human Rights Act ("VHRA"), Va. Code Ann. § 2.2-3900 *et seq.*, to request that the Office of Civil Rights of the Office of the Attorney General of Virginia investigate and prevent (i) deeply-rooted and long-standing practices of discrimination by the Virginia Department of Education ("VDOE") and the Fairfax County School Board ("FCSB") against disabled children in Fairfax County and across Virginia, a protected class under the VHRA; and (ii) widespread and significant violations by VDOE and FCSB of the federal and state civil rights of Virginia's disabled children and their families. Given the profound public interest in the subject matter of this Complaint, Petitioners specifically tender this Complaint as a public and non-confidential filing, and further request that the Office of Civil Rights make its investigation and further proceedings public, consistent with the limited confidentiality obligations placed upon the Office of Civil Rights by Va. Code Ann.

§ 2.2-523(A), which requires only that the Office of Civil Rights "not make public, prior to a public hearing pursuant to § 2.2-520, investigative notes and other correspondence and information furnished to the Office in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice."

2. It is the policy of the Commonwealth of Virginia to provide for equal opportunities throughout the Commonwealth to all its citizens, regardless of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, sexual orientation, gender identity, ***disability***, familial status, marital status, or status as a veteran and, to that end, ***to prohibit discriminatory practices with respect to*** employment, places of public accommodation, including ***educational institutions***, and real estate transactions by any person or group of persons, including state and local law-enforcement agencies, ***in order that the peace, health, safety, prosperity, and general welfare of all the inhabitants of the Commonwealth be protected and ensured***. Va. Code Ann. § 2.2-520(A) (emphases added).

3. The VHRA provides that conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, military status, ***disability***, or

national origin is an unlawful discriminatory practice. Va. Code Ann. § 2.2-3902. And the Virginia General Assembly has directed that the provisions of the VHRA shall be construed liberally for the accomplishment of its policies. *Id.*

4. On information and belief, for decades, and continuing to the present day, VDOE has discriminated against the disabled by knowingly failing to comply with its obligations under the Virginia Constitution and under federal law to protect the educational and civil rights of disabled children throughout Virginia including by facilitating and failing to prevent the deprivation of such rights by the FCSB, the governing body of the single largest school system in Virginia. Specifically, VDOE oversees a systemically defective educational system that is designed to obstruct, delay and ultimately prevent families with disabled children from receiving and vindicating their educational rights – rights guaranteed to them under the Virginia Constitution and federal law. Because the VDOE and FCSB have treated disabled children unfairly relative to children without disabilities in relation to fundamental educational rights, VDOE and FCSB have engaged in unconstitutional discrimination against such disabled children.

5. Petitioners have described these acts of discrimination and violations of law in painstaking detail in the Amended Complaint filed in *D.C. et al. v. VDOE, et al.*, Case No. 22-cv-1070-MSN-IDD (E.D. VA) (ECF No. 43), attached hereto as

Exhibit D and incorporated by reference.[1] These allegations include curating and maintaining a roster of hearing officers, the majority of whom have never ruled in favor of a disabled child in a due process hearing brought under the IDEA in two decades. In Northern Virginia, the situation is shockingly even worse with over 80% of the hearing officers having never ruled for a disabled child in the last decade. The allegations set forth in the Amended Complaint are based in significant part on previously unpublished documents received pursuant to requests under the Virginia Freedom of Information Act as well as the actual experiences of many families of disabled children in Virginia who have come forward.

6. VDOE and FCSB have been depriving disabled children of their federal and civil rights for decades. VDOE and FCSB have done so despite multiple investigations and findings of violations by the U.S. Department of Education ("USDOE"), violations that continue to this day. For example, the USDOE announced on November 30, 2022 ("USDOE 2022 Report") that it had identified widespread violations of the IDEA by FCSB during the pandemic that must be remedied by the delivery of compensatory services. Attached hereto as Exhibit A is

[1] To the extent that the allegations in Exhibit D concern the injustices suffered by the Chaplick and Bingham families, they are incorporated herein based on personal knowledge of each family. Otherwise, they are incorporated based on investigation, information, and belief.

the USDOE 2022 Report documenting the findings of its nearly two-year investigation of FCSB.

7. In January and February of 2023, the USDOE reemphasized its long-standing findings that VDOE has continuously failed for years to adequately oversee its school districts. The USDOE has expressed significant concern over Virginia's failure to adequately supervise its school systems including, but not limited to, failures with respect to monitoring, due process, and policies and procedures governing independent educational evaluations ("IEEs"). Attached hereto as Exhibits B-1, B-2 and B-3 are the most recent letters from the USDOE to VDOE documenting the USDOE's findings and warnings concerning legal violations. In fact, VDOE's violations and failed oversight have been so widespread and long-standing that the USDOE threatened to both restrict federal funding and potentially downgrade its rating of Virginia under the IDEA. *See* Exhibit B-1 ("However, please note that the noncompliance first identified in OSEP's monitoring report and follow-up letters include items that represent longstanding required correction. If VDOE is unable to demonstrate full compliance with the IDEA requirements identified in OSEP's monitoring report, this could result in the imposition of Specific Conditions on VDOE's IDEA Part B grant award and could affect VDOE's determination under section 616(d) of IDEA." (emphasis added)).

8. The violations identified by the USDOE have been so extensive, and consequently the discrimination against the disabled community is so acute, that disabled families could be in jeopardy of losing the benefit of critically needed federal funding. Aside from the basic injustice of discrimination against the disabled, the Virginia Attorney General and its Office of Civil Rights must step in to investigate VDOE and FCSB, to ensure disabled students rights and to prevent the imminent loss of up to thirteen billion dollars annually in federal funds that are awarded to Virginia under the IDEA. Attached hereto as Exhibit C is the letter dated July 1, 2022 from the USDOE approving Virginia's application for funds in 2022 under Part B of the IDEA.

9. The problems found by the USDOE have also been investigated and confirmed in a report prepared by the Joint Legislative Audit and Review Commission, the agency authorized by the Virginia Legislature to oversee and report on the Virginia state agencies (the "Commission"). On December 14, 2020, the Commission published a Report to the Virginia Governor and the General Assembly on special education in Virginia (the "Commission Report"). *See* http://jlarc.virginia.gov/landing-2020-special-education.asp. Before 2020, the last comprehensive review of special education by the Commission was in 1984. The Commission Report is extensive and approximately the same length as the Petitioners' Amended Complaint (Exhibit D).

10. The Commission Report both mirrors the findings in the USDOE investigation and found other extensive problems in the way disabled children are treated in Virginia. An overarching problem identified by the Commission was the VDOE's failure to meet its federal obligation to oversee school districts in administering special education services for disabled students.

11. Specifically, the Commission Report found that (i) "***VDOE's awareness of potential problems*** with school divisions' identification and eligibility determination practices ***is limited***"; (ii) "VDOE generally ***does not validate*** divisions' self-reported compliance"; and (iii) "VDOE ***provides minimal monitoring of IEP development*** in school divisions, despite how critical the process is to ensuring students receive appropriate special education and related services". Commission Report at 32, 43, 90 (emphases added). The Commission further determined that (i) "VDOE does not require school divisions to address identified non-compliance even when it involves not providing needed services," and (ii) VDOE "rarely ensures found non-compliance is corrected" in state complaints submitted to VDOE. Rather than require compensatory services as required under federal law, "with only rare exceptions" VDOE simply directs the school division to hold another IEP meeting and advises dissatisfied parents to pursue dispute resolution through mediation or due process hearings. This subjects parents to costly

due process hearings and "***further delays the provision of needed services to students***." Commission Report at iii–iv, 92–93 (emphasis added).

12. After reviewing the Commission Report, Charniele Herring the Virginia House Majority Leader described the findings of the Commission Report as "shocking". Virginia Senator Janet Howell, the Legislative Vice Chair of the Commission, described the Report as "devastating". She said, "I sense a real urgency for us . . . the last thing we need is a federal lawsuit." *See* https://www.virginiamercury.com/2020/12/15/devastating-new-report-finds-major-problems-with-special-education-in-virginia/. So, Virginia officials have known the issues are bad for a long time and have been bracing for a lawsuit like the one alleged in the Amended Complaint for years. Unfortunately, history overtook both the USDOE and the Commission investigations with the arrival of the pandemic. In fact, it actually got worse for the disabled during the pandemic as evidenced by the findings of the USDOE 2022 Report against Fairfax County.

13. In short, the USDOE and the Commission have both determined after extensive investigations that the VDOE is not overseeing or policing school districts and is failing to protect disabled children. When school districts go rogue like Fairfax County and violate the federal law, the VDOE does nothing and is simply directing parents into a due process system that is so badly rigged and stacked against them that parents almost never win. Parents are left with no effective remedies to protect

the rights of their disabled children. Many parents are desperate and frustrated that no one has stopped these ongoing injustices.

14. As noted above, under Section 2.2-3900.B.1 of the VHRA, it is the policy of Virginia to safeguard all disabled persons from unlawful discrimination. "Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of . . . disability . . . is an unlawful discriminatory practice." Section 2.2-3902. Petitioners assert that the Office of Civil Rights of the Virginia Attorney General have both a moral and legal obligation to investigate the matters alleged in this Complaint as unlawful discriminatory practices that have gone on for far too long. On information and belief, the actions and omissions of VDOE and FCSB have not only deprived the protected class of disabled children of their fundamental rights, but have created an imminent risk of jeopardizing critical federal funding for such children under the IDEA.

15. The core injury suffered by disabled children is the deprivation of their fundamental right to an appropriate education guaranteed by both the Virginia Constitution and the IDEA. Another fundamental injury caused by the systemic defects in the Virginia educational system is that parents of disabled children, many of whom are poor or of limited means, have been wasting their precious resources to fight for the educational rights of their children with no knowledge of the many ways in which the education system is stacked against them and the fact that due

process hearings are virtually always decided against families. Had the VDOE and FCSB been transparent, these parents could have used their precious resources to provide needed educational benefits to their children rather than wasting such money on lawyers, consultants and other litigation expenses. The poor in Virginia have borne a disproportionate burden under Virginia's defective system in attempting to vindicate the legal rights of their disabled children.

16. On information and belief, the Virginia Attorney General and its Office of Civil Rights have inexplicably failed to investigate this scandal for decades. It is time that the Office of the Virginia Attorney General no longer ignore the civil rights of disabled children and take action to (i) comply with its statutory as well as moral obligations to investigate and defend the civil and human rights of Virginia's disabled children, and (ii) prevent the imminent loss of critical federal funding due to chronic and serious violations of the IDEA.

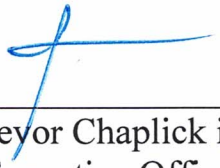
WHEREFORE, Petitioners request that the Office of Civil Rights fulfill its duty under to Va. Code Ann. § 2.2-520(C)(1) to receive, investigate, hold hearings pursuant to the Virginia Administrative Process Act (Va. Code Ann. § 2.2-4000 *et seq*.), and make findings and recommendations upon this Complaint alleging unlawful discriminatory practices, including complaints alleging a pattern and practice of unlawful discriminatory practices, pursuant to the Virginia Human Rights Act (Va. Code Ann. § 2.2-3900 *et seq*.); that the Office of Civil Rights fulfill its duty

under Va. Code Ann. § 2.2-520(C)(3) to investigate the above-referenced incidents that constitute unlawful acts of discrimination under state and federal law and take such action within the Office's authority designed to prevent such acts; and that the Office of Civil Rights fulfil its duty under to Va. Code Ann. § 2.2-520(C)(4) to seek through appropriate enforcement authorities, prevention of or relief from the unlawful discriminatory practices alleged in this Complaint.

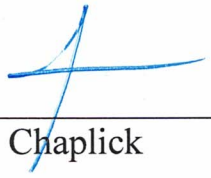
Affirmation

In accordance with Va. Code Ann. § 2.2-3907(A), Trevor Chaplick and Vivian Chaplick declare under penalty of perjury that the information provided herein that is related to the Chaplick family is true and correct based on their personal knowledge. James Bingham and Sheila Bingham likewise declare under penalty of perjury that the information provided herein that is related to the Bingham family is true and correct based on their personal knowledge. Petitioners further declare that all other information provided herein is true and correct based on investigation, information and belief.

Hear Our Voices, Inc.



By: Trevor Chaplick its President and Chief Executive Officer



Trevor Chaplick

Vivian Chaplick

James Bingham

Sheila Bingham

APPENDIX of information required by Va. Admin. Code 45-20-50(A)

1. The full name, address, and telephone number of the person making the complaint;

   Hear Our Voices, Inc.
   c/o MerrittHill, PLLC
   919 East Main Street
   Suite 1000
   Richmond, Virginia 23219
   (804) 916-1600

   Trevor Chaplick
   c/o MerrittHill, PLLC
   919 East Main Street
   Suite 1000
   Richmond, Virginia 23219
   (804) 916-1600

   Vivian Chaplick
   c/o MerrittHill, PLLC
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   Suite 1000
   Richmond, Virginia 23219
   (804) 916-1600

   James Bingham
   c/o MerrittHill, PLLC
   919 East Main Street
   Suite 1000
   Richmond, Virginia 23219
   (804) 916-1600

   Sheila Bingham
   c/o MerrittHill, PLLC
   919 East Main Street
   Suite 1000
   Richmond, Virginia 23219
   (804) 916-1600

2. The full name and address of the person against whom the complaint is made;

   Dr. Michelle Reid, Superintendent
   Fairfax County School Board
   8115 Gatehouse Road
   Falls Church, Virginia 22042

   Dr. Lisa Coons, Superintendent of Public Instruction of Virginia
   Virginia Department of Education
   James Monroe Building
   101 N 14th Street
   Richmond, VA 23219

3. A clear concise statement of the facts, including pertinent dates, constituting the alleged unlawful discriminatory practices;

   See paragraphs 2-11 above.

4. The date of filing and the name of the agency in cases where complaints alleging unlawful discriminatory practices have been filed before a local, state, or federal agency charged with the enforcement of discrimination laws; and

   January 20, 2023; United States District Court for the Eastern District of Virginia, Alexandria Division

5. Any documentation the complainant believes will support the claim.

   See Exs. A-D below.

Exhibit A

U.S. Department of Education 2022 Report

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

November 30, 2022

By email only to **mcreid@fcps.edu**

Dr. Michelle Reid
Superintendent
Fairfax County Public Schools
Gatehouse Administration Center
8115 Gatehouse Road
Falls Church, Virginia 22042

Re: OCR Docket No. 11-21-5901
Fairfax County Public Schools

Dear Dr. Reid:

This letter is to notify you of the disposition of the above-referenced directed investigation initiated by the U.S. Department of Education, Office for Civil Rights (OCR), of the Fairfax County Public Schools (the Division) on January 12, 2021. OCR opened this investigation to determine whether during the COVID-19 pandemic the Division provided a free appropriate public education (FAPE) to each qualified student with a disability as required by federal law and provided students with disabilities equal access to education. In OCR's letter issued to the Division on May 4, 2021, OCR inquired about what the Division has done to address the effects of any pandemic-related disruptions in services required to meet the individual educational needs of students with disabilities.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability under any program or activity receiving Federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The Division is a public entity that receives funds from the Department and is therefore subject to Section 504, Title II, and their implementing regulations. Accordingly, OCR had jurisdiction to investigate and resolve this directed investigation under Section 504 and Title II.

Based on the evidence obtained through the Division's documents and data, as well as interviews of administrators, OCR found that the Division failed or was unable to provide a FAPE to thousands of qualified students with disabilities in violation of Section 504. Specifically, OCR found that during remote learning, the Division failed or was unable to provide a FAPE to thousands of qualified students with disabilities and failed to conduct evaluations of students with

disabilities prior to making significant changes to their placements and to ensure that placement decisions were made by a group of persons knowledgeable about the students and the meaning of the evaluation data, in violation of the Section 504 regulation at 34 C.F.R. §§ 104.33 and 104.35; (2) directed staff to apply an incorrect standard for FAPE that was not compliant with the Section 504 regulation, and categorically reduced and placed limits on services and special education instruction provided to students with disabilities based on considerations other than the students' individual educational needs, in violation of 34 C.F.R. § 104.33; and (3) failed to develop and implement a plan adequate to remedy the instances in which students with disabilities were not provided a FAPE as required by Section 504 during remote learning. In addition, the evidence obtained to date raised compliance concerns that staffing shortages and other administrative obstacles resulted in non-provision of some FAPE services for students with disabilities; and that the Division did not accurately or sufficiently track services provided to students with disabilities to enable the Department to ascertain the Division's compliance with 34 C.F.R. § 104.33, as required by 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.6(b)).

The Division signed the enclosed Resolution Agreement to address the violations and compliance concerns identified below.

I. Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires public school districts to provide a free appropriate public education (FAPE) to all qualified students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 104.34-36. Districts are required to conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. 34 C.F.R. § 104.35(a). Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. § 104.33(b)(2).

In interpreting evaluation data and in making placement decisions, a recipient school district must draw upon information from a variety of sources, establish procedures to ensure that information obtained from all such sources is documented and carefully considered, and ensure that the decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 104.35(c).

In addition, the Section 504 regulation, at 34 C.F.R. § 104.36, requires that school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of IDEA is one means of meeting this requirement.

The Section 504 regulation, at 34 C.F.R. § 104.6(a), provides that when OCR finds that a district has discriminated against persons on the basis of disability, the district shall take such remedial action as OCR deems necessary to overcome the effects of the discrimination. Compensatory services are required to remedy any educational or other deficits that result from a student with a disability not receiving the evaluations or services to which they were entitled.

Additionally, the Section 504 regulation at 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.6(b)) requires districts to keep records and accurate compliance reports in such form determined to be necessary to enable OCR to ascertain whether the district has complied or is complying with the regulations.

II. Summary of OCR's Investigation

A. Background

The Division is one of the largest school districts in the United States with 198 schools and centers serving more than 178,000 students. Of those, more than 25,000, or 14.4 percent, are students with disabilities. On March 13, 2020, in response to the COVID-19 pandemic, the Governor of the Commonwealth of Virginia issued an Emergency Order closing schools for a two-week period. Then, on March 23, 2020, the Governor ordered all Virginia K-12 schools to close for in-person learning for the remainder of the school year.

B. Methodology

OCR requested data from the Division on May 4, 2021. OCR requested information regarding the Division's response to the COVID-19 pandemic, actions the Division took to ensure that students with disabilities received a FAPE during remote learning, and what the Division had done to address the effects of any pandemic-related disruptions in services required to meet the individual educational needs of students with disabilities. OCR also conducted interviews of the Division's [redacted content], as well as the Division's former Director of the Office of Special Education and Procedural Support ("Director"), who was serving in that role at the outbreak of the COVID-19 pandemic and continued through June 2021.

III. Findings of Fact

A. The Provision of FAPE During Remote Learning

1. The Pivot to Remote Learning: Spring and Summer 2020

Following the emergency closure of schools on March 13, 2020, for the first two weeks the Division posted a variety of learning activities for students on its public website and through its Blackboard learning platform. Learning packets distributed to students during these weeks were focused on review of previously taught content. Then, after a transition period and spring recess, the Division initiated remote learning for all students on April 14, 2020. The remote learning program was limited and looked significantly different than the typical school day. The Division described the instruction offered during this time as a blend of review, practice, and new learning.

It was delivered through a combination of synchronous and asynchronous learning that included weekly instruction packets delivered by mail and virtually. The Division worked to procure and distribute 15,000 laptops at this time for students who were without access to a device at home. The Division's Distance Learning Plan for spring and summer 2020, published on its website, referred to the period from mid-April to June 2020 as Phase 2, which it described as including "Learning packet new instructional content mailed and posted, grades PreK-12; Teacher-directed synchronous and asynchronous learning sessions; Teacher April 14 to June 12 check-ins with asynchronous learning sessions; Teacher check-ins with students and virtual office hours; Continued distribution of laptops and MiFi devices; Ongoing staff training and collaboration."

The Division's Distance Learning Plan set forth the following learning timeframes for spring 2020:

- 2-3 hours per day, 4 days per week of synchronous learning activities (described as participation in virtual, teacher-directed instruction and individualized student support for language arts and mathematics, with integrated science and social studies; engaging with learning content presented through cable television, video web streaming, and the Division's YouTube Channel; and connecting with teachers through virtual office hours)
- 2-3 hours per day, 4 days per week of asynchronous learning activities (described as completing independent work, such as remote learning packets and other activities directed by the teacher for language arts and mathematics, integrated science and social studies, and choice activities for art, music, and physical education); and Flex learning for an amount of time to be determined by the student/family (described as including reading aloud and independent reading for pleasure for suggested minutes based on grade level, being active, and exploring "personal interests/passions").

The Division maintains that remote learning during the spring of 2020 was voluntary, rather than compulsory, meaning students were not required to participate. There was no penalty for not participating, *e.g.*, no truancy or grade penalties. Students did not receive fourth-quarter grades; rather, grading was used only to help students, by bumping up their grades from quarters one through three, primarily at the secondary school level.

On March 23, 2020, the Governor ordered all Virginia schools to remain closed for in-person learning through the end of the 2019-2020 school year. According to the Division, that order required its schools to remain in closed status for the rest of the spring. OCR asked the [redacted content] to explain her understanding of this "closed" status. She answered that if the Division is closed, "that's a different story in terms of providing everything provided when open. They were closed but they didn't want students to have no instruction, so there was a good faith effort to provide as much as possible with a closed Division." She stated that this was the general understanding in the Division. In response to a systemic complaint filed by a group of parents of Division students with disabilities with the Virginia Department of Education (VDOE) in May 2020, the Division asserted that, because it was only "attempting to provide ungraded and nonmandatory extension and enrichment learning activities for all students, [it was] not providing the kind of 'instruction/instructional services' generally to students—nor [were] schools 'open'—in a way that would constitute a full 'school day,' even on a virtual basis."

Despite its asserted "closed status," the Director told OCR that the Division believed "FAPE was necessary and an obligation." However, the Division communicated to staff and the student/parent community that FAPE under these circumstances "necessarily look[ed] different." The Director told OCR that what the Division provided to students receiving special education services through an IEP during spring of 2020 was "FAPE in light of the circumstances." As she later clarified, the Division understood FAPE at the time to require only "good faith reasonable efforts" to provide the services outlined in a student's IEP. She explained to OCR that "FAPE in light of the circumstances" meant that they did "the best they could to provide what a student needed to receive a FAPE" in the context of remote learning. She used an example of a student with an IEP requiring physical therapy services, telling OCR that students were not able to have a stander in their home during the pandemic, and that physical therapy therefore looked different.

To ensure equal access and provide "FAPE in light of the circumstances," the Division announced, on April 16, 2020, that it would be developing a Temporary Learning Plan (TLP) model for its students with IEPs.[1] According to that model, each TLP would "outline [the] special education and related services" that those students would receive through the rest of the spring, even though those services would "look different than what [was then] included in [their] IEP[s]." The Director told OCR that the purpose of the TLP was to ensure students with disabilities had access to remote learning. Information disseminated to staff, including training materials and FAQs provided to parents, explained that the purpose of the TLP was to identify "what goals, accommodations, and services" a student would receive during remote learning.

The TLP was formatted as a one-page letter, and information provided to parents made clear that it was not an IEP or Section 504 plan. Further, while staff were instructed to look to the IEP goals, as well as accommodations and services provided in the IEP, when developing the TLP, the Division made clear that the TLP would not contain the same services and accommodations included in the IEP. According to its April 9, 2020, FAQ, the TLP was instead "a letter which identifies the continuity of learning services and consultation that will be provided to students between now and the end of the school year."

In an April 27, 2020, letter addressed to parents of Division students, the Department of Special Services explained that it would "be doing [its] best" throughout the spring "to provide FAPE within the constraints of distance learning." The Division accordingly directed special education case managers to explain to parents that, "[d]uring the closure," the Division would "continue to provide [their] student with access to instruction and review related curriculum content and [their] child's specific IEP needs." For high school students, that would include "the opportunity" for students on IEPs "to move forward in [their] learning to receive credit for high school classes."

Special education case managers—whom the Division tasks with collecting, monitoring, and processing information regarding individual students—were also made responsible for developing the TLP. They were told to do so with input from any related service providers, as well as parents, but the Division made clear that case managers alone were to make those changes. If parents disagreed with the TLP the case manager proposed, they had the opportunity to request an IEP

[1] Although some documentation from the Division indicated students with Section 504 plans would also receive TLPs, communications from the [redacted content] to school-based Section 504 coordinators clarified that students on Section 504 plans were not included in the TLP requirement.

meeting. The Director acknowledged that the Division did not believe it was feasible to convene IEP meetings for all students. The Division told parents in the FAQs disseminated to the community and provided to staff in training that, by agreeing to the TLP, parents did not waive their or their child's rights under the IEP. They also told them that IEPs would be implemented "when school resumed." Case managers were provided the following statement to be used "to explain service delivery methodology on the TLP":

> Services and related services may be delivered in a variety of formats, such as telephone contact, emails, pre-recorded instruction via videos, and/or instruction through video conferencing sessions.

The Division also submitted two charts, one for pre-K through elementary students with disabilities, and another for middle and high school students with disabilities, dated April 17, 2020, each setting forth "suggested times" for services "during Covid-19 closure." As an example, the chart advised that for virtual related services, including speech, OT [occupational therapy], PT [physical therapy], counseling, etc., a student should receive 30 minutes per month per service, for students who had related services outlined in their IEPs "and require[d] access to virtual related services for maintenance." In another example, for a student needing adapted physical education, the chart called for her services to be set at "5 minutes per month."

The Division also submitted copies of sample TLPs, drafted by category of special education placement. Each gave examples of TLPs for specific services, along with suggested amounts. For example, the sample TLP for a middle or high school student learning in the Division's Adapted Curriculum program called for the student to receive 120 minutes per week of ID [intellectual disabilities] services and 30 minutes per month of speech and language services. The Division also reminded IEP teams that the services provided through a TLP "will look different and may be significantly reduced."

According to the [redacted content], students with Section 504 plans were not given TLPs; rather, the [redacted content] asserted that the Division continued to implement Section 504 plans. The [redacted content] told OCR that she provided guidance to schools to review every Section 504 plan and convene team meetings as necessary, to ensure that the plan could meet the student's needs within the new reality of remote learning. When speaking with OCR, the [redacted content] did not refer to "FAPE in light of the circumstances." Instead, she said that she instructed schools that they needed to be still trying for as close to FAPE as possible. She also acknowledged, however, that the reality was that the overall educational milieu was different and that impacted all students. Several documents the Division provided from that spring—including an April 13, 2020, e-mail to Section 504 school-based coordinators and FAQs issued later that month—were consistent with what the [redacted content] described. One set of Division FAQs regarding students with Section 504 plans from spring 2020 indicated that there were students who were to receive a related service or other special education service or class via their Section 504 plan that might not be able to be implemented within the remote learning setting. The FAQs advised Section 504 case managers to schedule a Section 504 plan meeting to address any needed modifications.

OCR asked the [redacted content] if there was a system to track how many Section 504 plans were reviewed during spring 2020. She stated that she could run a report to show how many meetings

happened, but it would not show whether teams looked at plans together and made a determination whether the needs of the child were being met or any determination made by the team. She noted that there was a professional expectation of staff that they were reviewing each plan, whether or not a parent asked for this to occur.

2. Return to School: 2020-2021 School Year

Following the Governor's June 9, 2020, order requiring school divisions to deliver new instruction regardless of the operational status of school buildings, and with the evolving perspective that the pandemic was going to last longer than initially anticipated, the Division shifted its approach beginning in the summer of 2020. The Division refers to the 2020-2021 school year as "post-closure," or the period of "re-opening" and "return to learning," even though the school year began virtually. These references appear to stem from the fact that the Division maintained that schools remained in closed status through the end of the 2019-2020 school year. While the educational program continued to look different in the fall of 2020 than it did before the emergency closure, the documentation reflects an effort to mirror the typical school day, including time for specialized instruction, special education support in general education classrooms, and teacher and peer-to-peer interaction.

The Director told OCR that, in accordance with guidance from VDOE, the Division discontinued the use of TLPs in the fall of 2020 and focused exclusively on the implementation of IEPs as written. The Director explained to OCR that the Division always saw the TLP as "a temporary provision of services for a short period of time," and knew it needed to implement IEPs for the 2020-2021 school year. The discontinuation of TLPs was also noted in an FAQ first disseminated to parents on August 20, 2020. The FAQ stated that, as part of the Division's "re-opening plan," supports and services for students with disabilities would include: convening IEP and Section 504 team meetings and providing individualized instruction based on IEP goals. It further stated that "Case Managers will review IEPs to determine if services can be delivered within the virtual schedule," and IEP teams would convene if the "goals, accommodations, or services need to be amended due to the virtual environment." The Division instructed IEP teams to meet to review IEPs to determine if the plans, as written, could be implemented virtually, and to convene team meetings to make changes as necessary, including contingency planning in the event of a return to in-person learning.

The Director told OCR that IEP teams began this process in the spring of 2020 and completed it in the fall of 2020, such that all IEPs were reviewed by early in the 2020-2021 school year. The [redacted content] told OCR that, in many cases, Section 504 plans were adjusted in the spring or summer of 2020. However, with instruction being "more robust" in the fall of 2020, she instructed school-based staff that they needed to be "re-looking at plans" in August 2020 and convene team meetings as necessary. It is unclear whether Section 504 teams convened in all situations where changes were needed.

The Division provided OCR a copy of a PowerPoint presentation titled "Return to School – Virtual IEP Guidance Document August 2020" and the associated document titled "Return to School – Virtual Individualized Education Program (IEP) Guidance Document for Staff August 4, 2020," as well as separate August 4, 2020, guidance documents broken out by grade level, including one

for elementary and one for middle and high school students. The speaker notes indicate that the presentation was for case managers. While the written guidance accompanying that presentation included a "Note" saying that "[s]ome" students with disabilities might need "additional time," both the presentation and the guidance indicated that there was a "maximum number of hours" that could "be documented on the IEP services page"—"no more than" 21 hours per week for elementary students, and "no more than" 24 hours for middle and high school students. Neither the presentation nor the webinar included the same "Note" regarding additional time. And the Division has provided no explanation reconciling the inconsistency.

With regard to related services including speech, OT, PT, and counseling, the presentation stated that for the virtual return to school in fall 2020 the IEP team was to determine the amount of related services based on the student's instructional time and IEP goals. The presentation stated that related service providers could join synchronous learning sessions, provide small group or individual sessions, review and appraise work samples (e.g., videos, pictures), and/or provide coaching to the parent and teacher.

The guidance accompanying the presentation also indicated that, for some students, IEP goals and objectives should be reduced, both qualitatively and quantitatively, to account for the virtual setting. It accordingly instructed "[c]ase managers [to] focus on goals or objectives that have practical application in the home environment, based on the number of specialized instructional hours determined for each student and can be realistically supported based on the number of days/hours in the week." The August 4, 2020, "Return to School – Virtual Individualized Education Program (IEP) Guidance Document for Staff" included more detailed examples of the goal changes the Division expected during remote learning. For instance, for a "Current IEP Goal" that expected a student to "answer who, what, when and where questions" after "listening to a text," "across 4 out of 5 texts per quarter", the suggested "Virtual Sample Instruction Goal" instead called for the student to "answer who and where questions about the text across 3 out 4 texts over four weeks." And for a "Current IEP Goal" in math, where the IEP expected that a student would be able to solve "multi-step equation problems" at 90% accuracy over three assessments that quarter, the Virtual IEP would instead aim for solving only "multi-step addition and subtraction problems," and then with only 80% accuracy over the same three assessments. OCR did not obtain evidence suggesting that the Division anticipated making similar changes to the objectives that students in the regular education curriculum were expected to master at the time, despite also learning remotely.[2]

In addition, OCR has learned of at least one student whose virtual IEP significantly reduced the level of services he was to receive while learning remotely. According to a federal complaint filed by the Division in July 2021, if the student were learning in person, "[f]or fifteen hours per month," he "would receive special education services within the general education setting," as well as "2 hours per month of small, self-contained speech language services." If services moved online—as

[2] At the time, the Division was communicating to the public that it did not expect the materials covered that year to change. *See* Hannah Natanson, *What you need to know about Fairfax public schools this year*, WASH. POST (Aug. 30, 2020), https://www.washingtonpost.com/education/2020/08/30/fairfax-public-schools-faq/ (asked in August 2020 whether "the school system curriculum changed as a result of the pandemic," a Division spokeswoman reportedly told the *Washington Post* that it expected "[t]he material being covered [that] year [to be] essentially the same as in other years," and that "[t]he Standards of Learning set by the Virginia Department of Education [would] remain the foundation of what [was to be] taught in Fairfax classrooms").

they did for "much" of the 2020-2021 school year—the student could only expect "2.5 hours per week of special education service in the general education setting" and another "hour per month" of his speech language services." According to the Division, "[b]oth of th[ose] proposals in the [student's] August 19, 2020 IEP offered [him] an appropriate education in the least restrictive environment."[3]

The August 2020 Virtual IEP guidance further noted that there might be a teacher shortage for students placed on home-based instruction, and asked staff to consider recruiting teachers at the attending school to take the assignment.

Other evidence OCR obtained from the fall semester suggests the Division was not fully tracking when students were really receiving services online. For example, during a recorded December 2020 webinar for middle and high school special education lead teachers, teachers expressed concern that during virtual instruction some students would log in, never turn on their camera or microphone, or otherwise engage or participate in instruction, for entire class periods. Nevertheless, according to the recording, the Division was still instructing teachers to count those students present. One teacher on the webinar expressed concern that those students may be struggling or not doing work and were not really part of class.

While some students were able to return for part-time in-person learning for part of the fall of 2020, the Division suspended the return to in-person instruction in December 2020 due to the surge of COVID-19 cases. The return to in-person instruction resumed in late January 2021, with students needing the most intensive support among the first students to return. The Director told OCR that, by March 2021, most students had been given the option to return to in-person instruction. However, documentation showed that the return to in-person was not full-time. For example, a March 18, 2021, elementary principal briefing mentioned a guidance being available titled, "Guidance for 4-Day Support for Students with Disabilities." An elementary principal briefing dated April 15, 2021, indicated that the Division would not be returning to 5-day in-person learning until the 2021-2022 school year. Moreover, media reports from summer 2021 indicated that the Division also had to delay the start of its summer 2021 instructional program because of a lack of teaching staff. According to those reports, summer instruction, including Extended School Year Services for students with disabilities, would not begin until late July.

The Division conducted a study published in November 2020 that demonstrates the significant impact on Division students with disabilities while learning remotely. The study found that the percentage of students with disabilities in middle and high school who failed two or more classes in the first quarter of the 2020-2021 school year (19%) more than doubled from the same time a year before. The study also found that, overall, the students who struggled the most academically before the pandemic were the ones most impacted by remote learning.

[3] Complaint, *Fairfax Cnty. Sch. Bd. v. A.G. by and through his Parents, Mr. G and Ms. G*, No. 21-cv-840 (E.D. Va. July 19, 2021). The district court ultimately resolved the case without addressing the appropriateness of the student's virtual IEP. *See Fairfax Cnty. Sch. Bd. v. A.G.*, No. 1:21-cv-00840-MSN-JFA, 2022 WL 4016882 (E.D. Va. Sept. 2, 2022).

B. Remedying Pandemic-Related Disruptions in Education Services for Students with Disabilities

1. Spring 2020

The Division provided OCR copies of e-mail correspondence among Division staff from the spring of 2020 through June 2020, including the Director, that indicated that Division administrators were aware that many students with disabilities were not receiving all of the supports and services provided for in their plans. These e-mails included an April 2, 2020, e-mail from the Director to the Assistant Superintendent for Special Services stating that the Division was "one of very few divisions that are committing to 'new learning' which will be a distinct disadvantage for sped compensatory."[4] An April 3, 2020, e-mail from the Division's Superintendent to other administrators in preparation for a Facebook event being held that afternoon asked "how do we want to identify students for future compensatory services – the more we can explain that process the more we can save community folks going to the board." In an April 8, 2020, e-mail, the Director stated to the Assistant Superintendent for Special Services that she had heard that, during the Facebook Live event, the Superintendent "made it sound like we know we are going to do compensatory services" but that she thought he meant "Tier 1" services for identified students "in danger of missed skills." An e-mail thread of April 9, 2020, discussed whether and how to include a question and answer on the topic "How will requests for compensatory services be managed?" in an FAQ for principals that was being drafted.

On April 16, 2020, the Director sent an e-mail to other Division administrators and counsel concerning an FAQ for parents that was being drafted, stating:

> It is premature to discuss remediation for students or to analyze our obligations to students. Compensatory services has been a term used recently, however, that term is a legal standard in special education specifically when there has been a denial of a FAPE. Covid 19 and the closure is not a denial of FAPE by the division. We agree that students with disabilities are a vulnerable population but it is too early to discuss exposure for special education compensatory remediation.

The Division submitted to OCR a copy of an undated FAQ disseminated to parents in the spring of 2020 which noted that "the IEP team should evaluate and discuss the effect of the extended closure on the student's progress toward their IEP goals." However, consistent with the Director's statement that it was premature to consider compensatory services for students, the FAQ stated that compensatory educational services would be determined only after "normal school operations resume."

Division administrators also discussed the budgetary implications of providing services students

[4] Although the Director did not elaborate, the Virginia Department of Education had similarly cautioned districts that spring that "[i]f a school division d[id] begin to offer instructional services by alternative means the division w[ould] remain responsible for the free appropriate public education (FAPE) of its students eligible for special education services with an individualized education program (IEP)." Va. Dep't of Educ., *School Closure Frequently Asked Questions*, Q.78 (last updated June 1, 2020), https://web.archive.org/web/20220120012537/https://www.doe.virginia.gov/support/health_medical/office/covid-19-faq.shtml.

missed in the spring of 2020. On April 21, 2020, the Assistant Superintendent for Special Services asked for a working group to be formed to put together costs and details for "sped compensatory services." On May 12, the Director sent an e-mail to the Assistant Superintendent for Special Services and the [redacted content], providing an "additional compensatory projection" that listed the amount of OT, PT, and speech and language services that Division students missed since March 13, 2020, and their anticipated cost.

The projection indicated that there were 2,187 students with OT services in their IEPs, who had missed approximately 10,371 total sessions of OT services since March 13, 601 students with PT services in their IEP who had missed approximately 2,535 total sessions of PT, and 7,032 students with speech services in their IEPs who has missed approximately 48,006 total sessions of speech. The Division calculated based on these numbers of missed sessions that compensatory services would cost $3,045,600 for this time period.

Later internal e-mails discussed preparations of similar figures for a budget presentation to the school board in late June 2020. Although the e-mail correspondence earlier in the spring discussed recovery and compensatory services, in an e-mail dated May 20, 2020, the Assistant Superintendent for Special Services mentioned that "with intervention/support and compensatory services," the Division "had more items ($) than the [CARES] grant could cover." Fiscal year 2021 budget documents on the Division's school board website indicated the Division had been approved by VDOE for a fiscal year 2021 CARES Act[5] grant that included $2.9 million for budget item "Remediation & Recovery," which was described as being for "Special Ed Compensatory."

In the same e-mail thread as the May 20, 2020, message described above, the Assistant Superintendent on May 21, 2020, asked other administrators, when they next presented to the school board, "can we refer to the sped compensatory language to [sic] 'Recovery/Remediation?'" From that point on, the group decided to use the term "Special Education Recovery/Remediation."

A June 30, 2020, e-mail from the Director to the Assistant Superintendent for Special Services included a modified version of the compensatory services projection described above.

The chart, dated May 13, 2020, was titled "Anticipated Compensatory Costs for Special Education," and set forth estimates for anticipated "comp claims" and "special education IEP related services missed within the time since distance learning started week of 4/13/20." Under the category "comp claims," the chart stated that the anticipated number of students "varied" and the number of services "varied" and included private placements and private tutoring, for a total approximate cost of $869,393. The second category was titled "Related Service Therapies (OT/PT/Speech)" and listed 9,820 students with approximately 40,608 sessions of services missed since April 13, for a total cost of $2,030,400. The chart projected $2,899,793 total anticipated compensatory costs for special education, approximately the amount the Division received through the CARES Act grant.

[5] The Department awarded grants under the Coronavirus Aid Relief, and Economic Security (CARES) Act for the Elementary and Secondary School Emergency Relief Fund (ESSER Fund) to State educational agencies for the purpose of providing local educational agencies with emergency relief funds to address the impact of COVID-19 on elementary and secondary schools across the Nation.

2. "Recovery Services:" Fall 2020

By early fall of 2020, the Division had launched its "COVID recovery services." As part of their roll-out, the Division offered staff a series of guidance documents and webinars throughout the fall, clarifying how it understood those services, and explaining how IEP teams were to design and deliver them. Those documents and webinars both make clear that the Division defined and implemented those services specifically to address demonstrated learning loss, not a denial of FAPE. And as the Division told its staff at the time, and OCR later, it did not consider those services to be the same as compensatory education, nor would it treat them the same way.

In August and September 2020, the Division developed two written guidance documents on recovery services: the "FCPS Guidance Document for IEP Teams for COVID Recovery Services" and another document called "Supplemental Document for Recovery Services." Purportedly adapted from VDOE guidance released on July 28, 2020, both documents were published on the Division's website and widely disseminated to the Division's staff.[6] According to those documents, the goal of offering recovery services was "[t]o mitigate and close the[ ] gaps" in learning that "some students with disabilities" saw following the shift to virtual instruction the prior spring. As the documents explained, recovery services were designed either to offer "additional services and support" so that those students could "recoup previously learned skills," or else to provide "new services and supports"—such as mental health services or "services related to a student's disability to address significant disengagement"—to help those students successfully return to in-person learning.

Eligibility for those services would therefore hinge on demonstrated learning loss. "[E]ach IEP team" was to "consider the student's rate of skill acquisition and IEP goal progress, and data from a variety of sources," including "data spanning the continuum of pre-COVID-19 school closure to the return to school with a focus on reducing the impact of the school closure and a return to student progress that is appropriate for the student." As a first step, the documents called for IEP teams to establish what the Division refers to as a "Pre-COVID 19 baseline," measuring the student's "rate of skill acquisition" prior to the spring of 2020. That "baseline" purportedly captured "the rate at which a student makes progress toward a goal when participating in instruction," and was to be based on variety of sources about the student's performance, such as progress on IEP goals, objectives, and benchmarks, as well as performance on assessments. Slides from the spring 2021 Division-wide training suggest, however, that only "students who are at or below this baseline are to be **considered** for COVID recovery services" (emphasis in original). The Guidance Document nevertheless indicated that staff should hold team meetings to consider recovery services in response to parent/guardian requests.

Beyond the pre-COVID baseline, the Division's guidance also advised IEP teams to consider other factors that appear to further limit who would be eligible for recovery services. For example, both the Guidance and Supplemental Documents instructed teams to consider the extent to which the student participated during remote learning or whether the parent declined services or did not make the student available for services during remote learning. The training provided to staff in November 2020 similarly suggested that a student who did not participate in remote learning may

[6] A version of the FCPS Guidance Document for IEP Teams for COVID Recovery Services remained available on the School Division's website as of March 30, 2022.

not be eligible for recovery services—a limitation reinforced by several of the examples given in the later Supplemental Document. Moreover, the Guidance Document again advised teams to consider whether services provided by the Division during remote learning were "reasonable in light of the circumstances," invoking the same understanding of FAPE that the Division had adopted by the end of the prior spring. Asked about these statements in the Division's guidance, the Director confirmed that the Division continued to apply its "FAPE in light of the circumstances standard" to make recovery services determinations. According to the Director, the question IEP teams were to ask was whether the Division had "offer[ed] FAPE in light of learning from home?" The Director conceded to OCR that the Guidance Document, so written, could result in not giving recovery services, but added that, in reality, the Division "didn't want to leave a student behind because they didn't participate," and that the Division "worked hard to provide" recovery services if a family wanted them.

The Division's guidance appears less clear about when a student could be found eligible for recovery services. The Guidance Document generally "recommended that schools schedule IEP meetings" to discuss recovery services only "after data [was] collected," seven to nine weeks into the 2020-2021 school year. Asked whether an IEP team could consider a student for recovery services earlier than that, the Director told OCR that the Division did not prohibit it but did encourage teams to use data from the first nine weeks of in-person instruction. The same timeline was echoed by other Division special education administrators during webinars held that fall.

During those fall webinars, the Division's special education administrators also made clear to staff that the "recovery services" the Division was providing were not the same as compensatory education, and that IEP teams should steer parents away from discussing compensatory services, and redirect them to recovery services instead. For instance, during a September 21, 2020, webinar for the Division's middle and high school special education chairs, a Division special education administrator ("Administrator") acknowledged that "some of you have gotten requests from parents that say 'I want to talk about recovery services,' or they maybe have said or attorneys or advocates have said 'I want to talk about compensatory services.'" The Administrator explained, however, that the two were not the same: "The reason for providing compensatory services involves a denial of FAPE, and/or failure to provide the student with the services and supports outlined in the IEP." The Administrator went on to advise that if "the parent continues to believe that this is compensatory let them know recovery services are very similar,'" but that "when we are looking at recovery services we are considering the services due to the COVID-19 pandemic school closure, and not a denial of FAPE." A week later, the Director drew the same distinction in a webinar for the Division's special education lead teachers. "You may have parents," she noted, "who use the word 'compensatory services' in their discussion with you about recovery." But, she explained, "They are not synonyms. They are not the same thing."

The Division conveyed the same message several weeks later, in an October webinar for its elementary special education lead teachers. In that meeting, the Administrator again stressed that recovery and compensatory services were not the same, and that at least for spring 2020, the Division was only considering recovery services:

> We've gotten a lot of questions what is the difference between 'recovery services' and 'compensatory,' because parents are using 'compensatory' a lot. During the

> COVID closure we heard, we received a lot of questions from school teams that parents have said their child requires compensatory services because of the COVID school closure… So when you think about compensatory services it's a remedy under IDEA when a student has been denied FAPE. It's when we've failed, or there's an inability by [the Division] to provide FAPE or implement the IEP. We didn't fail. Schools were closed. We had no control over COVID-19 and the school closures and the pandemic that occurred. It wasn't something that [the Division] did on purpose by closing its schools… And if parents—and parents may still bring this up in an IEP meeting—they may wany to call it compensatory, we're going to call it recovery.

Two months later, the Division held two virtual "Recovery Office Hours" for its department chairs, administrators, and teachers. In the December 7 webinar for its elementary school staff, the Administrator acknowledged that "people may be angry" about the building closures but added that "this is very different from compensatory," because "there's no failure on the part of anyone." Instead, she explained, "recovery services [are] not somebody's fault. Nobody did anything wrong. You know, COVID happened, and this is part of us trying to provide support for students where they have the need, or they haven't recouped skills, or they've shown huge gaps and regression." The Administrator delivered a similar message for the Division's middle and high school staff two days later. Referring to discussions about recovery services, she again acknowledged that:

> …they're tough conversations. But recovery services are so different from compensatory, in the sense that, it's not that we did anything wrong. It happened. The pandemic happened. And we're just trying to determine whether or not a student requires some services to recoup some lost skills or any skills that they've regressed in, versus compensatory where there's a denial of FAPE in some manner.

3. Recovery Services: Spring 2021

The Division continued to stress the same message about recovery services into the spring of 2021, while also acknowledging some unevenness in how IEP teams were handling and documenting those services.

In a January 25, 2021, webinar for special education lead teachers, a Division Program Manager opened a discussion of recovery services with "a reminder … about IEP teams continuing to think about recovery services for students." She explained that the Division had "heard from several parent groups that they ha[d] concerns that it's on a parent to bring up the idea of recovery services," even though "it is [the Division's] responsibility to provide recovery services." Still, she went on to say, "[r]ecovery services are not compensatory services. Recovery services aren't that anybody did anything wrong. Recovery services are just something that a child might require because of the pandemic and the situation that we've been in with virtual schooling for a lot of students." She also urged teachers "to be just really careful when" recording those services on students' IEPs. As she went on to explain, after running "a SEA-STARS report,"[7] the Division

[7] The Division uses an online platform called Special Education Administrative System for Targeting and Reporting Success (SEA-STARS).

had found that for "60% of the students who ha[d] recovery services on the services grid of their IEP, it was just a clerical error."

A week later, the Program Manager relayed the same message during a webinar for the Division's special education department chairs. There she again explained that the Division had "heard from a couple parent organizations and seen in some SEA-STARS reports … some concerns that [parent organizations] feel like parents are having to bring up recovery services," and that it was the Division's "responsibility to provide recovery services." Once again, however, she stressed that "recovery services are not compensatory services."

By spring 2021, the Division was also making recovery services determinations for Section 504-only students. The [redacted content] told OCR that the Division had provided its Section 504 staff the same Guidance Document as a resource but did not create another document specific to Section 504. According to an e-mail dated January 29, 2021, the [redacted content] advised the Section 504 school-based coordinators that "in the coming days/weeks" they could expect to hear about opportunities to learn more about COVID recovery services. The e-mail stated that the Division had an obligation to consider whether students with disabilities, "in some cases, may have sustained such significant consequences from the adjustments and related loss of educational opportunities during the pandemic that would lead to the consideration of recovery services." A little under a month later, the [redacted content] followed with another e-mail requesting that by March 1, 2021, the school-based coordinators "provide [their] best estimate of the number of students [they] believe[d] may require recovery services, for whom there is not currently a teacher/staff member in-house who [could] provide those services." The e-mail advised, however, that the coordinators "only need[ed] to submit information for those students for whom the knowledgeable committee [was] recommending recovery services," rather than "ALL 504 students."

4. Student Receipt of Recovery Services

According to the Division, as of May 17, 2021, there were 637 students with disabilities receiving recovery services, out of the approximately 25,000 students with disabilities in the Division. On February 23, 2022, OCR requested an updated total of students with disabilities who had received recovery services. In response, the Division told OCR that by the start of February 2022, approximately 1,070 students had received or had recovery services indicated on their IEP "in some form" and a total of 8 students on Section 504 plans had received recovery services.

The Director told OCR that the Division was monitoring the number of team meetings and the number of IEP amendments and that the numbers that included recovery services "were slower than [they had] anticipated at first." In response, she said that the Division sent staff from the Division's Office of Special Education Procedural Support (OSEPS) to the schools to help consider every student for recovery services. Additionally, the Division-wide training on recovery services provided in spring of 2021 was part of the Division's efforts to increase the number of students considered for recovery services.

The Director explained to OCR that, in some instances, the Division offered recovery services, but the parent felt that the student was not capable of benefitting from additional services at the time.

In those cases, she said, the recovery services remain available to the student should they wish to take advantage of them at a later point. She stated there was no end point for the receipt of recovery services.

The Division submitted to OCR a copy of a memorandum, dated April 13, 2021, from the Department of Special Services to special education elementary lead teachers and middle school and high school department chairs. A section titled "Summer Academy Recovery Services 2020-21" stated that recovery services would be provided during the summer 2021 "for select students with disabilities to address learning needs or regression because of the Spring 2020 school closure and virtual learning [during the 2020-2021] school year." The memo said that recovery services would be provided "at the ESY site" from June 28 to July 23, 2021, for students requiring them. The memo indicated there might be school teams that set up opportunities for summer recovery services to be delivered at the schools. The memo stated that a database for recovery services would be "coming soon." The memo further stated that the Department of Special Services would hold "Summer Recovery Academy" from June 21 through August 12, 2021, at various sites throughout the county, "to meet special education and Section 504 obligations for Recovery Services."

The Director told OCR that the Division did not rule out the provision of compensatory services, where the Division failed to provide an agreed-upon aid or service. The Director also stated, without elaborating, that she was aware of instances where the Division awarded compensatory services requested by the parent/guardian.

IV. Analysis and Conclusions

As described further below, OCR found that the Division failed or was unable to provide a FAPE as required by Section 504 to thousands of qualified students with disabilities in violation of Section 504. Specifically, OCR found that, beginning with the spring 2020 shift to remote learning through the 2020-2021 school year, the Division categorically reduced and/or limited the services and special education that students were entitled to receive through their IEPs or Section 504 plans while learning remotely, in violation of 34 C.F.R. §§ 104.33 and 104.35. In addition, OCR has concerns that staffing shortages and other administrative obstacles may have denied some students with IEPs the services they required for FAPE, such as Extended School Year services for summer 2021 and home-based instruction services in fall 2020. OCR also has concerns that the Division did not accurately or sufficiently track the services that it did provide to students with disabilities for the Department to ascertain its compliance with 34 C.F.R. § 104.33, as required by 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.6(b)). Despite these lapses in the provision of FAPE, OCR also found that the Division has yet to develop and implement a plan adequate to remedy these denials of FAPE.

A. The Division inappropriately reduced and limited services provided to students with disabilities, based on considerations other than the students' individual educational needs

The preponderance of the evidence supports that, beginning in spring 2020 through the 2020-2021 school year, the Division categorically reduced and/or limited the services and special education

that students were entitled to receive through their IEPs or Section 504 plans while learning remotely. Based on that evidence, OCR finds that throughout that period, the Division failed to appropriately develop and provide students with disabilities instruction and related services during remote learning that were designed to meet their individual educational needs, in violation of §§ 104.33 and 104.35.

1. Spring 2020

The Division's obligation to provide FAPE to each of its qualified students with a disability has remained in effect throughout the COVID-19 pandemic. The Division therefore had to provide services designed to meet the individual educational needs of each qualified student with a disability to the same extent that it met the needs of their nondisabled peers. 34 C.F.R. § 104.33(b)(1). And it had to design and decide upon those services through the procedures outlined in 34 C.F.R. § 104.35(b). 34 C.F.R. § 104.33(b)(2). According to the evidence OCR has obtained, however, the Division did not meet these requirements during the spring of 2020, in the following respects.

First, after shifting to remote learning in mid-April 2020, the Division adopted and directed staff to apply a diluted standard for FAPE—one that consequently did not comply with the Section 504 regulation. The Division itself acknowledged, both at the time and to OCR since, that it had an obligation to provide students FAPE during the pandemic, including the spring of 2020. The Division has also acknowledged, however, that once school buildings closed that spring, it was simply unable to provide many of the services identified in students' IEPs or Section 504 plans. The Division has nevertheless taken the position that because it was not offering instruction comparable to that provided in a typical school day, it was not obligated to implement IEPs in full. Instead, it drafted and implemented what it called temporary leaning plans (TLPs), at least for its students with IEPs. And it did so not to ensure that those students received a FAPE, but rather to provide what it called "FAPE in light of the circumstances"—or the best the Division could in "good faith" have provided at the time. As the Department has consistently explained, however, the right to FAPE does not change with a pandemic.[8] The Division therefore had to make every effort to provide special education and related services to students in accordance with their IEPs or, for those entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504. By the Division's own admission, its use of TLPs fell short of that standard.

[8] *See, e.g.*, U.S. Dep't of Educ., *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, at 2 (Mar. 12, 2020) ("If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE."); *see also* U.S. Dep't of Educ., *Non-Regulatory Guidance on Flexibility and Waivers for Grantees and Program Participants Impacted by Federally Declared Disasters*, at 13 (Sept. 2017) ("Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504."); U.S. Dep't of Educ., *Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak*, at 3, 4 (Dec. 2009) (explaining that when a child did not receive services during the H1N1 outbreak a district was required under the IDEA and Section 504 to "make a subsequent individualized determination … to decide whether a child with a disability requires compensatory education").

Second, partly owing to its use of an incorrect FAPE standard, the services the Division did provide through its TLPs were not designed to meet students' individual educational needs. Instead, the Division directed its IEP teams to draft TLPs that would "look different" from students' IEPs, and that would "be significantly reduced," due to the virtual setting. According to those instructions, the services students could receive through a TLP were not only cut, but limited to suggested amounts—in some cases, as little as 30 or even 5 minutes per month per service. And the Division made clear to its IEP teams that in making those cuts they were to "consider what services student[s] require[d] to support online, distance learning," not what services those students needed online to support their continued progress on their IEPs. IEP teams were told, moreover, that they could make these changes unilaterally—despite in many cases not being able to conduct evaluations before doing so, as the Division acknowledged at the time. In addition, the Division's guidance made clear to staff that for TLPs they could count such things as telephone contacts, e-mails, and pre-recorded videos as services provided.

Third, the Division also did not provide students the placements and services required by their IEPs and Section 504 plans once school buildings closed that spring. In the month following the March 2020 building closure, the Division initially provided only a variety of learning activities and packets for students on its public website and through Blackboard, which for many students with disabilities would have constituted a significant change in their services. But even by April, after the Division transitioned to remote learning, and to its use of TLPs, OCR found that many services were still not being provided at all. By May 13, 2020, according to the Division's own internal tallies at the time, 9,820 students on IEPs had already missed some 40,608 sessions of occupational, speech, or physical therapy during remote learning—over the course of only a single month. Including earlier figures from March, that number rose to over 60,000 sessions missed in just the first two months after school buildings closed. Division documentation indicated that other students with disabilities also had those services on their Section 504 plans.

2. 2020-2021 School Year

During the 2020-2021 school year, the Division continued to direct its IEP teams to categorically reduce and place limits on the services, special education instruction, and educational curriculum that students with IEPs could receive while learning remotely.

The Division told OCR that by the fall of 2020, it returned to implementing IEPs, rather than TLPs. For some students, though, the Division put into place what it called "virtual IEPs." According to the internal guidance the Division prepared and disseminated to its staff in August 2020, case managers were instructed to draft those virtual IEPs based on the goals and services already outlined in the IEP, but to revise them "to focus on goals or objectives" that "the student can achieve and can be realistically supported based on the number of days/hours" in the shortened 4-day week. In practice, however, that meant further reducing the instruction and services that some students on IEPs could receive and what they would be expected to learn during remote learning—beyond the 20% decrease in the school week for live instruction and services.

On the one hand, the Division's guidance to staff apparently capped the services that could be provided in a virtual IEP. For example, in its August 2020 Virtual IEP presentation to staff, Division administrators explained that an elementary student was to receive "no more" than 21

hours per week of services, with no more than one hour of specialized instruction per synchronous instruction day. And according to other evidence OCR has obtained, virtual IEPs could also significantly cut some of the services a student was expected to receive remotely, possibly beyond the categorical limitations. In one case, according to the Division, a student saw his special education services reduced by a third in the general education setting, and his speech language services cut by half.

On the other hand, the Division's documents also indicated a virtual IEP could water down what students were expected to master during remote learning—answering only 'who' or 'where' questions, for example, in response to a text read aloud, but dropping 'what' and 'when'. The documents reflected that a virtual IEP could also lower how much a student was expected to master of that less ambitious material—correctly answering problems involving only multi-step addition and subtraction, for instance, rather than multi-step equations, and then only 80% of the time, rather than 90%. To date, OCR has obtained no evidence suggesting that the Division had similarly downgraded its academic expectations for students without disabilities during the 2020-2021 school year, even though they, too, were learning remotely. To the contrary, in late August 2020, the Division had said publicly that it expected its students to master essentially the same material as in any other year, despite learning online.

B. The Division's provision and tracking of FAPE services during the 2020-2021 school year and following summer raise concerns under Section 504

OCR also has concerns that, due to staffing shortages and other administrative obstacles, the Division was not able to provide certain services that students with disabilities needed to receive a FAPE during the 2020-2021 school year and the following summer. Throughout both periods, the evidence OCR obtained shows that the Division was struggling at the time to find teachers to support its virtual instruction and services. According to the August 2020 Virtual IEP guidance, for instance, that fall the Division was anticipating a teacher shortage for students placed on home-based instruction. The guidance therefore asked staff to consider recruiting teachers at the attending school to take the assignment. According to media reports, similar staffing issues continued through the following summer, reportedly forcing the Division to delay its 2021 Extended School Year services by several weeks. OCR has concerns that these delays and disruptions, while understandable, may nevertheless have deprived students with disabilities of some of the services to which they were entitled by their IEPs.

The evidence OCR reviewed also raised further concerns that the Division may not have been accurately or sufficiently tracking services provided to students with disabilities during remote learning, as required for the Department to ascertain its compliance with 34 C.F.R. § 104.33. For the spring 2020, for example, the [redacted content] told OCR that though she could run a report to show how many meetings Section 504 teams had held to review and revise Section 504 plans, that report would not indicate whether teams looked at plans together, or whether a team had made a determination that the needs of the student were being met—or, for that matter, whether it had made any determination at all. And during the next school year, at a December 2020 webinar, several teachers expressed concern that the Division had instructed them to count students with disabilities present for virtual instruction even when those students were only logging in, but not turning on their cameras or microphones or otherwise engaging in instruction. Based on this

evidence, OCR has concerns that during remote learning the Division may not have been adequately tracking the provision of its services, as required by 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.6(b)), to confirm that its students with disabilities were receiving an education and services consistent with 34 C.F.R. 104.33.

C. The Division failed to adequately remedy denials of FAPE during remote learning

The Division has also neither designed nor implemented a plan adequate to remedy the denials of FAPE that occurred during remote learning. According to the evidence OCR reviewed, as early as April 2020, Division administrators understood that compensatory services would be required for students with disabilities. An April 2, 2020, e-mail among administrators claimed that because the Division was "one of very few divisions that are committing to 'new learning'," rather than reviewing what students had already learned, it would "be at a distinct disadvantage for [special education] compensatory."[9] Later that spring, Division administrators had even estimated how many students would be owed related services (9,820), and how much those services would likely cost them—around $3 million, for the more than 60,000 service sessions missed from March 13 to May 13, 2020.

Not long after drawing up those estimates, however, the Division shifted its approach—away from "compensatory services" to its current system of "recovery services." As the Division told its staff throughout the 2020-2021 school year, it no longer views compensatory services as an appropriate remedy for any pandemic-related disruptions in services that the Division was supposed to provide according to students' IEPs or Section 504 plans. The Division has instead explained, both to its staff and to OCR, that because it does not regard itself at fault for disruptions caused by the pandemic, it does not believe it denied any students FAPE as result of them, nor consequently owes those students compensatory services. Consistent with that view, Division administrators were explicitly advising their IEP and Section 504 teams to steer parents away from conversations about compensatory services, and to discuss only "recovery services" instead. OCR finds that approach inadequate, in several respects.

First, by refusing even to discuss compensatory services, the Division appears to be applying the same erroneous standard that it used to deny students FAPE in the first place. As already explained, FAPE did not change during the pandemic, nor did districts' obligation to adequately remedy shortfalls in the services that students with disabilities require for FAPE. Further, providing compensatory services to a student does not draw into question a school's good faith efforts during these difficult circumstances. It is a remedy that recognizes the reality that students experience injury when they do not receive appropriate and timely initial evaluations, reevaluations, or services, including the services that the school had previously determined they were entitled to, regardless of the reason. For example, a school may need to provide compensatory services for a student who did not receive physical therapy during school closures or for a student who did not receive a timely evaluation.

[9] The Division appears to have incorrectly assumed that it was only required to provide compensatory services because it was offering "new learning." As the Department has made clear, the right to FAPE did not change during the pandemic. See supra note 8.

Accordingly, for students with disabilities who did not receive those services while learning remotely, the Division was responsible for convening a group of persons knowledgeable about the student to make an individualized determination whether, and to what extent, compensatory services are required.[10] The Division's efforts to deter parents and staff from so much as discussing compensatory services—even for students that the Division knows did not receive the services they were due—is flatly at odds with the Division's obligations under Section 504.

Second, the Division's specific approach to remedial services—what it refers to as "recovery services"—falls short of what is required to remedy denials of FAPE. As the Director made clear, and the Division's written guidance confirms, "'recovery services' and 'compensatory services' are not synonyms," nor are they "the same thing," in either design or effect. The initial screening methodology that the Division uses to determine whether an IEP or Section 504 team should convene to consider the need for recovery services focuses primarily on regression, leaving behind students who made progress but failed to make adequate progress in light of the child's circumstances. According to training materials disseminated to Division staff in the winter and spring of 2021, only students who are at or below baseline, according to how they performed on their IEP goals, assessments, etc., before the closure in March 2020, would even be considered for recovery services. Under this "recovery" approach, students who made any progress at all, no matter how minimal, would apparently not be eligible for recovery services. Moreover, that screening methodology altogether fails to consider whether the Division provided the services outlined in an IEP or Section 504 plan—including the tens of thousands of service sessions for PT, OT, and speech language therapy that the Division has acknowledged it did not provide just during the spring of 2020. However, whenever a student with a disability has not received the services or instruction he or she needed for FAPE—even while learning remotely—the Division must convene those students' IEP or Section 504 teams to consider the student's need for compensatory education. Yet the Division has not done that. Instead, as a general matter of policy, the Division has refused even to entertain compensatory education for services it did not or could not provide due to the COVID-19 pandemic—apparently based on its erroneous belief that it was responsible for providing only "FAPE in light of the circumstances."

Even apart from that erroneous standard, the Division appears to have limited students' ability to receive remedial services in yet other ways. For example, in several webinars early in 2021, Division administrators acknowledged that parents and advocates had voiced concerns that IEP teams were still not raising the possibility of recovery services with parents. Moreover, both the Supplemental Document for Recovery Services and the Guidance Document suggest that students who did not fully participate in remote learning during the spring of 2020 would not be considered for compensatory or remedial services at all. The Director conceded that the Division guidance, as written, could result in not giving recovery services. She nevertheless told OCR that, "in reality," the Division "didn't want to leave a student behind because they didn't participate" and that the Division "worked hard to provide" recovery services if a family wanted them. Yet, as of March 2022, that guidance remained publicly available on the Division's website, and was still being cited and used in trainings for its staff through the spring of 2021. And as of early February 2022,

[10] For more information, *see* U.S. Dep't of Educ., Office for Civil Rights, *Fact Sheet: Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504* (Feb. 2022).

only some 1,070 students with IEPs had received recovery services, joined by only 8 students with Section 504 plans – although the Division serves more than 25,000 students with disabilities.

Together this evidence raises concerns that throughout the 2020-2021 school year, school staff were relying on the Division's written guidance to unduly narrow the number of students considered for remedial services. To date, OCR has received no documentation to support that recovery services are being widely offered in the Division. With so few students having received those services as of February 2022—nearly two years after COVID-19 first closed the Division's buildings—the evidence strongly suggests that appropriate remedial services still remain unavailable, as a practical matter, to the many thousands of students with disabilities in the Division who may need them.

For these reasons, OCR found that the Division failed to develop and implement a plan adequate to remedy denials of FAPE during remote learning, in a manner consistent with Section 504.

V. Resolution Agreement and Conclusion

To address the violations identified during the investigation, the Division entered into the attached Resolution Agreement which is aligned with the issues investigated and the information obtained by OCR. The Division agreed to create and implement a comprehensive plan which will describe for Division staff, students, and parent/guardians the efforts the Division will undertake to address the compensatory education needs of students with disabilities resulting from the Section 504 violations identified by OCR in this directed investigation. The plan will include a tracking mechanism to ensure all students who need compensatory education receive those services. The Division will also appoint an administrator to oversee the Division's implementation of the plan and ensure that parents/guardians have a point of contact for addressing questions and concerns.

Based on the commitments made in the Resolution Agreement, OCR is closing the investigation as of the date of this letter. When fully implemented, the Resolution Agreement is intended to address the areas of violation and compliance concerns identified by OCR. OCR will monitor the implementation of the Resolution Agreement until the Division is in compliance with Section 504 and Title II.

This concludes OCR's investigation. This letter should not be interpreted to address the Division's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR investigation. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the Division may not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because that individual asserts a right or privilege under a law enforced by OCR or has files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation in resolving this investigation. OCR looks forward to receiving the Division's first monitoring report by December 9, 2022. If you have any questions regarding this letter, please contact Sara Clash-Drexler at Sara.Clash-Drexler@ed.gov; Samantha Shofar at Samantha.Shofar@ed.gov; and Betsy Trice at Betsy.Trice@ed.gov.

Sincerely,

/s/

Emily Frangos
Regional Director
District of Columbia Office
Office for Civil Rights

Enclosure

Exhibit B-1

OSEP Letter dated January 17, 2023

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
OFFICE OF SPECIAL EDUCATION PROGRAMS

DIRECTOR

January 17, 2023

Honorable Jillian Balow
Superintendent of Public Instruction
Virginia Department of Education
P.O. Box 2120
Richmond, Virginia 23218
Jillian.Balow@doe.virginia.gov

Dear Superintendent Balow:

The purpose of this letter is to summarize the current status of our review of the Virginia Department of Education's (VDOE) outstanding noncompliance first identified in OSEP's June 23, 2020 monitoring report (OSEP's monitoring report), and of the documentation you have provided to date. VDOE has submitted documents and responses to OSEP on September 18, 2020, October 29, 2020, March 4, 2021, December 21, 2021, March 11, 2022, June 10, 2022, November 3, 2022, and January 11, 2023. In addition, VDOE has communicated information in conference calls with OSEP on January 15, 2021, May 25, 2021, April 20, 2022, and January 13, 2023. As a result of these submissions, as detailed in OSEP's September 1, 2022 letter, VDOE has corrected some, but not all of the findings. This letter provides a general summary of OSEP's review and analysis of VDOE's document submissions, except for those submitted on January 11, 2023. After we have completed our review of the most recent document submission, we will provide a more detailed analysis of VDOE's actions taken to address the identified noncompliance, and additional actions, if any, that are required to close out the noncompliance.

The findings and required actions set forth in OSEP's monitoring report required VDOE to demonstrate correction as soon as possible and in no case, beyond one year after identification. In OSEP's monitoring report, OSEP included the results of its May 2019 on-site monitoring visit and put VDOE on notice of its failure to comply with the following requirements under the Individuals with Disabilities Education Act (IDEA).

- VDOE does not have procedures and practices that are reasonably designed to enable the State to exercise general supervision over all educational programs for children with disabilities administered within the State to ensure that all such programs meet the requirements of Part B of IDEA, and to effectively monitor the implementation of Part B of IDEA, as required by 20 U.S.C. §§ 1412(a)(11) and 1416(a), 34 C.F.R. §§ 300.149(a) and (b) and 300.600(a) and (b), 20 U.S.C. § 1232d(b)(3)(A) and (E), 34 C.F.R. § 300.600(e) and 2 C.F.R. § 200.331(d)(1)–(2).
- VDOE is not exercising its general supervisory and monitoring responsibilities to implement its State complaint resolution system in a manner consistent with all of the requirements in 20 U.S.C. § 1412(a)(11)(A) and 1416(a) and 34 C.F.R. §§ 300.149 and 300.600 and 34 C.F.R. §§ 300.151 through 300.153 for the following reason: The State does not ensure that it resolves every complaint that meets the requirements of 34 C.F.R. § 300.153 in accordance with the minimum State complaint procedures in 34 C.F.R. §

300.152, specifically in the situation where the State has developed a communication plan with an individual parent-complainant.

- VDOE is not exercising its general supervisory and monitoring responsibilities in accordance with 20 U.S.C. §§ 1412(a)(11)(A) and 1416(a) and 20 U.S.C. § 1232d(b)(3)(A) and 34 C.F.R. §§ 300.149(a) and (b) and 300.600(a) and (d)(2) with regard to the following:
  a. VDOE does not ensure and document that LEAs track the implementation of the timelines for the resolution process for due process complaints filed by parents in 34 C.F.R. § 300.510 and for calculating the beginning and expiration of the 45-day due process hearing decision timeline in 34 C.F.R. § 300.515(a), unless under 34 C.F.R. § 300.515(c), a hearing officer grants a specific extension of the 45-day timeline at the request of a party to the hearing; and
  b. VDOE does not ensure that its LEAs track the implementation of the resolution timelines in 34 C.F.R. § 300.532(c)(3) and that hearing officers track the implementation of the expedited due process hearing timelines in 34 C.F.R. § 300.532(c)(2) in order to properly track due process hearing decision timelines.
- VDOE does not have procedures and practices that are reasonably designed to ensure a timely resolution process for due process complaints filed by parents or the timely adjudication of due process complaints that result in due process hearings, or a timely resolution process for expedited due process complaints, and the timely adjudication of expedited due process hearings.
- Because VDOE does not have a mechanism to reliably determine the date on which the 45-day due process hearing timeline in 34 C.F.R. § 300.515(a) commences, VDOE is unable to report valid and reliable data on the adjudication of due process complaints as required under Section 618(a)(1)(F) of IDEA.
- Because VDOE does not have a mechanism for reliably determining whether expedited hearing timelines are met, the VDOE is unable to report valid and reliable data on expedited due process hearings in accordance with Section 618(a) of IDEA.
- VDOE does not have procedures and practices that are reasonably designed to implement a mediation process that is consistent with the requirements of 20 U.S.C. § 1415(e) and 34 C.F.R. § 300.506. Specifically, the State's practice of having its mediation coordinator co-mediate when the mediator is new and permitting its mediation coordinator to be present at the mediation sessions is inconsistent with the requirement in 34 C.F.R. § 300.506(c)(1) that the State's procedures ensure that a mediator is not an employee of the SEA and has no personal or professional interest that would conflict with the mediator's objectivity.
- OSEP concluded the provision of Virginia's regulation, 8VAC20-81-170(B)(2)(a) and (e), are inconsistent with 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502, because the State's regulation restricts a parent's right to an independent educational evaluation (IEE) at public expense to only those areas in which the public agency had previously evaluated the child.

As explained in OSEP's letter dated September 1, 2022, OSEP determined VDOE demonstrated compliance in the areas related to mediation. With respect to general supervision, OSEP determined VDOE's evidence of its revised general supervision and monitoring system was sufficient to close the related finding while reserving the right to revisit the matter based on any subsequent information OSEP may receive.

OSEP further concluded VDOE has not provided sufficient information to demonstrate correction of the identified noncompliance related to State complaint procedures, due process complaint and hearing procedures, and IEEs. OSEP scheduled a follow-up phone call with VDOE on August 30, 2022, which was rescheduled by VDOE to September 8, 2022, and subsequently rescheduled again to October 5, 2022, to discuss the outstanding OSEP DMS findings. On October 4, 2022, VDOE informed OSEP that it was going to decline to participate in the scheduled call because, in VDOE's view, some of the relevant OSEP DMS subject matter was being raised as the subject of a Federal class action lawsuit filed in September of 2022. However, VDOE has since confirmed and participated in a follow-up call with OSEP on January 13, 2023.

During the January 13, 2023 conference call, OSEP noted that a number of case closure records indicated that timelines for due process hearings were improperly extended at the behest of the hearing officer, with no indication that they were requested by either party to the hearing. The IDEA implementing regulations only provide for a hearing officer to grant specific extensions of time at the request of either party. 34 .C.F.R. § 300.515(a).

Relatedly, OSEP reviewed Virginia's Regulation, 8VAC20-81-210(P)(9)(b), which states as follows:

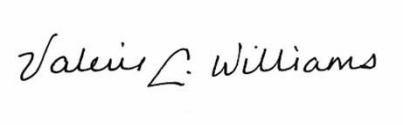
> *8VAC20-81-210(P)(9)(b) In instances where neither party requests an extension of time beyond the period set forth in this chapter, and mitigating circumstances warrant an extension, the special education hearing officer shall review the specific circumstances and obtain the approval of the Virginia Department of Education to the extension.*

The practice noted in the case closure records and, on its face, the Virginia regulation appear inconsistent with 34 C.F.R. § 300.515(a). As we indicated on the January 13, 2023 call, the practice and the Virginia regulation also need to be addressed.

We believe that the conference call held on January 13, 2023, was productive and we are committed to continuing to engage with VDOE to assist the State in closing the remaining DMS findings. However, please note that the noncompliance first identified in OSEP's monitoring report and follow-up letters include items that represent longstanding required correction. If VDOE is unable to demonstrate full compliance with the IDEA requirements identified in OSEP's monitoring report, this could result in the imposition of Specific Conditions on VDOE's IDEA Part B grant award and could affect VDOE's determination under section 616(d) of IDEA.

If you have any questions, please contact Koko Austin, your OSEP State Lead, at 202-245-6720 or Ayorkor.Austin@ed.gov.

Sincerely,



Valerie C. Williams

cc: Samantha Hollins, State Director of Special Education

Exhibit B-2

OSEP Letter dated February 8, 2023

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
OFFICE OF SPECIAL EDUCATION PROGRAMS

February 8, 2022

Honorable Jillian Balow
Superintendent of Public Instruction
Virginia Department of Education
P.O. Box 2120
Richmond, Virginia 23218
Jillian.Balow@doe.virginia.gov

Dear Superintendent Balow:

The U.S. Department of Education, Office of Special Education Programs (OSEP) is writing in response to the Virginia Department of Education's (VDOE or State) corrective action documentation submitted to OSEP on September 18, 2020, October 29, 2020, March 4, 2021, and December 21, 2021. Some of the information in this response is also based on a telephone meeting with the State on January 15, 2021. OSEP has carefully reviewed the documentation and information and determined that the State has not demonstrated correction of all the noncompliance identified in our June 23, 2020, Differentiated Monitoring and Support (DMS) monitoring letter (DMS letter). In the attached chart (DMS Response to State.VA.2.8.22) OSEP has detailed the outstanding issues, the previous required actions, a list of relevant documents submitted by Virginia, OSEP's analysis of those documents, OSEP's specific conclusions regarding correction, and what, if any, corrective actions, or additional next steps are appropriate to demonstrate correction.

As you are aware, our office continues to be contacted by multiple parents and other stakeholders in Virginia regarding the State's system of general supervision including, but not limited to, monitoring, due process, and policies and procedures governing independent educational evaluations (IEEs). While we understand that these communications only convey one side of often complicated situations, we remain concerned about the volume and nature of the concerns raised by these individuals and groups. Specifically, parents and other stakeholders have shared concerns about VDOE's compliance with its general supervisory responsibilities. Through this letter, we are providing notice that OSEP intends to engage further with the State on the following allegations:

a. Whether LEAs are properly addressing consideration of extended school year (ESY) services.
b. Whether, in certain situations, the maximum allowable charges for evaluations established by an LEA result in a denial of parents' rights to an IEE at public expense.
c. Whether LEAs are denying parental requests for IEEs without initiating a due process complaint to demonstrate the public agency's evaluation of the child is appropriate.
d. Whether LEAs are ensuring all access rights to special education records.

e. Whether Due Process Hearing Officers are refusing to open parents' (virtual) hearings to the public.
f. Whether LEAs are providing all accommodations and services included in children's IEPs that are necessary for the provision of FAPE.
g. Whether the State's complaint resolution process addresses allegations of systemic noncompliance occurring within LEAs.

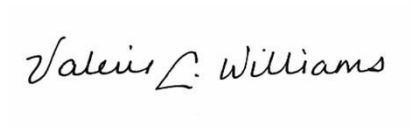
In addition, in an email dated March 4, 2021, VDOE requested "written notification from OSEP explaining the foundation for restricting the Coordinator of Mediation from evaluating mediators through observation, given that the approach is permitted in other states under IDEA". VDOE has asked for clarification on OSEP's position regarding its mediation evaluation practices. As outlined in the attachment to this letter, OSEP remains concerned that the presence of an SEA employee during mediations can potentially affect the objectivity and professional interests of the mediator and that the SEA employee may be taking an active role in guiding the mediation itself-- which is prohibited under the IDEA. VDOE has not submitted any protocols, documentation, or other evidence to the contrary. To ensure that the mediation program is consistent with IDEA regulations, if Virginia intends to continue mediator evaluations that rely primarily on the presence of an SEA employee in the mediation sessions, then it must revise its mediation and mediator evaluation procedures to include and specify, at a minimum, the following:

- A requirement that mediation is conducted by only one individual.
- A requirement that the mediation evaluator is only present at the mediation session in an observatory role. No participation in the session is permitted.
- The frequency and duration of mediation evaluations.
- Prior written notice to parents participating in mediation sessions where a mediation evaluator will attend, stating that: Mediation is voluntary and parents may refuse to participate in mediation if they do not want the mediation evaluator to be present; the evaluator is an employee of the SEA; the evaluator will be present only to observe; and, the evaluator is prohibited from participating in the mediation.
- Parent exit surveys or other documentation demonstrating that the mediation evaluator was only present at the mediation sessions in an observatory role and did not participate.

As a reminder, the State must ensure this noncompliance is corrected as soon as possible, and in accordance with the timelines specified in the attached corrective actions. If VDOE anticipates difficulty in meeting the timelines including in the corrective actions attached, OSEP requests that the State provide a plan that includes projected dates for carrying out the required actions necessary to achieve full compliance.

We thank you in advance for your prompt attention to this important matter. If you have any questions or would like to schedule a call to discuss OSEP's review and conclusions in this matter, please contact your OSEP State Lead, Koko Austin, at (202) 245-6720.

Sincerely,



Valerie C. Williams
Director
Office of Special Education Programs

Attachment

cc: Samantha Hollins, Ph.D.
State Director of Special Education

Exhibit B-3

OSEP Letter dated February 17, 2023

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
OFFICE OF SPECIAL EDUCATION PROGRAMS

DIRECTOR

February 17, 2023

Honorable Jillian Balow
Superintendent of Public Instruction
Virginia Department of Education
P.O. Box 2120
Richmond, Virginia 23218
Jillian.Balow@doe.virginia.gov

Dear Superintendent Balow:

This letter, and the accompanying chart, summarizes the current status of the outstanding findings from the Office of Special Education Program's (OSEP's) Differentiated Monitoring and Support (DMS) report issued on June 23, 2020. As detailed below, some findings are closed with no further action required. Some findings, remain open due to continued concerns around the documentation provided to date and information related to the required actions. Finally, through review of the submitted documentation, continued contacts from Virginia parents and advocates, and other sources of information that have come to the attention of our office, we have significant new or continued areas of concerns with the State's implementation of general supervision, dispute resolution, and confidentiality requirements of Part B of the Individuals with Disabilities Education Act (IDEA). Appropriate policies and procedures for both oversight and compliance, and their implementation**,** are crucial to ensuring that children with disabilities and their families are afforded their rights under IDEA and that a free appropriate public education (FAPE) is provided. For this reason, as is discussed below, we are notifying you of OSEP's plan to initiate additional monitoring activities focused on both the new and continued areas of concern and on the effective implementation IDEA requirements in these areas.

June 23, 2020 DMS findings: The chart below summarizes the current status of the findings from OSEP's June 23, 2020 letter. Further details of OSEP's analysis and next steps are found in the attached chart.

Finding	**Status**
CLOSED FINDINGS	
GENERAL SUPERVISION: Based on the review of documents, analysis of data, and interviews with State personnel, OSEP concludes that the State does not have procedures and practices that are reasonably designed to enable the State to exercise general supervision over all	Original finding is closed based on the submission documentation consistent with required actions.

Finding	Status
educational programs for children with disabilities administered within the State, to ensure that all such programs meet the requirements of Part B of IDEA, and to effectively monitor the implementation of Part B of IDEA, as required by 20 U.S.C. §§ 1412(a)(11) and 1416(a), 34 C.F.R. §§ 300.149(a) and (b) and 300.600(a) and (b), 20 U.S.C. § 1232d(b)(3)(A) and (e), 34 C.F.R. § 300.600(e) and 2 C.F.R. § 200.332.	However, the consistent implementation of these practices and procedures remains an area of concern. Further, as noted in our September 1, 2022 letter, OSEP intends to continue to monitor the State's implementation of its general supervision and monitoring system through State-reported data and has reserved the right to revisit the matter based on future, additional information OSEP may receive. OSEP intends to further investigate implementation of VDOE's general supervision system in our additional monitoring activities and may require additional corrective actions based on new analyses and findings, if any.
DUE PROCESS COMPLAINT AND HEARING PROCEDURES: Based on the review of documents, analysis of data, and interviews with State personnel, OSEP concludes that: 1. The State is not exercising its general supervisory and monitoring responsibilities in accordance with 20 U.S.C. §§ 1412(a)(11)(A) and 1416(a) and 20 U.S.C. § 1232d(b)(3)(A) and 34 C.F.R. §§ 300.149(a) and (b) and 300.600(a) and (d)(2) with regard to the following: a. VDOE does not ensure and document that LEAs track the implementation of the timelines for the resolution process for due process complaints filed by parents in 34 C.F.R. § 300.510 and for calculating the beginning and expiration of the 45-day due process hearing decision timeline in 34 C.F.R.	Closed. Findings 1 (a) and (b): No further action is required.

Finding	Status
§ 300.515(a), unless under 34 C.F.R. § 300.515(c), a hearing officer grants a specific extension of the 45-day timeline at the request of a party to the hearing; and VDOE does not ensure that its LEAs track the implementation of the resolution timelines in 34 C.F.R. § 300.532(e)(3) and that hearing officers track the implementation of the expedited due process hearing timelines in 34 C.F.R. § 300.532(e)(2) in order to properly track due process hearing decision timelines.	
MEDIATION: Based on the review of documents and interviews with State personnel, OSEP concludes that the State does not have procedures and practices that are reasonably designed to implement a mediation process that is consistent with the requirements of 20 U.S.C. § 1415(e) and 34 C.F.R. § 300.506. Specifically, the State's practice of having its mediation coordinator co-mediate when the mediator is new, and permitting its mediation coordinator to be present at the mediation sessions is inconsistent with the requirement in 34 C.F.R. § 300.506(e)(1) that the State's procedures ensure that a mediator is not an employee of the SEA and has no personal or professional interest that would conflict with the mediator's objectivity	Closed, no further action is required at this time.
OPEN FINDINGS	
GENERAL SUPERVISION: Additional Concern Provision of FAPE and Compensatory Services during the pandemic.	**<u>Additional Concern</u>** As a result of the Office for Civil Rights' (OCR) November 30, 2022 letter to Fairfax County, OSEP is concerned about the potential for similar issues in other LEAs in Virginia. OSEP intends to further investigate this issue in our additional monitoring activities and may require additional corrective

Finding	Status
	actions based on new analyses and findings, if any.
STATE COMPLAINT PROCEDURES: Based on the review of documents, analysis of data, and interviews with State personnel, OSEP concludes that the State is not exercising its general supervisory and monitoring responsibilities to implement its state complaint resolution system in a manner consistent with all the requirements in 20 U.S.C. § 1412(a)(11)(A) and 1416(a) and 34 C.F.R. §§ 300.149 and 300.600 and 34 C.F.R. §§ 300.151 through 300.153 for the following reason: The State does not ensure that it resolves every complaint that meets the requirements of 34 C.F.R. § 300.153 in accordance with the minimum State complaint procedures in 34 C.F.R. § 300.152, specifically in the situation where the State has developed a communication plan with an individual parent-complainant.	Open. Further actions are required to close this finding. OSEP intends to further investigate compliance and implementation of State complaint procedures in our additional monitoring activities and may require additional corrective actions based on new analyses and findings, if any.
DUE PROCESS COMPLAINT AND HEARING PROCEDURES: Based on the review of documents, analysis of data, and interviews with State personnel, OSEP concludes that: 2. The State is not exercising its general supervisory and monitoring responsibilities in accordance with 20 U.S.C. §§ 1412(a)(11)(A) and 1416(a) and 20 U.S.C. § 1232d(b)(3)(A) and 34 C.F.R. §§ 300.149(a) and (b) and 300.600(a) and (d)(2) with regard to the following: a. VDOE does not ensure and document that LEAs track the implementation of the timelines for the resolution process for due process complaints filed by parents in 34 C.F.R. § 300.510 and for calculating the beginning and expiration of the 45-day due process hearing decision timeline in 34 C.F.R. § 300.515(a), unless under 34 C.F.R. § 300.515(c), a hearing officer grants a specific extension of the 45-day timeline at the request of a party to the hearing; and	Open. Findings 2-4: Further actions are required. For details see attached chart. OSEP intends to further investigate compliance and implementation of due process complaint and hearing procedures in our additional monitoring activities and may require additional corrective actions based on new analyses and findings, if any.

Finding	Status
b. VDOE does not ensure that its LEAs track the implementation of the resolution timelines in 34 C.F.R. § 300.532(e)(3) and that hearing officers track the implementation of the expedited due process hearing timelines in 34 C.F.R. § 300.532(e)(2) in order to properly track due process hearing decision timelines. 3. Consequently, OSEP concludes that the State does not have procedures and practices that are reasonably designed to ensure a timely resolution process for due process complaints filed by parents or the timely adjudication of due process complaints that result in due process hearings, or a timely resolution process for expedited due process complaints, and the timely adjudication of expedited due process hearings. 4. Because the State does not have a mechanism to reliably determine the date on which the 45-day due process hearing timeline in 34 C.F.R. § 300.515(a) commences, the State is unable to report valid and reliable data on the adjudication of due process complaints as required under Section 618(a)(1)(F) of IDEA. 5. Because the State does not have a mechanism for reliably determining whether expedited hearing timelines are met, the State is unable to report valid and reliable data on expedited due process hearings in accordance with Section 618(a) of IDEA.	
INDIVIDUAL EDUCATIONAL EVALUATIONS (IEE): Based on a review of documents and interviews with State personnel, for the reasons set forth above, OSEP concludes that the provision of Virginia's regulation, 8VAC20-81-170(B)(2)(a) and (e), are inconsistent with 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502, because the State's regulation restricts a parent's right to an IEE at public expense to only those areas in which the public agency had previously evaluated the child.	Open. Further actions are required to close this finding. In addition, OSEP intends to further investigate compliance and implementation of IEE procedures in our additional monitoring activities and may require additional corrective actions based on new analyses and findings, if any.

Additional Concerns around the implementation of general supervision, dispute resolution, and confidentiality requirements of IDEA. Based on substantial numbers of contacts from parents and other advocates, and additional information we have found in reviewing corrective actions for the 2020 monitoring findings, OSEP has identified significant concerns around the implementation of key requirements of IDEA that, while related to the 2020 findings, go beyond the scope of those findings. As a result, OSEP is notifying VDOE that we will undertake additional monitoring activities to address these concerns. We anticipate conducting these activities in August and/or September of 2023. A description of the areas of additional monitoring appears below.

1. *General Supervision procedures for the identification and correction of noncompliance:* General supervision is the primary mechanism for ensuring that all students in the State receive FAPE, no matter which school district they attend. OSEP appreciates the work that VDOE has undertaken to revise its monitoring procedures. However, to ensure that VDOE is fulfilling it general supervisory responsibilities under 34 C.F.R. §§ 300.149(a) and (b) and 300.600(a) and (d)(2), OSEP intends to examine the effective implementation of the revised policies and procedures and practices. At a minimum, OSEP intends to utilize the DMS 2.0 monitoring protocols for a systematic review of VDOE's policies, procedures and practices for the identification and correction of noncompliance.

   Provision of FAPE during the COVID-19 Pandemic and Compensatory Services: The negative impact on children with disabilities of school closures and other limitations on education during the COVID-19 pandemic has been both significant and disparate. The Department has issued guidance on ways to mitigate the significant impact through the provision of compensatory services. Many States have responded both positively and proactively to ensure that students with disabilities get back on track. OSEP is concerned that Virginia's leadership and guidance in this area has been deficient and may have led to noncompliance by school districts.

   On November 30, 2022, OCR issued a letter and resolution agreement resulting from its directed investigation of Fairfax County Public Schools. As a result of its investigation, OCR concluded that during the Covid-19 Pandemic, Fairfax County Public Schools failed or was unable to provide a FAPE to thousands of qualified students with disabilities in violation of Section 504 (Section 504) of the Rehabilitation Act of 1973. Although, OCR's investigation was specific to Fairfax, the letter makes clear that Fairfax County Public Schools based their policies and practice at least partially upon guidance issued by VDOE.[1]Similarly, although OCR cited violations with Section 504, the policies and practices identified in this letter also appear to be inconsistent with IDEA. In addition, we are aware of State complaint decisions that were consistent with the policy and practices cited by OCR. Since the VDOE guidance was Statewide and because OSEP has received complaints from across the State about practices similar to those cited by OCR in Fairfax, OSEP will examine this matter.

[1] See, "Considerations for COVID Recovery Services for Students with Disabilities."

2. *State complaint policies, procedures, and practices:* The appropriate and effective investigation and resolution of State complaints is a significant mechanism to both avoid resolve disputes and avoid costly and protracted hearings and litigation.

   Through the review of State-submitted and publicly available documentation and information, and that provided by parents, OSEP has identified concerns with VDOE's State complaint systems that go beyond the concerns originally identified in our DMS letter. These include, VDOE's policies and practices for determining sufficiency of complaints consistent with 34 C.F.R. § 300.153(b), the conducting of investigation and issuing of a report that addresses each allegation in the complaint in accordance with 34 C.F.R. § 300.152(a)(5), meeting the timelines, including extensions, as specified under 34 C.F.R. § 300.152 (a and b), and procedures for the effective implementation of the SEA's final decision.

3. *Due process complaint and hearing procedures and implementation:* Since its inception, the IDEA has guaranteed a dispute resolution mechanism grounded in due process and providing parents with the ability to enforce IDEA's requirements for FAPE.

   Through the review of State-submitted and publicly available documentation and information, and that provided by parents, OSEP has identified concerns with VDOE's due process complaint and hearing process that go beyond the concerns originally identified in our DMS letter. These include inconsistencies between State rules and IDEA (including 34 C.F.R. §300.515(c) which sets out that a hearing or reviewing officer only may grant specific extensions of time beyond the periods set out in §§300.515(a) and (b) at the request of either party), as well as practices, as documentation submitted does not demonstrate that hearing officers have granted extensions only at the request of either party.

4. *IEE policies, procedures, and practices:* A comprehensive educational evaluation is the cornerstone to determining whether a child is eligible under the IDEA and parents who believe that the public agency's evaluation of their child was either improper or incomplete have an important IDEA protection in the form of independent educational evaluation (IEE).

   Through the review of State-submitted and publicly available documentation and information, and that provided by parents, in addition to the continuation of improper practices previously cited, OSEP also has identified at least five LEAs that have procedures or practices for IEEs that appear inconsistent with IDEA's regulations generally requiring the public agency to either fund the IEE (with an exception) or file a due process complaint to prove its evaluation was proper. 34 C.F.R. § 300.502(b)(2).

OSEP intends to provide additional information about our monitoring activities, additional work with VDOE staff, and scheduling in the near future.

Thank you for your continued cooperation in ensuring the implementation of IDEA within Virginia. If you have any questions, please contact your State lead, Koko Austin at ayorkor.austin@ed.gov.

Sincerely,

Valerie Williams

cc: Samantha Hollins, State Director of Special Education

Exhibit C

USDOE Letter dated July 1, 2022 re Award of Funds under Part B of IDEA

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

July 1, 2022

Honorable Jillian Balow
State Superintendent of Public Instruction
Virginia Department of Education
P.O. Box 2120
Richmond, Virginia 23218

Dear State Superintendent Balow:

We have approved Virginia's application for Federal Fiscal Year (FFY) 2022 funds under Part B of the Individuals with Disabilities Education Act (IDEA Part B). Our approval is based on our review of the IDEA Part B application submitted by the Virginia Department of Education to the U.S. Department of Education (Department), Office of Special Education Programs (OSEP), on May 23, 2022, including the assurances provided in Section II and incorporated by reference to this letter as noted in Enclosure A. Our approval is also based on the State's certification in Section II.D of its FFY 2022 application (Enclosure B) that the State's provisions meet the requirements of IDEA Part B as found in Public Law 108-446, and that the State will operate its Part B program in accordance with all of the required assurances and certifications, consistent with 34 C.F.R. § 76.104. The effective date of this grant award is July 1, 2022.

Please note that OSEP Memorandum 22-07, dated February 3, 2022, explained the impact of recent amendments to the Copyright Act, 17 U.S.C. § 121, on certain terms relevant to Assurance 23a or 23b related to accessible instructional materials as reflected in your State's FFY 2022 application for funds under IDEA Part B. As a result, the term "blind and other persons with print disabilities" has been removed from the Copyright Act and replaced with "eligible person," and the term "specialized format" has been removed and replaced with the term "accessible format." Although at this time Congress has not made conforming amendments to section 612(a)(23) of IDEA, the Department construes Assurances 23a and 23b as incorporating the terms "eligible person" and "accessible format."

Please note that as part of your State's application for FFY 2022 IDEA Part B funds, the State has provided a certification, pursuant to 34 C.F.R. § 76.104, that its application meets the requirements of IDEA Part B and that the State will operate its Part B program in accordance with all of the required assurances and certifications. Any changes made by the State, after OSEP approval, to information that is a part of the State's Part B application, must meet the public participation requirements in 34 C.F.R. § 300.165.

Enclosed are the State's FFY 2022 grant awards for funds currently available under the Consolidated Appropriations Act, 2022 (Public Law 117-103) for the IDEA Part B Section 611 (Grants to States) and Section 619 (Preschool Grants) programs. These funds are available for obligation by States from July 1, 2022, through September 30, 2024, in accordance with 34 C.F.R. § 76.709.

The amount in your State's award for Section 619 represents the full amount of funds to which the State is entitled. However, the amount shown in your State's award for the Section 611 program is only part of the total funds that will be awarded to the State for FFY 2022. Of the $13,343,704,000 appropriated for Section 611 in FFY 2022, $4,060,321,000 is available for awards on July 1, 2022, and $9,283,383,000 will be available for awards on October 1, 2022. Under the Section 611 formula, in a year in which the amount available for allocations to States increases from the prior year, subject to certain maximum and minimum funding requirements, State allocations are based on the amount that each State received under Section 611 for FFY 1999, the relative population of children in the age range for which each State ensures the availability of a free appropriate public education (FAPE) to children with disabilities, and the relative population of children living in poverty in the age range for which each State ensures the availability of FAPE to children with disabilities.[1]

For FFY 2022, the appropriation for the Preschool Grants program is $409,549,000. Under the Section 619 formula in a year in which the amount available for allocations to States remains the same or increases from the prior year, State allocations, subject to certain maximum and minimum funding requirements, are based on the amount that each State received under Section 619 for FFY 1997, the relative population of children aged three through five, and the relative population of all children aged three through five living in poverty.

Enclosure C provides a short description of how Section 611 funds were allocated and how those funds can be used. In addition, Table I in Enclosure C shows funding levels for distribution of Section 611 funds and the parameters for within-State allocations.

Enclosure D provides a short description of how Section 619 funds were allocated and how those funds can be used. In addition, Table II in Enclosure D shows State-by-State funding levels for distribution of Section 619 funds.

Section 611(e)(1)(C) of the IDEA provides that "[p]rior to expenditure of funds under this paragraph [Section 611(e)(1) concerning funds for State administration], the State shall certify to the Secretary that the arrangements to establish responsibility for services pursuant to [S]ection 612(a)(12)(A) are current." We read this provision to mean that if a State does not have interagency agreements or other arrangements in place to establish responsibility for the provision of services, the State may not expend funds available to the State under Section 611(e)(1) [State administration funds] until the State has these agreements or arrangements in place.

Under IDEA section 605, the Office of Management and Budget Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (OMB Uniform Guidance) in 2 C.F.R. Part 200, and 34 C.F.R. § 300.718, the State must request prior approval from OSEP for certain State-level activities or expenses. On October 29, 2019, the Office of

[1] The amount that a State's allocation may increase from one year to the next is capped at the amount the State received in the prior year multiplied by the sum of 1.5 percent and the percentage increase in the total amount appropriated for Part B of IDEA from the prior year. Additionally, the maximum amount that a State may receive in any fiscal year is calculated by multiplying the number of children with disabilities ages 3 through 21 served during the 2004-2005 academic year in that State by 40 percent of the annual per pupil expenditure (APPE), adjusted by the rate of annual change in the sum of 85 percent of the children aged 3 through 21 for whom that State ensures the availability of FAPE and 15 percent of the children living in poverty. Because there are multiple caps, in any year the "effective cap" on a State's allocation is the lowest cap for that State.

Special Education and Rehabilitative Services released a Frequently Asked Questions document (2019 FAQs) on prior approval.[2] The State did not submit a participant support costs request with its grant application. If the State plans to use its FFY 2022 IDEA Part B grant funds for such costs, and those costs fall outside of the scope of the 2019 FAQs, it must submit a request for prior approval to which OSEP will respond separate from the grant letter.

Under Section 608(a)(2) of the IDEA, each State that receives funds under IDEA Part B is required to inform, in writing, local educational agencies located in the State of any State-imposed rule, regulation, or policy that is not required by IDEA or Federal regulations. A State may use the same list of State-imposed rules, regulations, and policies that it was required to submit to the Department in Section IV of its IDEA Part B application for this purpose.

In Section V.A of its IDEA Part B application, pursuant to the authority in IDEA Section 618(a)(3), the State was required to submit data on the total amount of State financial support made available for special education and related services for children with disabilities in State fiscal year (SFY) 2020 and SFY 2021. If OSEP receives information through audits, fiscal monitoring or other means that raises questions about the data your State has provided in Section V.A, OSEP will follow up with your State.

Section 604 of the IDEA provides that "[a] State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this [Act]." Section 606 provides that each recipient of assistance under the IDEA make positive efforts to employ and advance in employment qualified individuals with disabilities in programs assisted under the IDEA. Therefore, by accepting this grant, your State is expressly agreeing as a condition of IDEA funding to a waiver of Eleventh Amendment immunity and to ensuring that positive efforts are made to employ and advance employment of qualified individuals with disabilities in programs assisted under the IDEA.

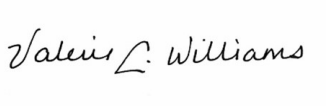
The enclosed grant awards of FFY 2022 funds are made with the continued understanding that this Office may, from time to time, require clarification of information within your application, if necessary. These inquiries may be necessary to allow us to appropriately carry out our administrative responsibilities related to IDEA Part B.

As a reminder, all prime recipients of IDEA Part B funds must report subaward information as required by the Federal Funding Accountability and Transparency Act of 2006 (FFATA), as amended in 2008. First-tier subaward information must be reported by the end of the following month from when the award was made or obligated. FFATA guidance is found at https://www.fsrs.gov/. Please contact your State's Fiscal Accountability Facilitator if you have further questions.

[2] Prior approval must be obtained under IDEA for the following direct costs: (1) equipment (defined generally as $5,000 or more per item of equipment) (2 C.F.R. § 200.1 and 34 C.F.R. § 300.718); (2) participant support costs (such as training or travel costs for non-employees) (2 C.F.R. § 200.1); and (3) construction or alteration of facilities (34 C.F.R. § 300.718). Under the 2019 FAQs, OSERS granted prior approval for participant support costs under IDEA that: are associated with State Advisory Panels; are incurred during the provision of services under IDEA; do not exceed $5000 per individual participant per training/conference; and are incurred by local educational agencies under IDEA Part B. In addition, the 2019 FAQs provide prior approval for equipment that is identified on or directly related to the implementation of an individualized education program for youth and children with disabilities.

We appreciate your ongoing commitment to the provision of quality educational services to children with disabilities.

Sincerely,



Valerie C. Williams
Director
Office of Special Education Programs

Enclosures

Enclosure A (Sections II.A-C. of the State's application)
Enclosure B (Section II.D. of the State's application)
Enclosure C
Enclosure D

cc: State Director of Special Education

State Name: Virginia

Enclosure A

Section II

A. Assurances Related to Policies and Procedures

The State makes the following assurances that it has policies and procedures in place as required by Part B of the Individuals with Disabilities Education Act. (20 U.S.C. 1411-1419; 34 CFR §§300.100-300.174)

Yes *(Assurance is given.)*	**No** *(Assurance cannot be given. Provide date on which State will complete changes in order to provide assurance.)* *Check and enter date(s) as applicable*	**Assurances Related to Policies and Procedures**
X		1. A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled, in accordance with 20 U.S.C. 1412(a)(1); 34 CFR §§300.101-300.108.
X		2. The State has established a goal of providing a full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal. (20 U.S.C. 1412(a)(2); 34 CFR §§300.109-300.110)
X		3. All children with disabilities residing in the State, including children with disabilities who are homeless or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services in accordance with 20 U.S.C. 1412(a)(3); 34 CFR §300.111.
X		4. An individualized education program, or an individualized family service plan that meets the requirements of section 636(d), is developed, reviewed, and revised for each child with a disability in accordance with 34 CFR §§300.320 through 300.324, except as provided in §§300.300(b)(3) and 300.300(b)(4). (20 U.S.C. 1412(a)(4); 34 CFR §300.112)
X		5. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular

			classes with the use of supplementary aids and services cannot be achieved satisfactorily in accordance with 20 U.S.C. 1412(a)(5)(A)-(B); 34 CFR §§300.114-300.120.
X		6.	Children with disabilities and their parents are afforded the procedural safeguards required by 34 CFR §§300.500 through 300.536 and in accordance with 20 U.S.C. 1412(a)(6); 34 CFR §300.121.
X		7.	Children with disabilities are evaluated in accordance with 34 CFR §§300.300 through 300.311. (20 U.S.C. 1412(a)(7); 34 CFR §300.122)
X		8.	Agencies in the State comply with 34 CFR §§300.610 through 300.626 (relating to the confidentiality of records and information). (20 U.S.C. 1412(a)(8); 34 CFR §300.123)
X		9.	Children participating in early intervention programs assisted under Part C, and who will participate in preschool programs assisted under this part, experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(9). By the third birthday of such a child, an individualized education program or, if consistent with 34 CFR §300.323(b) and section 636(d), an individualized family service plan, has been developed and is being implemented for the child. The local educational agency will participate in transition planning conferences arranged by the designated lead agency under section 635(a)(10). (20 U.S.C. 1412(a)(9); 34 CFR §300.124)
X		10.	Agencies in the State, and the SEA if applicable, comply with the requirements of 34 CFR §§300.130 through 300.148 (relating to responsibilities for children in private schools), including that to the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the requirements found in 34 CFR §§300.130 through 300.148 unless the Secretary has arranged for services to those children under subsection (f) [By pass]. (20 U.S.C. 1412(a)(10); 34 CFR §§300.129-300.148)
X		11.	The State educational agency is responsible for ensuring that the requirements of Part B are met including the requirements of 34 CFR §§300.113, 300.149, 300.150 through 300.153, and 300.175 and 300.176 and that the State monitors and enforces the requirements of Part B in accordance with 34 CFR §§300.600-300.602 and 300.606-300.608. (20 U.S.C. 1412(a)(11); 34 CFR §300.149)
X		12.	The Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (b) of 34 CFR §300.154 and the State educational agency, in order to ensure that all services described in paragraph (b)(1)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under §300.154(a)(3). Such agreement or

			mechanism shall meet the requirements found in 20 U.S.C. 1412(a)(12)(A)-(C); 34 CFR §300.154.
X		13.	The State educational agency will not make a final determination that a local educational agency is not eligible for assistance under this part without first affording that agency reasonable notice and an opportunity for a hearing. (20 U.S.C. 1412(a)(13); 34 CFR §300.155)
X		14.	The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities as noted in 20 U.S.C. 1412(a)(14)(A)-(E); 34 CFR §300.156.
X		15.	The State has established goals for the performance of children with disabilities in the State that meet the requirements found in 20 U.S.C. 1412(a)(15)(A)-(C); 34 CFR §300.157.
X		16.	All children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 1111 of the Elementary and Secondary Education Act of 1965, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs as noted in 20 U.S.C. 1412(a)(16)(A)-(E); 34 CFR §300.160.
X		17.	Funds paid to a State under this part will be expended in accordance with all the provisions of Part B including 20 U.S.C. 1412(a)(17)(A)-(C); 34 CFR §300.162.
X		18.	The State will not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year, unless a waiver is granted, in accordance with 20 U.S.C. 1412(a)(18)(A)-(D); 34 CFR §§300.163 through 300.164.
X		19.	Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities. (20 U.S.C. 1412(a)(19); 34 CFR §300.165)
X		20.	In complying with 34 CFR §§300.162 and 300.163, a State may not use funds paid to it under this part to satisfy State-law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation. (20 U.S.C. 1412(a)(20); 34 CFR §300.166)
X		21.	The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State as found in 20 U.S.C. 1412(a)(21)(A)-(D); 34 CFR §§300.167-300.169.
X		22.	The State educational agency examines data, including data disaggregated by race and ethnicity, to determine if significant

		discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities in accordance with 20 U.S.C. 1412(a)(22)(A)-(B); 34 CFR §300.170.
X		23a. The State adopts the National Instructional Materials Accessibility Standard for the purposes of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after the publication of the National Instructional Materials Accessibility Standard in the Federal Register in accordance with 20 U.S.C. 1412(a)(23)(A) and (D); 34 CFR §300.172.
		23b. *(Note: Check either "23b.1" or "23b.2" whichever applies.*
X		23b.1 The State educational agency coordinates with the National Instructional Materials Access Center and not later than 12/03/06 the SEA as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials enters into a written contract with the publisher of the print instructional materials to: • require the publisher to prepare and, on or before delivery of the print instructional materials, provide to the National Instructional Materials Access Center, electronic files containing the contents of the print instructional materials using the National Instructional Materials Accessibility Standard; or • purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats. (20 U.S.C. 1412(a)(23)(C); 34 CFR §300.172)
		23b.2 The State educational agency has chosen not to coordinate with the National Instructional Materials Access Center but assures that it will provide instructional materials to blind persons or other persons with print disabilities in a timely manner. (20 U.S.C. 1412(a)(23)(B); 34 CFR §300.172)
X		24. The State has in effect, consistent with the purposes of the IDEA and with section 618(d) of the Act, policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in 34 CFR §300.8. (20 U.S.C 1412(a)(24); 34 CFR §300.173)
X		25. The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 812(c)) as a condition of attending school, receiving an evaluation under 34 CFR §§300.300 through 300.311, or receiving services under the IDEA as described in 20 U.S.C. 1412(a)(25)(A)-(B); 34 CFR §300.174.

B. Other Assurances

The State also makes the following assurances:

Yes	Other Assurances
X	1. The State shall distribute any funds the State does not reserve under 20 U.S.C. 1411(e) to local educational agencies (including public charter schools that operate as local educational agencies) in the State that have established their eligibility under section 613 for use in accordance with this part as provided for in 20 U.S.C. 1411(f)(1)-(3); 34 CFR §300.705.
X	2. The State shall provide data to the Secretary on any information that may be required by the Secretary. (20 U.S.C. 1418(a)(3); 34 CFR §§300.640-300.645.)
X	3. The State, local educational agencies, and educational service agencies shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds. (34 CFR §76.702)
X	4. As applicable, the assurance in OMB Standard Form 424B (Assurances for Non-Construction Programs), relating to legal authority to apply for assistance; access to records; conflict of interest; merit systems; nondiscrimination; Hatch Act provisions; labor standards; flood insurance; environmental standards; wild and scenic river systems; historic preservation; protection of human subjects; animal welfare; lead-based paint; Single Audit Act; and general agreement to comply with all Federal laws, executive orders and regulations.

C. Certifications

The State is providing the following certifications:

Yes	Certifications
X	1. The State certifies that ED Form 80-0013, *Certification Regarding Lobbying*, is on file with the Secretary of Education. With respect to the *Certification Regarding Lobbying,* the State recertifies that no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making or renewal of Federal grants under this program; that the State shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," when required (34 CFR Part 82, Appendix B); and that the State Agency shall require the full certification, as set forth in 34 CFR Part 82, Appendix A, in the award documents for all sub awards at all tiers.
X	2. The State certifies that certification in the Education Department General Administrative Regulations (EDGAR) at 34 CFR §76.104 relating to State eligibility, authority and approval to submit and carry out the provisions of its State application, and consistency of that application with State law are in place within the State.
X	3. The State certifies that the arrangements to establish responsibility for services pursuant to 20 U.S.C. 1412(a)(12)(A)-(C); 34 CFR §300.154 (or 20 U.S.C. 1412(a)(12)(A); 34 CFR §300.154(a) are current. This certification must be received prior to the expenditure of any funds reserved by the State under 20 U.S.C. 1411(e)(1); 34 CFR §300.171.

D. Statement

I certify that the State of _Virginia_____ can make the assurances checked as 'yes' in Section II.A and II.B and the certifications required in Section II.C of this application. These provisions meet the requirements of the Part B of the Individuals with Disabilities Education Act as found in PL 108-446. The State will operate its Part B program in accordance with all of the required assurances and certifications.

If any assurances have been checked 'no', I certify that the State will operate throughout the period of this grant award consistent with the requirements of the IDEA ,as found in PL 108-446 and any applicable regulations, and will make such changes to existing policies and procedures as are necessary to bring those policies and procedures into compliance with the requirements of the IDEA, as amended, as soon as possible, and not later than June 30, 2023. (34 CFR § 76.104)

I, the undersigned authorized official of the

Virginia- Virginia Department of Education,

(Name of State and official name of State agency)

am designated by the Governor of this State to submit this application for FFY 2022 funds under Part B of the Individuals with Disabilities Education Act (IDEA).

Printed/Typed Name of Authorized Representative of the State: Kent Dickey
Title of Authorized Representative of the State: Deputy Superintendent, Budget, Finance & Operations
Signature: Kent C. Dickey
Date: 5/17/22

Enclosure C
IDEA Grants to States Program
(Part B, Section 611)

Explanation of the Federal Fiscal Year (FFY) 2022 Allocation Table

Total Grant Award (Column B)

Column B shows your total grant award for the Grants to States program for FFY 2022 under the Consolidated Appropriations Act, 2022 (Public Law 117-103).

State total grants are calculated in accordance with several factors. First, each State is allocated an amount equal to the amount that it received for fiscal year 1999. If the total program appropriation increases over the prior year, 85 percent of the remaining funds are allocated based on the relative population of children aged 3 through 21 who are in the age range for which the State ensures the availability of a free appropriate public education (FAPE) to children with disabilities. Fifteen percent of the remaining funds are allocated based on the relative population of children aged 3 through 21 living in poverty who are in the age range for which the State ensures the availability of FAPE to children with disabilities. The statute also includes several maximum and minimum allocation requirements when the amount available for distribution to States increases.

If the amount available for allocation to States remains the same from one year to the next, States receive the same level of funding as in the prior year. If the amount available for allocation to States decreases from the prior year, any amount available for allocation to States above the fiscal year 1999 level is allocated based on the relative increases in funding that the States received between fiscal year 1999 and the prior year. If there is a decrease below the amount allocated for 1999, each State's allocation is ratably reduced from the fiscal year 1999 level.

Section 611 Base Allocation to LEAs (Column C)

Column C is the portion of the local educational agency (LEA) flow-through amount that must be distributed to LEAs based on the amounts that the LEAs would have received from FFY 1999 funds had the State educational agency (SEA) flowed through 75 percent of the State award to LEAs. Note that this amount is less than the minimum amount that States were required to provide to LEAs from FFY 1999 funds. The Part B regulations at 34 CFR §300.705(b)(2) clarify how adjustments to the base payment amounts for LEAs are made.

Maximum Set-Aside for Administration (Column D)

Column D includes the maximum State set-aside amount for administration. A State may reserve for State administration up to the greater of the maximum amount the State could reserve for State administration from fiscal year 2004 funds, or $800,000, increased by inflation as reflected by the Consumer Price Index for All Urban Consumers (CPIU). The maximum State set-aside amount available for administration for FFY 2022 is a 6.0 percent increase over the maximum amount that was available for FFY 2021. Each outlying area may reserve for each fiscal year not more than 5 percent of the amount the outlying area receives under this program or $35,000, whichever is greater.

Maximum Set-Aside Available for Other State-Level Activities (Columns E - H)

The maximum level of funding that may be set aside from a State's total allocation for State-level activities, other than administration, is contingent upon the amount that the State actually sets aside for administration and whether the State opts to establish a LEA high-risk pool under IDEA, section 611(e)(3). For FFY 2022:

(1) If the actual amount a State will set aside for State administration is over $850,000 and the State will use funds from its award to support a high-risk pool, the maximum amount the State may set aside of its total award for State-level activities (other than administration) is 10.0 percent of its FFY 2006 award as adjusted for inflation based on the CPIU.
(2) If the actual amount a State will set aside for State administration is over $850,000 and the State will not use funds from its award to support a high-risk pool, the maximum amount the State may set aside of its total award for State-level activities (other than administration) is 9.0 percent of its FFY 2006 award as adjusted for inflation based on the CPIU.
(3) If the actual amount a State will set aside for State administration is $850,000 or less and the State will use funds from its award to support a high-risk pool, the maximum amount the State may set aside of its total award for State-level activities (other than administration) is 10.5 percent of its FFY 2006 award as adjusted for inflation based on the CPIU.
(4) If the actual amount a State will set aside for State administration is $850,000 or less and the State will not use funds from its award to support a high-risk pool, the maximum amount the State may set aside of its total award for State-level activities (other than administration) is 9.5 percent of its FFY 2006 award as adjusted for inflation based on the CPIU.

SEAs are required to use some portion of these State set-aside funds on monitoring, enforcement, and complaint investigation and to establish and implement the mediation process required by section 615(e), including providing for the costs of mediators and support personnel. In addition, States setting aside funds for a high-risk pool, as provided for under section 611(e)(3), must reserve at least 10 percent of the amount the State reserved for State-level activities for the high-risk pool.

SEAs also may use State set-aside funds: (1) for support and direct services, including technical assistance, personnel preparation, and professional development and training; (2) to support paperwork reduction activities, including expanding the use of technology in the individualized education program process; (3) to assist LEAs in providing positive behavioral interventions and supports and mental health services to children with disabilities; (4) to improve the use of technology in the classroom by children with disabilities to enhance learning; (5) to support the use of technology, including technology with universal design principles and assistive technology devices, to maximize accessibility to the general education curriculum for children with disabilities; (6) for development and implementation of transition programs, including coordination of services with agencies involved in supporting the transition of students with disabilities to postsecondary activities; (7) to assist LEAs in meeting personnel shortages; (8) to support capacity building activities and improve the delivery of services by LEAs to improve results for children with disabilities; (9) for alternative programming for children with disabilities who have been expelled from school, and services for children with disabilities in correctional facilities, children enrolled in State-operated or State-supported schools, and children with disabilities in charter schools; (10) to support the development and provision of appropriate accommodations for children with disabilities, or the development and provision of alternate assessments that are valid and reliable for assessing the performance of children with disabilities,

in accordance with sections 1111(b) and 1201 of the Elementary and Secondary Education Act of 1965 (ESEA); and (11) to provide technical assistance to schools and LEAs, and direct services, including direct student services described in section 1003A(c)(3) of the ESEA to children with disabilities, in schools or LEAs implementing comprehensive support and improvement activities or targeted support and improvement activities under section 1111(d) of the ESEA on the basis of consistent underperformance of the disaggregated subgroup of children with disabilities, including providing professional development to special and regular education teachers, who teach children with disabilities, based on scientifically based research to improve educational instruction, in order to improve academic achievement based on the challenging academic standards described in section 1111(b)(1) of the ESEA.

Section 611 Population/Poverty

The minimum amount that a State must flow through to LEAs based on population/poverty equals the total award (Column B) minus the LEA base allocation (Column C), the maximum amount available for administration (Column D), and the maximum amount available for other State-level activities (Column E, F, G, or H). Of this amount, 85 percent must be distributed on a pro-rata basis to LEAs according to public and private elementary and secondary school enrollment, and 15 percent on a pro-rata basis to LEAs according to the number of children in LEAs living in poverty, as determined by the State.

Enclosure D
IDEA Preschool Grants Program
(Part B, Section 619)

Explanation of the Federal Fiscal Year (FFY) 2022 Allocation Table

Total Grant Award (Column B)

Column B shows your total grant award for the Preschool Grants program for FFY 2022 under the Consolidated Appropriations Act, 2022 (Public Law 117-103).

State total grants are calculated in accordance with several factors. First, each State is allocated an amount equal to its fiscal year 1997 allocation. For any year in which the appropriation is greater than the prior year level, 85 percent of the funds above the fiscal year 1997 level are distributed based on each State's relative population of children aged 3 through 5. The other 15 percent is distributed based on each State's relative population of children aged 3 through 5 who are living in poverty. The formula provides several minimums and maximums regarding the amount a State can receive in any year.

If the amount available for allocation to States remains the same from one year to the next, States receive the same level of funding as in the prior year. If the amount available for allocation to States decreases from the prior year, any amount available for allocation to States above the fiscal year 1997 level is allocated based on the relative increases in funding that the States received between fiscal year 1997 and the prior year. If there is a decrease below the amount allocated for fiscal year 1997, each State's allocation is ratably reduced from the fiscal year 1997 level.

Maximum State Set-Aside (Column C)

States may reserve funds for State-level activities up to an amount equal to 25 percent of the amount they received for fiscal year 1997 under the Preschool Grants program, adjusted upward each year by the lesser of either the rate of increase in the State's allocation or the rate of inflation as reflected by the Consumer Price Index for All Urban Consumers (CPIU). If a State chooses to set aside the maximum amount of FFY 2022 section 619 funds for State-level activities, the amount available for making local educational agency (LEA) base payments in Column E may be below 75 percent of the State's FFY 1997 section 619 grant.

State educational agencies (SEAs) may use State set-aside funds: (1) for administration (limited to no more than 20 percent of the maximum State set-aside – Column C); (2) for support services (including establishing and implementing the mediation process required under section 615(e) of the IDEA and 34 C.F.R. § 300.506), which may benefit children with disabilities younger than 3 or older than 5, as long as those services also benefit children with disabilities aged 3 through 5; (3) for direct services for children with disabilities who are eligible for services under section 619; (4) for activities at the State and local levels to meet the performance goals established by the State under section 612(a)(15) of the IDEA; (5) to supplement other funds used to develop and implement a statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families (but not more than up to 1 percent of the amount received under this program); (6) to provide early intervention services (which shall include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills) in accordance with Part C to children with disabilities who are eligible for services under section 619 and who previously received services under Part C until such children enter, or are eligible under State law to enter, kindergarten; or (7) at the

State's discretion, to continue service coordination or case management for families who receive services under Part C, consistent with number 6.

Maximum Set-Aside Available for Administration (Column D)

Column D indicates the maximum portion of the total State set-aside amount (Column C) that may be used to administer this program. The amount that may be used for administration is limited to 20 percent of the maximum amount available to a State for State-level activities. These funds may also be used, at the State's discretion, for the administration of the Grants for Infants and Families program (IDEA Part C).

Section 619 Base Payment for LEAs (Column E)

Column E is the portion of the LEA flow-through amount that must be distributed to LEAs based on the amounts that the LEAs would have received from the FFY 1997 funds had the SEA flowed through 75 percent of the State award to LEAs. Note that this amount is less than the minimum amount that States were required to provide LEAs from the FFY 1997 funds. The IDEA Part B regulations at 34 C.F.R. § 300.816(b) clarify how adjustments to the base payment amounts for LEAs are made. If, after the State set-aside is subtracted from the total award, the State determines that the amount available for base payments is less than 75 percent of the State's FFY 1997 section 619 grant, the State must ratably reduce each LEA's base payment by the percentage of the reduction in the total amount actually available for making base payments in FFY 2021. For example, if the total amount in the "Base Payment for LEAs" column is $100 and the total amount available for making base payments in FFY 2022 is $90, the reduction in the total base payment amount is 10 percent, and each LEA's base payment for FFY 2022 must be reduced by 10 percent. The State, if necessary, must make base payment adjustments in accordance with 34 C.F.R. § 300.816(b) based on the ratably reduced base payments.

Section 619 Population/Poverty Factors (Column F)

Column F shows the minimum amount a State must allocate to LEAs based on population and poverty factors if a State chooses to set aside the maximum amount of FFY 2022 section 619 funds for State-level activities. As noted above, if a State chooses to set aside the maximum amount of FFY 2022 section 619 funds for State-level activities, the amount available for LEA subgrants could be below the base payment amount in Column E, and the State will not have any remaining section 619 funds available after making base payments. Therefore, the State would be unable to make a population or poverty payment. If States with no funds in Column F reserve the maximum amount of FFY 2022 section 619 funds for State-level activities, they would be unable to make a population or poverty payment.

After a State sets aside funds for State-level activities and makes the required base payments, 85 percent of the remaining amount must be distributed on a pro-rata basis to LEAs according to public and private elementary and secondary school enrollment, and 15 percent on a pro-rata basis to LEAs according to the number of children in LEAs living in poverty, as determined by the State.

Total State Minimum Flow-Through to LEAs (Column G)

The minimum flow-through to LEAs (Column G) is the difference between the Total Grant Award (Column B) and the Maximum State Set-Aside (Column C). If States do not choose to retain the maximum amount available under the State set-aside (Column C), the remaining funds flow through to LEAs in addition to the funds in Column G.

Exhibit D

Amended Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

D.C., *by his parents and guardians,*
***Trevor Chaplick and Vivian Chaplick*,**
Trevor Chaplick,
Vivian Chaplick,

M.B., *by his parents and guardians,*
***James Bingham and Sheila Bingham*,**
James Bingham,
Sheila Bingham,

and

Hear Our Voices, Inc. *on behalf of themselves and all others similarly situated*

Plaintiffs,

v.

Fairfax County School Board,

Dr. Michelle Reid, Superintendent of Fairfax County Public Schools (in her official capacity),

Virginia Department of Education,

and

Jillian Balow, Superintendent of Public Instruction of Virginia Department of Education (in her official capacity)

Defendants.

Civil Action No. 1:22CV1070-MSN-IDD

JURY TRIAL DEMANDED

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PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiffs on behalf of themselves and others similarly situated, and by their undersigned counsel, bring this civil action for declaratory and injunctive relief, to remedy violations of the Constitution and laws of the United States of America resulting from actions undertaken by the Defendants under color of law.

I. Introduction

1. The Individuals with Disabilities Education Act ("IDEA") and implementing regulations require Defendants to provide a "free appropriate public education" ("FAPE") to children identified as disabled, one of the most vulnerable groups in the country. Instead, Defendants have established a rigged system designed to delay, limit and avoid providing appropriate services to eligible children within the Commonwealth of Virginia. In doing so, Defendants have systemically violated for decades the federal, due process, and equal protection rights of disabled children in Virginia. This abuse has been extensively documented by federal regulators and yet it continues to this day.

2. Fairfax County Public Schools ("FCPS") and the Virginia Department of Education ("VDOE") have created this rigged system by employing many tactics including obstruction, burden, delay, concealment, bullying, and outright harassment that collectively are designed to prevent disabled students from obtaining the services to which they are entitled under the IDEA. FCPS is subject to multiple consent decrees as a result of its mistreatment of disabled students. And, VDOE is subject to ongoing orders from the United States Department of Education's Office of Special Education and Rehabilitative Services (OSEP) based on its multiple and repeated violations of the IDEA and similar laws.

3. This Complaint provides an extensive description of representative violations of federal law carried out by Defendants against parents and disabled children in the Commonwealth of Virginia. In many cases, these violations have been documented and confirmed in multiple investigations of Defendants by the U.S. Department of Education ("USDOE") spanning many years. Plaintiffs' allegations against Defendants in this Complaint are organized to demonstrate how Defendants' concerted efforts to undermine the procedural safeguards of the IDEA have caused children in Fairfax County, and across the Commonwealth of Virginia, to be deprived of federally-mandated special education services in violation of their civil rights and rights under the IDEA.

4. The pervasive and systemic violations start with Defendants engaging in various tactics to avoid and delay evaluating students with disabilities. Such tactics include ignoring parents' repeated requests for evaluations, failing to conduct evaluations within the requisite time periods required by law, arbitrarily limiting the scope of evaluations, and refusing to pay for an Independent Educational Evaluation ("IEE") as required under the IDEA.

5. If parents are fortunate enough to overcome these initial obstacles, the next barrier confronting them is an evaluation process that Defendants have designed with bias ***against*** a finding of disability. For example, FCPS, acting under the supervision of VDOE, regularly ***ignores,*** rather than gathers, the functional, developmental, and academic information about eligible children. Indeed, teachers and other participants in the IDEA process often are instructed to minimize evidence of students' disabilities, exaggerate their academic process, and conceal other relevant information, including the school district's failures to provide FAPE and other specific accommodations and services that are required under the IDEA.

6. Parents who are aggrieved by this systematic denial of services to their children

have no viable means to pursue relief. In theory, they have a federally-mandated right to seek a due process hearing to challenge these adverse decisions. But, in practice, it is impossible for children and parents in Virginia to overcome the obstruction practiced by the Defendants. If a family with a disabled child has enough resources to hire counsel and engage in a contentious, multi-year fight with the school district – only a very few have such resources – it can file a request for a due process hearing under the IDEA. But, as school district officials repeatedly warn parents, the parents will lose. This is because, contrary to the due process hearing right afforded by the IDEA, VDOE has developed a "kangaroo court system" replete with sham procedures, biased "adjudicators," and outcomes against the disabled students that are nothing more than foregone conclusions.

7. VDOE's sham process begins and ends with its slate of biased, predisposed, and unqualified (so-called) due process hearing officers. That slate has been carefully curated to ensure that only those hearing officers willing to play ball with VDOE and FCPS – and rule against parents the vast majority of the time – qualify for and remain on the list. Under state law, VDOE is responsible for: certifying hearing officers to hear special education due process cases, determining the number of hearing officers who will be certified, reviewing Hearing officer actions, and reviewing and recertifying hearing officers on an annual basis. VDOE is also responsible for training and compensating hearing officers. These powers give VDOE near-absolute control over these hearing officers. Using this power, VDOE carefully curated a select group of twenty-two (22) hearing officers who nearly always rule in favor of school districts and against parents. Despite (or because of) the incredibly one-sided outcomes generated by these hearing officers, VDOE has repeatedly recertified these hearing officers. VDOE also failed to add a new single hearing officer during the period from 2010 to July of 2021, ensuring that no one

except for VDOE's own tried-and-tested allies would adjudicate due process hearings. The result has been an entire generation of disabled children and their parents facing a near-insurmountable hurdle to obtaining a fair due process hearing.

8. VDOE's concerted effort to develop its roster of biased hearing officers has borne bitter fruit. From 2010 through July 2021 less than 1% of parents who initiated a due process hearing under the IDEA in Northern Virginia received a favorable ruling granting the relief they requested. That is only 3 rulings in 395 cases in all of Northern Virginia, over more than 11 years. The results are not much better statewide in Virginia with a little over 1.5% of parents who initiated a due process hearing ultimately receiving a favorable ruling—only 13 such rulings in all 847 cases brought in Virginia over that same 11-year period. Shockingly, nearly two-thirds of these hearing officers have never ruled for a disabled child in a due process hearing in the last two decades. ***Worse, in Northern Virginia, 83% of hearing officers never once ruled in favor of parents from 2010 to July 2021.***

9. Despite receiving numerous complaints about the biased hearing process, VDOE has refused to exercise its oversight authority to ensure that disabled students and their parents receive a fair and impartial due process hearing.

10. Under VDOE's watch, its hearing officers have fostered a costly (albeit lucrative for themselves) and highly contentious dispute resolution system while repeatedly violating federal law. Such violations include:

a. Backdating decisions to falsify compliance with federal and state laws,

b. Engaging in *ex parte* communications with LEA[1] lawyers and personnel to

[1] An "LEA" is defined in the IDEA as a "Local Education Agency," which generally equates with the board or district overseeing local public schools. FCPS is an LEA.

the exclusion of parents,

c. Ignoring and excluding evidence and open admissions that teachers and school administrators routinely manipulate and falsify academic records,

d. Imposing unique and biased procedural burdens on parents and not schools,

e. Rejecting expert testimony provided by parents on frivolous and false grounds,

f. Attributing statements, claims and requests to parents that were never in fact made,

g. Unilaterally delaying the proceedings and postponing deadlines without agreement from the parents or on motion from either party, and

h. Misrepresenting special education law to bar parents from contesting substantive provisions of IEPs[2].

11. To further ensure favorable outcomes, VDOE employs "hearing monitors" to attend all due process hearings. These hearing monitors report back to VDOE about the due process proceedings. There are currently two hearing monitors and, according to one hearing officer, one of these monitors engaged in multiple *ex parte* communications with this hearing officer to try to persuade him to disregard the parents' expert and rule in favor of the school district.[3]

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[2] An "IEP" is the "Individualized Education Program" developed for a disabled child as required under the IDEA.

[3] VDOE also places VDOE monitors in IDEA mediations, to oversee the process and report back to VDOE. Like the due process hearing monitors, these VDOE mediation monitors often improperly interfere with the mediation process. The United States Department of Education's Office of Special Education Programs (OSEP) cited VDOE for its practice of placing VDOE representatives in IDEA mediations and instructed them to discontinue it. *See* Letter Dated June 23, 2020 from, Laurie VanderPloeg, Director, Office of Special Education Programs, to James

12. The right to an impartial due process hearing is one of the most fundamental protections in the IDEA. Without a fair and impartial hearing, the goals of the IDEA will not be met, and disabled children will continue to be left behind. Further, a system tainted by biased hearing officers deters parents and others from fulfilling their role under the IDEA as education advocates for disabled children. That is exactly what is happening in Virginia.

13. In an attempt to hide their egregiously biased system and pervasive violations of the IDEA and other laws, Defendants have taken extreme measures to punish parents and advocates for attempting to challenge the unlawful machine. Invited advocates for the disabled and counsel have been excluded from or forced to leave IEP preparation sessions by VDOE personnel and administrators, and when they have refused, they have been arrested and charged with trespassing. Others have been subjected to costly and baseless civil litigation for attempting to uncover and expose Defendants' wrongdoing.

14. VDOE and its LEAs have also wrongfully claimed that parents must use the Virginia Freedom of Information Act ("FOIA") to access information to which they are entitled under the IDEA. Yet, when parents attempt to pursue FOIA requests, VDOE, as the gatekeeper of Virginia education information, makes the process so complicated, expensive, and otherwise burdensome that parents rarely can access the necessary information to uncover what has happened, and is happening, to their child. Indeed, the methodical and ubiquitous policies and procedures employed to frustrate the procedural safeguards and substantive rights of disabled

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Lane, then Superintendent of VDOE, *available at* https://www2.ed.gov/fund/data/report/idea/partbdmsrpts/dms-va-b-2020-letter.pdf (last accessed January 19, 2023). OSEP indicated that having a VDOE representative present could influence the process and, on top of that, the VDOE representatives were improperly participating in the mediation process, rather than just observing. In spite of the order from the USDOE, VDOE has, thus far, refused to remove their representatives from IDEA mediations.

students and their parents in Virginia, described in detail below, were not discovered, and could not have been discovered, until members of HOV spent tens of thousands of dollars and over a year's worth of time preparing detailed information requests, corresponding with VDOE's FOIA gatekeepers, sending multiple follow ups, and combing through mountains of data to uncover the truth.

15. Defendants' concerted effort to undermine the procedural safeguards of the IDEA has caused a systemic breakdown in IDEA services across the Commonwealth of Virginia. Without effective oversight from VDOE, LEAs routinely violate various provisions of the IDEA and deprive vulnerable disabled children of the special education services to which they are entitled under federal law. As a consequence, an entire population of children within the Commonwealth of Virginia is currently being denied access to the free public education guaranteed by the Constitution of Virginia.

16. Named Plaintiffs M.B. and D.C. are children with sensory, emotional, physical, cognitive, developmental or language disabilities, and their parents, who tried to obtain special education and related services from FCPS, and to vindicate their rights through a due process hearing. Despite their eligibility for such services, FCPS and VDOE have denied, delayed or otherwise deprived plaintiffs of access to these services through a concerted and systematic effort to avoid compliance with the IDEA.

17. As fully set forth below, Named Plaintiffs seek—on behalf of themselves and all others similarly situated—a judicial declaration that Defendants' policies and procedures, resulting in the failures to provide FAPE, do not effectuate the congressional objectives articulated in the IDEA, satisfy the requirements of the IDEA, or meet the minimum requirements of procedural due process. Plaintiffs also seek injunctive relief barring the continued use by VDOE and FCPS of

procedures that systematically deprive special needs students of their rights under the IDEA. Plaintiffs further seek an injunction which will require VDOE to finally carry out its federally-mandated oversight of FCPS and other Virginia LEAs which consistently fail to provide eligible children with FAPE. This action is the only means by which Plaintiffs, and the class they intend to represent, can seek relief necessary to address Defendants' ongoing systematic violations of their and other disabled students' rights under federal law.

II. Parties

18. D.C. ("D.C.") is a nineteen-year-old, educationally disabled student who at all times relevant to this action resided in Fairfax County, Virginia.

19. Plaintiffs Trevor Chaplick and Vivian Chaplick are D.C.'s parents and guardians, with their primary residence in Fairfax County, Virginia, within this judicial district and division. They bring this action on D.C.'s behalf, in their own right, and on behalf of a class of similarly-situated individuals as alleged below.

20. D.C. has faced significant challenges throughout his life, including Autism, Attention Deficit Hyperactivity Disorder-Primarily Hyperactive-Impulsive Type, Tourette's Syndrome, Encephalopathy, Adjustment Disorder with Anxiety and Disturbance of Conduct, and an Intellectual Disability of an undetermined severity, as well as severe gastrointestinal complications and sleep disturbance.

21. D.C. engaged in daily aggressive behaviors since he was six years old. These behaviors include self-injury, such as head-banging, biting, hitting, and kicking, as well as emotional meltdowns, elopement, aggression and violence towards others, throwing items (glass, food, furniture), and damaging property. These behaviors have resulted in multiple hospitalizations to himself and others.

22. FCPS originally found D.C. eligible in August 2008 for special education services

as a student with Autism and an Intellectual Disability and provided him with an IEP.

23. Because of his profound disabilities and severe aggressive behavior and violence, D.C.'s parents petitioned FCPS for a residential educational placement in the Grafton Integrated Health Network's Integrated Residential/Education Program ("Grafton"), located in Winchester, Virginia. Grafton is one of the only schools in Virginia that offers an integrated setting for residential and educational care of disabled children.

24. This request for a residential placement was made after the parents consulted with, and D.C. had been examined by, medical professionals from some of the most prominent autism and general medical centers in the world, including The Children's Hospital in Maryland, the Discovery Center in New York, and Fairfax Innova Hospital in Virginia.

25. Despite the overwhelming and largely undisputed clinical and expert evidence that residential placement was exactly what D.C. needed to receive a free appropriate public education ("FAPE"), FCPS dismissed and rejected all the parents' requests for a higher level of educational support, told them that D.C. was appropriately placed in his current public-school setting, and refused to approve a residential educational setting.

26. Based on the advice of medical and educational professionals, the parents enrolled D.C. in Grafton in July 2014 at their own expense.

27. On June 26, 2015, D.C.'s parents filed a complaint for a due process hearing challenging the school system's inexplicable placement of D.C. in a public-school setting.

28. To the shock and dismay of D.C.'s parents, due process hearing officer Morgan Brooke-Devlin ruled that D.C. and his family were not entitled to any relief. Although they did not know it at the time, this decision was only the beginning of a long and ongoing struggle between D.C. and his family and FCPS, marked by FCPS' continued resistance to provide

necessary educational services. FCPS treated D.C. and his family poorly at each turn, and reneged on its commitment for a residential placement at the first possible opportunity. These struggles mark an ongoing series of inexplicable denials of services and due process for D.C. and his family, which continue to this day.

29. Plaintiff M.B. is a fifteen-year old, educationally disabled student who at all times relevant to this action resided in Fairfax County, Virginia. M.B. has been diagnosed with multiple learning disabilities, including Attention Deficit Hyperactivity Disorder ("ADHD"), dyslexia, and dyscalculia. On multiple assessments spanning Fifth to Eighth grade, M.B. scored well below his grade level in reading, mathematics, and various other areas of academic progress. M.B. also has challenges with his behavior and social skills. These behavioral issues have caused him to act out in academic settings.

30. Plaintiffs James and Sheila Bingham are M.B.'s parents and guardians, with their primary residence in Fairfax County, Virginia within this judicial district and division. They bring this action on M.B.'s behalf, behalf, in their own right, and on behalf of a class of similarly-situated individuals as alleged below.

31. During the Summer of 2013, FCPS determined that M.B. was eligible for special education and related services. At that time, a psychologist evaluated M.B. and concluded: "With intensive special education services under an IEP for his specific learning disabilities in the areas of reading, spelling, written language, fine motor, and speech, a specific remediation program for dyslexia, accommodations for ADHD, Combined Type, additional school supports to help him with organizational skills, and possibly medication, it is expected that [M.B.]'s learning disabilities and ADHD symptoms should be moderated and he should be better able to work up to his potential in school." Sadly, M.B. would not receive these needed services, and his potential would not be

reached for several years.

32. From 2018 through 2021, M.B. struggled through a series of improper FCPS-mandated public school placements. During those years, M.B. showed no significant progress in reading, mathematics, and other measures of academic ability. He was also increasingly isolated from his peers and experienced escalating emotional and behavioral challenges. These struggles came to a head when, during the COVID-19 Pandemic, FCPS completely failed to implement his IEP and otherwise provide him with FAPE.

33. In the Fall of 2021, after suffering through years of FCPS' failures to properly develop and implement IEPs for their son, M.B.'s parents placed M.B. at the Phillips School – a non-public day school. Phillips School developed its own IEP for M.B. which included several services which FCPS had failed to provide, including 1:1 support for completing assignments and behavioral services, which included weekly counseling to address M.B.'s social skills and emotional management.

34. Once enrolled at the Phillips School, M.B. finally showed significant improvement in both his academics and his behavior. Nevertheless, FCPS continued to baselessly maintain that a public school setting, where M.B. had languished for years, was the proper placement for him.

35. M.B.'s parents filed a due process appeal in January 2022, challenging FCPS' IEPs and placements for the 2019, 2020, and 2021 school years. M.B.'s parents and advocates presented testimony and evidence from multiple experts regarding M.B.'s challenges and needs, and how FCPS had failed to meet them. They also developed testimony regarding the inappropriateness of FCPS' proposed placement at the Burke School for the 2021 school year.

36. Despite the evidence that M.B. had been deprived of FAPE, the hearing officer concluded that FCPS' IEPs and placements had been sufficient, and denied all relief to M.B. and

his parents.

37. On August 15, 2022, M.B. and his parents brought an action in the United States District Court for the Eastern District of Virginia challenging the hearing officer's adverse May 17, 2022 decision. *See M.B. et al. v. Fairfax County School Board*, Case No. 22-cv-00930. That case remains pending.

38. Organizational Plaintiff Hear Our Voices, Inc. ("HOV"), is a private, non-profit member organization that is incorporated in Delaware. HOV was established to protect and advocate for the rights of persons with disabilities and to safeguard the rights of individuals with developmental disabilities, like D.C. and M.B. HOV has members that are residents of Virginia and of Fairfax County. HOV's members include Trevor and Vivian Chaplick and Sheila and James Bingham, as well as other residents of Virginia and Fairfax County.

39. Organizational Plaintiff HOV has a mission of ending systemic mistreatment of persons with disabilities, including in school. HOV brings this suit on behalf of its members and in furtherance of its efforts and expenditure of resources in promoting its principal mission of securing appropriate and equal educational services for students with disabilities, including efforts focused on each of the procedures required by the IDEA, from the initial identification of students with potential disabilities through the evaluation, IEP, mediation and the due process hearing and appeal process, including ensuring the right to a fair due process hearing before an impartial hearing officer as required by federal law. HOV works with parents, teachers, advocates, attorneys and other constituents to further these goals, including through assistance, advocacy and legislative efforts.

40. The violations by VDOE and FCPS of the United States Constitution and the IDEA ("Defendants' Wrongful Actions") have required HOV to divert its two principal resources, time

and money, away from several of its core efforts and toward efforts designed to address the harm caused by Defendants' Wrongful Actions.

41. For example, one of HOV's core efforts is legislative analysis and review for potential expansion. Having started to form a legislative drafting committee to address disability issues on a multi-state and national level, HOV had to put those efforts on hold to address the current situation in Virginia. HOV's plans included drafting national and state-specific legislation to improve the rights of disabled students under the IDEA and related state legislation and regulations.

42. HOV had also initiated plans to meet with key officials in-person to discuss some of the issues that need to be addressed in special education law, including potential legislation to address these issues. Another core effort HOV was beginning to explore was expanding work with parents and other constituents to improve educational services available to parents related to the IDEA processes and to work with local organizations to provide enhanced resources and workshops to parents who are unsatisfied with a school's treatment of their disabled child.

43. HOV's efforts also were to include seeking commitments from law schools to open (or re-open) disability rights clinics and working with volunteer lawyers' organizations to provide such services. One of HOV's founders had also started to create a toolkit for parents in all states to use when dealing with inadequate treatment of disabled students and the failure of state and local educational agencies to meet their obligations under state and federal law. For example, the toolkit includes a FOIA demand template and was to include other draft template documents . It was also going to include a roster of special education experts to assist with issues arising in the implementation of IEPs. However, like HOV's other efforts, this project has gone unfinished because of the need to address more immediate issues in Virginia. Because of the issues in

Virginia, HOV has been forced to put virtually all of its core efforts on hold in order to focus its resources on the more immediate and insidious issues in Virginia, rather than spending its time and money on its other projects.

44. As a result of the concerns over VDOE and FCPS' ubiquitous failures, HOV has had to focus its efforts on the following activities, which would not be necessary, but for the Defendants Wrongful Actions:

a. Talking to parents who have reached out (from Virginia), walking them through their options, offering them suggestions regarding various and potential next steps (a significant investment of time);

b. Reaching out to regulators (e.g., the Department of Justice and the Office of Civil Rights of the U.S. Department of Education), and other organizations about the problems in Virginia specifically;

c. Spending numerous hours investigating the special needs education problems in Virginia;

d. Hiring counsel to prepare and continue to pursue over many months Virginia FOIA requests – costing significant time and money – to expose the Defendants' Wrongful Actions;

e. Preparing for interviews with the press about the problems in Virginia and drafting op-eds on the problems with Virginia;

f. Diverting resources away from national legislative efforts to efforts in Virginia.

45. HOV also has representational standing to sue on behalf of its members for each claim it brings because (i) at least multiple identified members would otherwise have Article III

standing to sue in their own right, (ii) the interests at stake are germane to its purpose, and (iii) neither the claims asserted nor the relief requested requires participation of individual members in the lawsuit.

46. HOV has several members who satisfy the first prong of the associational standing test, including D.C.'s parents, M.B.'s parents and multiple other parents who have suffered from the wrongful conduct described in this complaint. Several of these individuals were members of HOV at the time that the First Amended Complaint was filed. They include individuals whose children were denied or delayed the education and services required by the IDEA, at every stage of the IDEA and Virginia statutory process. This includes: (1) individuals who requested evaluations that were denied and delayed, (2) individuals whose IEPs were not implemented correctly or otherwise followed, (3) individuals who were denied the right to a fair and impartial due process hearing as well as other procedural safeguards, (4) individuals who submitted complaints to VDOE that were either not investigated at all or inadequately investigated by a biased VDOE employee, (5) individuals who either were denied their children's educational records or were provided false and incomplete information, such as manipulated educational records, false statements and testimony, padded grades, and misrepresentations about student capabilities, and (6) individuals who were refused access to information or from whom information was concealed, in spite of appropriate requests under the Virginia FOIA.

47. In addition, the interests at stake in this case clearly implicate the purposes of HOV, which was established to "achiev[e] a better education and life for disabled and special needs children and their families." Central to its mission is to "protect . . . the rights of children with special needs and disabilities, including under the federal civil rights laws and [the IDEA]" and to "end the systemic mistreatment in schools of disabled and special needs children." Nothing could

be more germane to those purposes than a lawsuit challenging Defendants' mistreatment of special needs children and their families.

48. And, neither the claims asserted nor the relief requested require the participation of HOV's members. This lawsuit seeks declaratory and injunctive relief against the Defendants, which does not require the participation of HOV members to implement.

49. Based on the foregoing and the facts described below, Plaintiff HOV has both direct organizational standing and representational standing, through their members who have been unjustifiably denied the substantive rights and procedural safeguards afforded by the IDEA.

50. Defendant Fairfax County School Board (the "Board") is the governing body of FCPS, a school division of the Commonwealth of Virginia. The Board directs, controls, and supervises the operation and administration of all schools, programs, and activities within FCPS and is organized under the laws of Virginia. Va. Code Ann. § 22.1-71. FCPS is the tenth largest school system in the country, and it receives federal funds under the IDEA, 20 U.S.C. §§ 1400 *et seq*. FCPS serves over 187,000 students each year. In the 2019–2020 school year, FCPS' approved budget for the school operating fund totaled $2.9 billion. FCPS has a staff of over 24,000 employees.

51. Defendant Dr. Michelle Reid is the FCPS Superintendent. She was elected by the Board and appointed effective July 1, 2022. Dr. Reid is responsible for working in conjunction with the Board and for overseeing the daily operations of FCPS, including overseeing its student IEP process, allocation of resources, training of employees, and methods of data collection. Dr. Reid is the FCPS official responsible for ensuring that FCPS' policies, practices, and procedures comply with the IDEA and other federal laws.

52. Defendant Virginia Department of Education ("VDOE") is an executive

department of the Commonwealth of Virginia established by and operating under the laws of the Commonwealth of Virginia. *See* Va. Code §§ 2.2-208, 22.1-8, *et. seq*. VDOE is subject to the IDEA and is responsible for ensuring Virginia's and its local school systems' compliance with the provisions of the IDEA.

53. Defendant Jillian Balow, the Virginia Superintendent of Public Instruction, serves as the executive officer of VDOE and manages its internal and external operations. In that capacity, Defendant Balow is responsible for overseeing the implementation of the IDEA in the Commonwealth of Virginia. Dr. Balow is the VDOE official responsible for ensuring that VDOE's policies, practices, and procedures comply with the IDEA and other federal laws.

III. Jurisdiction and Venue

54. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343, as this action includes claims brought pursuant to 42 U.S.C. §1983 to challenge actions undertaken by Defendants under color of the laws of the Commonwealth of Virginia that deprive Plaintiffs of rights conferred by the Fourteenth Amendment to the Constitution of the United States, as well as claims brought pursuant to 20 U.S.C. §1405 for violations of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq*.

55. The declaratory relief sought in this Complaint is authorized by 28 U.S.C. §§ 2201 and 2202.

56. This Court may exercise personal jurisdiction over each Defendant, as each is located and has offices within this judicial district.

57. Venue is properly laid in this Court pursuant to 28 U.S.C. § 1391, in that each Defendant is located and has its principal office within this judicial district, and the events giving rise to the claims occurred within this judicial district and division.

IV. Class Action Allegations

58. Plaintiffs D.C., M.B., Trevor Chaplick, Vivian Chaplick, Sheila Bingham, James Bingham, and HOV bring this action on behalf of themselves and on behalf of two classes of similarly-situated individuals under Federal Rules of Civil Procedure 23(a) and 23(b)(2).

59. The first proposed Class consists of "All students with disabilities aged 3 to 21 and their parents residing in the Commonwealth of Virginia who are eligible for special education and related services and have sought dispute resolution services[4] from VDOE under the IDEA between January 1, 2013 and the present." (The "VDOE Class").

60. The second proposed Class consists of "All current students with disabilities aged 3 to 21 residing in Fairfax County who have requested or received an evaluation for special education and related services, under the IDEA and their parents." (The "FCPS Class").

61. Each Class at least includes hundreds of Class members, such that joinder of all Class members in the prosecution of this action is impracticable. The identities and addresses of class members can be readily ascertained from the records maintained by Defendants.

62. Named Plaintiffs' claims are typical of the claims of all VDOE Class members because they have sought special education services in the Commonwealth of Virginia, including procedural safeguards, and were subjected to the same unfair dispute resolution procedures.

63. Named Plaintiffs' claims are likewise typical of the claims of all FCPS Class members because they are currently seeking to obtain from FCPS special education services, and have been subjected to systematic and pervasive FCPS violations of the IDEA, including failure by FCPS to conduct full and individual initial evaluations and reevaluations to determine if the

[4] The phrase "dispute resolution services" is defined to include special education mediation, due process proceedings, and special education complaints.

child is a child with a disability and the nature and extent of such disability pursuant to the requirements of the IDEA, and to develop and implement appropriate IEPs in compliance with the IDEA, as well as FCPS interference with the procedural safeguards afforded under the IDEA, including fair and impartial due process hearings. Consequently, Named Plaintiffs have suffered the same statutory and constitutional violations as the FCPS Class.

64. Named Plaintiffs will fairly and adequately represent the interests of each of the Classes because they have suffered and continue to suffer under the same biased system and they suffer the same or similar violations as other Class members, they have no conflicts with any Class member, and they have retained sophisticated and competent counsel experienced in prosecuting class actions and other complex litigation.

65. There are numerous questions of law and fact common to the VDOE Class—including but not limited to the following:

a. Whether VDOE and its Superintendent of Public Instruction have displayed a firm purpose to circumvent the IDEA and existing regulations in order to frustrate the legal rights of Named Plaintiffs and the VDOE Class in violation of their rights under the Constitution of the United States,

b. Whether VDOE and its Superintendent of Public Instruction have failed to conduct comprehensive evaluations and reevaluations of any child suspected of having a disability and to ensure that all Virginia LEAs conduct comprehensive evaluations and reevaluations of any child suspected of having a disability,

c. Whether VDOE and its Superintendent of Public Instruction have failed to ensure Virginia LEAs authorize and pay for an appropriate independent

educational evaluation ("IEE") when requested by a parent, unless the LEA has promptly initiated an appropriate Due Process hearing,

d. Whether VDOE and its Superintendent of Public Instruction have failed to require Virginia teachers, education administrators, and any other Virginia education employees to create and maintain accurate, complete, and timely records of a child's academic, emotional, and behavioral progress as required by the IDEA.

e. Whether VDOE and its Superintendent of Public Instruction have failed to provide to childrens' parents the complete and unaltered records of their child's academic, emotional, and behavioral progress,

f. Whether VDOE and its Superintendent of Public Instruction have failed to adequately monitor the compliance of local school districts with federal law and regulations under the IDEA,

g. Whether VDOE and its Superintendent of Public Instruction are failing to adequately investigate complaints regarding the failure of local school districts to provide a free appropriate public education to all children with disabilities, and to otherwise comply with federal law and regulations that protect children with disabilities,

h. Whether VDOE and its Superintendent of Public Instruction are failing to implement an impartial special education due process hearing system to resolve disputes between parents and local educational agencies as required by federal law and regulations,

i. Whether VDOE and its Superintendent of Public Instruction are failing to

adequately implement and enforce procedural safeguards afforded to children with disabilities and their parents, including ensuring that every hearing officer is qualified and impartial,

66. There are also numerous questions of law and fact common to the FCPS Class—including but not limited to the following:

a. Whether FCPS and its Superintended of Public Instruction have displayed a firm purpose to circumvent existing federal law and regulations and consistently frustrate the legal rights of Named Plaintiffs and the FCPS Class in violation of their Constitutional rights,

b. Whether FCPS and its Superintendent of Public Schools are failing to conduct comprehensive evaluations and reevaluations of any child suspected of having a disability, as required by 20 U.S.C. § 1414(a)-(c),

c. Whether FCPS and its Superintendent of Public Schools are concealing information pertinent to the development of the IEP and reevaluation process,

d. Whether FCPS and its Superintendent of Public Schools are using inflated grades and false indicia of progress in order to manipulate the IEP and reevaluation process,

e. Whether FCPS and its Superintendent of Public Schools are failing to require teachers, administrators, and other FCPS employees to create and maintain accurate, complete, and timely records of a child's academic, emotional, and behavioral progress as required by the IDEA,

f. Whether FCPS and its Superintendent of Public Schools are failing, upon

request, to immediately provide to childrens parents the complete and unaltered records of their child's academic, emotional, and behavioral progress,

g. Whether FCPS and its Superintendent of Public Schools are failing to authorize and pay for appropriate independent educational evaluations ("IEE") when requested by a parent, when FCPS has not promptly initiated an appropriate Due Process hearing,

h. Whether FCPS and its Superintendent of Public Schools, in an attempt to circumvent existing federal law and regulations, are systematically and consistently delaying implementation of the IEP and procedural safeguards,

i. Whether FCPS and its Superintendent of Public Schools are systematically using the IDEA's procedural safeguards in a manner that unnecessarily and drastically increases the costs to parents, and

j. Whether FCPS and its Superintendent of Public Schools are engaging in bullying and threats of retaliation to frustrate the legal rights afforded under the IDEA.

67. The Defendants' actions apply generally to the Classes, so that final injunctive and declaratory relief are appropriate for each of the Classes.

V. The Background and Objectives of the IDEA

68. Congress enacted the IDEA to guarantee children with disabilities an education that meets their unique needs and prepares them for further education, employment, and independent living, and to make parents of children with disabilities full partners in how their children are educated and protected.

69. Together with its precursors, the Education for All Handicapped Children Act and

the Americans with Disabilities Act, the IDEA represented an evolution in society's treatment of people with disabilities, away from seeing them as medical anomalies to be cured, pitied, or tolerated, and toward acceptance of individual differences as part of the human experience. At the core of the IDEA and other disability-rights statutes is respect for human diversity, eradication of discriminatory practices, and opportunity for inclusion and participation in public life.

70. The IDEA grants students a substantive right to a free appropriate public education ("FAPE") (defined at 20 U.S.C. § 1401(9)), achieved primarily through the development of an individualized education program, suited to their particular needs ("IEP") (defined at 20 U.S.C. § 1401(14)). Under the IDEA, school associations receiving funds are required to identify, evaluate, and supply special education services to children with disabilities in order to ensure a free appropriate public education. In addition to their substantive obligations, school associations are required to provide procedural safeguards such as impartial due process proceedings to ensure that access to FAPE is not lost.

71. Under the IDEA, a state or local level agency must "conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability." 20 U.S.C. § 1414(a)(1). "[A] parent of a child . . . may initiate a request for an initial evaluation to determine if the child is a child with a disability." *Id.* at § 1414(a)(1)(B). "Such initial evaluation shall consist of procedures . . . (I) to determine whether a child is a child with a disability . . . (II) to determine the educational needs of such child." *Id.* at § 1414(a)(C)(i).

72. The IDEA requires that each IEP take account of the child's particular needs, measure the child's current levels of academic achievement, and commit to a list of measurable goals for the child, elaborating on the specific set of services the child will receive, and describing how and to what extent the child will participate in educational programs with nondisabled

children.

73. The IDEA also grants procedural rights. Serving not only to guarantee the substantive rights accorded by the Act, the IDEA's procedural rights, in and of themselves, form the substance of IDEA. It requires school districts to provide parents both with notice and consent to participate in the creation of their child's IEP. Both federal and Virginia law require the development and revision of IEPs to be a cooperative, deliberative process involving the child's parent(s), teachers and counselors.

74. Parents with reason to believe that the IEP proposed by their school district does not meet the IDEA's standard of providing their child with an appropriate education may initiate a due process hearing.

75. The due process hearing is a critical feature of the IDEA. It is ordinarily the only process through which children with disabilities and their parents can challenge a school district's refusal to provide services or accommodations necessary to ensure that a disabled child receives a free appropriate public education guaranteed by the IDEA. Without a fair and impartial hearing process, school districts would be free to ignore requests for services and accommodations, with little consequence.

76. To ensure that the due process hearing is fair and impartial, it is critical that the hearing officer presiding over the due process hearing be knowledgeable, impartial, objective, and free of bias. If hearing officers always, or nearly always, rule in favor of the school district and against the disabled child, that virtually eliminates the ability of disabled children and their parents to obtain the services and accommodations guaranteed under the IDEA when schools refuse to provide them. Facing near-certain failure also deters parents from initiating legitimate challenges, resigning instead to the sad truth that whatever the school district says goes, notwithstanding

parental concerns. This is a serious problem, as school district interests often are not aligned with those of disabled students.

77. Although there is technically a right of appeal from an adverse hearing officer ruling, the significant cost of that process (on top of the cost of the due process hearing itself), and the substantial deference given to hearing officers makes the appellate process financially and practically impossible for nearly all disabled children and their parents. Without a fair and impartial due process hearing, the rights guaranteed under the IDEA are left entirely to the whim of the local school district.[5]

78. The IDEA requires that "[e]ach State that receives funds under this chapter shall . . . ensure that any State rules, regulations, and policies relating to this chapter conform to the purposes of this chapter." 20 U.S.C. § 1407 (a)(1). This includes the IDEA's requirement that parents have the opportunity for a fair due process hearing before a knowledgeable and impartial hearing officer.

79. The IDEA has a substantial, measurable impact on the Commonwealth of Virginia's capacity to provide FAPE to all children living within its borders. For the 2022 to 2023 time period, Virginia received federal funding under Part B of the IDEA in the amount of approximately $289 million. Of that, approximately $39 million was allocated to Fairfax County. However, these funds come with strings attached. Virginia and Fairfax County's continued ability to expend IDEA funds hinges on their compliance with numerous provisions of the IDEA and related federal regulations. *See* 20 U.S.C. § 1411. In Virginia, responsibility for ensuring such compliance rests largely in the hands of Defendant VDOE and LEAs like Defendant FCPS.

[5] As explained in detail below, USDOE has caught FCPS and VDOE repeatedly violating the provisions of the IDEA, to the substantial detriment of Fairfax County's and Virginia's disabled community.

80. Disturbingly, and as described in the proceeding sections, Defendants have failed and continue to fail to comply with their obligations at each stage of the process required by the IDEA.

VI. VDOE's Biased Hearing Officer System Deprives Parents and Special Needs Children of Their Right to a Fair and Impartial Due Process Hearing Under the IDEA

81. Under the IDEA, a due process hearing is a fundamental safeguard for ensuring children receive FAPE. The IDEA expressly guarantees the parents of eligible children "an opportunity for an impartial due process hearing" before a knowledgeable and impartial hearing officer. *See* 20 U.S.C. § 1415(f).

82. Contrary to this unambiguous obligation, VDOE's administration of its due process hearings, according to LEAs' own employees, all but ensures that special needs families who assert a proper complaint will lose. Preparing their challenge to FCPS' decisions concerning their child, D.C.'s parents were warned by an FCPS social worker not to even bother with the due process hearing procedures because they "would lose." D.C.'s parents pressed ahead with a "due process" hearing anyway, believing the social worker's warning to be exaggerated. However, the FCPS social worker knew something D.C.'s parents could not have known until *after* losing their hearing and *after* months of parsing VDOE data obtained via Virginia Freedom of Information Act ("FOIA") requests: Parents and disabled students in Virginia almost ***always*** lose their due process hearings.

A. Evidence Revealed Through FOIA Requests Ultimately Exposed the Travesty of VDOE's Rigged Due Process Hearing System

83. Following the behavior and ruling by hearing officer Morgan Brooke-Devlin as discussed below, the parents of D.C. commenced their investigation of the Virginia hearing officer system on July 16, 2021, by submitting through counsel a Virginia FOIA request to James Lane, the Superintendent of VDOE. Their FOIA request sought relevant records between January 1,

2010[6] up to the date of the FOIA request. The parents expended significant legal and out-of-pocket costs, and, after meeting consistent resistance from VDOE, were forced to send multiple FOIA requests and negotiate through counsel for over a year, to obtain relevant records from VDOE.

84. The documents obtained in the parents' FOIA requests included documents previously not made public and include, but are not limited to, the official Decisions Log for hearing officers as maintained by the Executive Secretary for the Virginia Supreme Court.[7] This log is a manual ledger that, to the parents' knowledge, has never been digitized, analyzed, or otherwise disclosed to the public until the parents of D.C. undertook this task, at significant personal expense and effort.[8] The results are now known and summarized in this Complaint as set forth herein in Exhibit A, Exhibit B, and Exhibit C.

85. In the eleven-year period between 2010 and 2021, 847 due process claims were filed in the Commonwealth of Virginia to seek an adjudication of rights under the IDEA. Of those 847 cases, only 13 resulted in a ruling granting the relief requested by a disabled student or the

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[6] The parents subsequently requested on June 29, 2022 additional documents from VDOE going back to January 1, 2000.

[7] While VDOE does publish on its website redacted hearing officer decisions (going back to 2003), this information is not practically useful for parents wanting to know aggregate outcomes or statistics, which VDOE does not publish. *See* https://www.doe.virginia.gov/special_ed/resolving_disputes/due_process/hearing_officer_decisions/2020-21/index.shtml. D.C.'s parents were only able to obtain the accumulated decision history maintained on the Hearing Officer Decision Log from their FOIA requests.

[8] D.C.'s parents undertook a significant amount of personal time to manually enter into a spreadsheet the results from all hearing officer decisions from 2003 through 2021, and to then categorize and analyze such results by judicial region. The results from 2003 through 2021 are summarized herein in Exhibit A (2010 through 2021), Exhibit B (2003 through 2009), and Exhibit C (cumulative hearing officer decisions from 2003 through 2021). As discussed below, the parents ultimately entered 1,391 hearing officer cases over a twenty-year period and analyzed the results. *See* Exhibit A, Exhibit B and Exhibit C.

student's parent. That is less than 1.5% in the entire state of Virginia. The numbers in Northern Virginia are even more stark and disappointing. In Northern Virginia,[9] only 3 rulings out of 395 cases filed in this eleven-year period ultimately resulted in a ruling in favor of the disabled student or the student's parents. This represents less than one percent (specifically 0.76%) of the total due process hearing cases filed by such families. *See* Exhibit A.

86. Moreover, out of the twenty-two (22) hearing officers eligible to serve during the last decade, only four (4) have ruled in favor of a disabled student or family more than once. See Exhibit A.

87. Fourteen (14) hearing officers, representing sixty-four percent (64%) of all eligible hearing officers, have never ruled fully in favor of a disabled student or family in a due process hearing during this entire 20-year period. *See* Exhibit C.

88. In Northern Virginia, the statistics are even more shocking. Eighty-three percent (83%) of the hearing officers have never ruled in favor of a disabled student or family in a due process hearing between 2010 and 2021 in almost 400 cases. *See* Exhibit A.

89. The lack of rulings in favor of special needs children is a problem that has existed for at least twenty (20) years, which is as far back as VDOE has kept individual hearing officer decisions in the Decisions Log made available to D.C.'s parents. Specifically, since 2003, hearing officers in Virginia have only ruled 25 times fully in favor of disabled children out of 1,391 cases

[9] The Office of the Executive Secretary of the Virginia Supreme Court ("OES") organizes the Commonwealth into six (6) geographic regions. Northern Virginia is identified as Region II and encompasses six (6) counties: Fairfax, Arlington, Loudon, Prince William, Fauquier, and Rappahannock Counties. Hearing officers were classified as serving in either Northern Virginia or outside of Northern Virginia in Exhibits A through C based on their business address set forth in the Special Education Hearing Officer listing published in June 2021 by VDOE that was delivered to the parents in response to their FOIA requests.

representing only 1.8% of the total aggregate cases overseen by these hearing officers. Over this same twenty-year period, hearing officers in Northern Virginia have only ruled fully in favor of disabled children in 7 cases out of 578 cases. *See* Exhibit C.

90. The same core group of twenty-two (22) hearing officers responsible for these decisions has been virtually unchanged over the last two decades which represents two generations of disabled children seeking a better education under the IDEA. *See* Exhibit A, Exhibit B, and Exhibit C.

91. The table attached as Exhibit A to this Complaint and excerpted below in Figure 1 shows the percentages of each category of resolution for the entire Commonwealth of Virginia and for Northern Virginia (Region II) during the last decade:

Hearing Officer Ruling Results for the Period from 2010 through July 2021

Key Statistics	Northern Virginia		Virginia	
	Officers	Pct	Officers	Pct
Number of Hearing Officers with Zero Rulings for Parents	10	83.33%	14	63.64%
Outcomes of Cases Initiated	Cases	Pct	Cases	Pct
Withdrawn	191	48.35%	433	51.12%
Settled	68	17.22%	115	13.58%
Dismissed or in Ruling in Favor of Schools	127	32.15%	266	31.40%
Partial Decision for Parents and School District	6	1.52%	20	2.36%
Ruled in Favor of Parents	3	0.76%	13	1.53%
Total Cases	395	100%	847	100%

92. As this table shows, the parental success rate, by any measure, is astoundingly

low.[10] As described in more detail below,[11] prominent studies have shown that the national average parental success rate is approximately 30% in due process cases in states throughout the country.

B. National Statistics Confirm VDOE Hearing Officers Rule Against Parents at Disproportionately Greater Rates Than Other Jurisdictions

93. The U.S. Department of Education does not require states to publish aggregate hearing officer statistics. And states, like Virginia, do not provide easy access to such aggregate statistics. Consequently, VDOE hearing officers have operated in a zone of low transparency with little public awareness of their aggregate ruling record.

94. Virginia's hearing officer ruling record is atrocious relative to national and state-by-state statistics. Such statistical results are the natural and intended consequence of Virginia's practices of consistently certifying as hearing officers only those with a proven track record of favoring school districts over parents.

95. To identify comparable ruling statistics for benchmarks against Virginia, D.C.'s parents spent a significant amount of time researching studies of hearing officer decisions in other states.

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[10] Though a significant percentage of the filed cases were withdrawn by parents, the reason for each of these withdrawn cases is unknown. Considering the significant time and cost of pursuing a due process hearing, against the minimal chance of success, many parents just give up. Parental deterrence seems to be the ultimate victory for Virginia's flawed and biased system.

[11] See the section below entitled "VDOE Hearing Officers Rule Against Parents at Disproportionately Greater Rates Than Other Jurisdictions" for an extensive compilation of studies of the parental success rate in due process hearings in other states in the country. As discussed below, the studies by all measures demonstrate that Virginia's hearing officer system is an extreme outlier in the percentage of rulings against parents.

96. A few national studies have analyzed hearing officer statistics. [12] One of the recent, national studies of hearing officer decision statistics across multiple states was conducted in the Gershwin-Mueller and Carranza study, which analyzed 575 due process cases under the IDEA that occurred in 41 states from 2005 to 2006. In such hearings, the school districts prevailed 58.6% of the time, and the parents prevailed 30.4% of the time, with 10.4% of the cases involving a split decision in which the school district or the parents obtained partial relief.[13]

97. An earlier, national study conducted during the time frame of 1975 to 1995 found a roughly similar parental win percentage of 28% before hearing officers in IDEA cases.[14]

98. For purposes of comparing Virginia to individual states, both the General Accounting Office and various researchers have confirmed that at least 80%, if not more, of all due process hearings occur in the following states: New York, California, Texas, New Jersey, Pennsylvania, Maryland, the District of Columbia, Massachusetts, and Illinois.[15] All states in the

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[12] *See Perry A. Zirkel & Cathy A Skidmore, National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 Ohio State J. on Disp. Resol. 529–31 (2014).

[13] Tracey Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. Disability Policy Studies, 131, 137 (2011). The study analyzed petitioner, disability, dispute and outcome including hearings of specific learning disabilities (26%), autism (20%), and health impairments (15%). In such study, parents initiated 85% of the hearings under the IDEA.

[14] Perry A. Zirkel & James Newcomer, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 Exceptional Child. 469, 473 n. 23, 475 (1999); *see also* Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 Ohio State J. on Disp. Resol. 525, 532 n.30 (2014) (discussing such national study of hearing officer statistics).

[15] Tracey Gershwin-Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. Disability Policy Studies, 131, 132 (2011).

country, other than six, place the burden of proof on the party requesting the due process hearing,[16] and the vast majority of due process hearings are requested by parents.[17]

99. California has the largest population of special-needs students in any state in the country.[18] A study of due process cases in California found that parents prevailed in 34.6% of these cases.[19] The same study found similar parental win statistics by parents in Ohio, where parents prevailed in 32.7% of due process hearing cases.[20]

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[16] In 2005, the Supreme Court ruled that the party requesting a due process hearing bears the burden of proof under the IDEA unless a state enacts legislation to the contrary. *See Schaffer v. Weast*, 546 U.S. 49, 61–62 (2005); s*ee also* Bailey Sanders & Jane Wettach, *Insights Into Due Process Reform: A Nationwide Survey of Special Education Attorneys* (October 16, 2021), Conn. Pub. Interest Law J., Vol. 20, 2021 at 245, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3944061 ("The majority of states have declined (despite pressure from parents and advocates) to pass such legislation. Because the vast majority of due process cases are initiated by parents, they typically bear the burden in the states that have not specifically shifted it to school districts."). Only the following six states place the burden of proof on the school district: Connecticut, Delaware, Florida, New Jersey, Nevada and New York. *See* Sanders & Wettach, supra at 245.

[17] *See also* Bailey Sanders & Jane Wettach, *Insights into Due Process Reform: A Nationwide Survey of Special Education Attorneys* (October 16, 2021), Conn. Public Interest L. J., Vol. 20, 2021 at 245, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3944061.

[18] Andrew A. Feinstein, Michele Kule-Korgood & Joseph B. Tulman, *Are There Too Many Due Process Cases? An Examination of Jurisdictions with Relatively High Rates of Special Education Hearings*, 18 U.D.C.L. Rev. 249, 255 (2015). For example, during the 2011–12 school year, California had 688,346 special education students followed by New York State which had 450,794 special education students. *See id.* at n.42. While the New York City Department of Education is the largest school district in the country, Los Angeles is the second largest, with approximately 640,000 students in over 900 schools. *See id.* at 266 n.44.

[19] Ruth Colker, *Disabled Education: A Critical Analysis of the Individuals with Disabilities Education Act* 187–88 (N.Y.U. Press 2013). Of the 101 decisions subject to the study between May 2, 2010 and June 20, 2011, the most frequent disabilities were: autism (30%), emotional disturbance (19%), speech and language impairments (17%), Other Health Impairment (OHI) (15%), learning disabilities (13%), and mental retardation/cognitive impairment (9%). *See id.* at 188.

[20] *Id.* at 148–49. Professor Colker noted that Ohio has a two-level administrative process for due process complaints. The first stage is before an independent hearing officer and the second stage

100. In Pennsylvania, a study of hearing officer decisions available through the Pennsylvania Office for Dispute Resolutions (ODR) showed that parents prevailed 58.75% of the time in due process hearings when they were represented by counsel.[21] Similarly, in a study of 343 IDEA cases in Illinois, parents who were represented by counsel prevailed in 50.4% of such due process cases.[22]

101. Researchers examined 139 special education due process hearings that occurred between 2011 and 2015 in Texas. Districts prevailed in 72% of such due process cases, and parents prevailed in 28.06% of such cases. In a study of 258 due process cases in Massachusetts held over eight years from 2005 through 2013, school districts prevailed on all issues 62.5% of the time, parents prevailed 27.2% of the time, and a mixed decision was issued in 10.3% of the cases.[23]

102. Two studies of Iowa hearing officer rulings found a parental win rate similar to the

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is before a state-level review officer. Only after exhausting these two stages can a party appeal a decision to a state or federal court. In her study, parents won 42.8% of the sufficiency decisions and such cases then proceeded to a review by the independent hearing officer. The above parental win percentage of 32.7% involved fifty-five cases during 2002 to 2006 before first-level hearing officers.

[21] Kevin Hoagland-Hanson, *Getting Their Due (Process): Parents and Lawyers in Special Education Due Process Hearings in Pennsylvania*, 163 U. Pa. L. Rev. 1805, 1802 (2015). The author of this publication examined 526 hearing officer decisions from the Pennsylvania ODR issued between February 2008 and September 2013. In such cases, counsel represented parents in roughly three-quarters of all hearings and experienced a 58.75% success rate of rulings in their favor. Pro se parents involved in the remaining quarter of such cases had a much lower rate of success prevailing only 16.28% of the time. The combined rate of parental success in due process cases during such period was 48.24% taking into account the lower rate of success of pro se parents.

[22] *Id.* at 1819. Like Pennsylvania, parents who proceeded without counsel only succeeded in 16.8% of such cases, which brought the composite parental success rate in due process hearings in Illinois to 38.3%.

[23] Blackwell, W.H. & Blackwell, V.V., *A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics* (2015), available at https://journals.sagepub.com/doi/full/10.1177/2158244015577669.

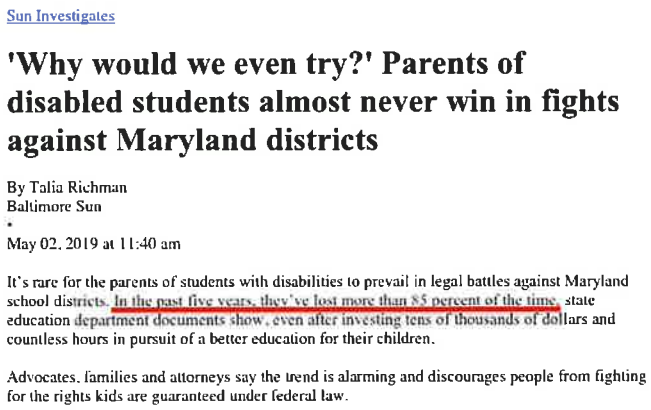
national average of approximately 30%. The first study analyzed 50 hearing officer decisions in Iowa from July 1989 to June 2001. The parental rate win was 34% in that study.[24] The second study examined hearing officer decisions in Iowa from 1978 to 2005. The parental win rate was 32% in that study.[25]

103. One of the lowest percentages identified other than in Virginia was in Maryland. Reporters from the Baltimore Sun investigated parental win percentages in due process hearings conducted under the IDEA from 2014 through 2018. In an article titled "Why Would We Even Try," excerpted below as Figure 3, the Baltimore Sun reported that parents prevailed in approximately 15% of the researched cases, based on data from the Maryland State Department of Education and Kennedy Krieger Institute Project HEAL[26]:

[24] Kristen Rickey, *Special Education Due Process Hearings: Students Characteristics, Issues, and Decisions*, 14 J. Disability Pol'y Stud. 46, 46 (2003); *see also* Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 Ohio St J. on Disp. Resol. 525, 535–36 (discussing the Rickey study).

[25] Perry A. Zirkel, Zorka Karanxha, & Anastasia D'Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study,* 27 J. Nat'l Ass'n Admin. L. 27, 37 (2007). *See also* Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 Ohio St J. on Disp. Resol. 525, at 535–36 (discussing such study).

[26] Talia Richman, *Why Would We Even Try? Parents of Disabled Students Almost Never Win in Fights Against Maryland Districts*, Baltimore Sun (May 2, 2019), *available at* https://www.baltimoresun.com/news/investigations/bs-md-due-process-hearings-20190502-story.html.



Sun Investigates

'Why would we even try?' Parents of disabled students almost never win in fights against Maryland districts

By Talia Richman
Baltimore Sun

May 02, 2019 at 11:40 am

It's rare for the parents of students with disabilities to prevail in legal battles against Maryland school districts. In the past five years, they've lost more than 85 percent of the time, state education department documents show, even after investing tens of thousands of dollars and countless hours in pursuit of a better education for their children.

Advocates, families and attorneys say the trend is alarming and discourages people from fighting for the rights kids are guaranteed under federal law.

104. As troubling as the Maryland data is, its parental success rate is substantially higher than Virginia's during the same period. Virginia's parental success rate is a glaring outlier when compared to other states. It is the product of a system in which—by design—almost two-thirds of VDOE hearing officers never ruled in favor of a special needs child in a due process hearing over a nearly 20-year period. The Virginia due process hearing outcomes are the result of a deliberate, long-standing effort to reward and institutionalize a system of crony hearing officers, while blocking out new hearing officers who are potentially neutral and unbiased.

C. The Children Behind the Statistics: Named Plaintiffs D.C. and M.B. Experienced First-Hand VDOE's Biased Due Process Hearing System

105. VDOE goes to great lengths to make sure that due process hearings in Virginia are a fait accompli. Both D.C. and M.B., and their parents, have suffered at the hands of VDOE's inevitable injustice.

D.C.'s Due Process Hearing

106. During D.C.'s 2015 due process hearing before hearing officer Morgan Brooke-Devlin, D.C.'s parents presented extensive evidence including numerous reputable medical, psychological, and educational experts who uniformly testified that D.C. would not make meaningful educational progress and would be a physical risk to himself and others, unless he

were in a residential placement with integrated educational services, like Grafton.

107. Officials from FCPS conceded in an open, pre-trial hearing that D.C.'s family had presented the largest volume and highest quality of proof demonstrating the severity of D.C.'s disabilities and support for a residential placement—including in the form of institutional and medical expert witness affidavits—that had ever been presented in the history of Fairfax County. Mr. Chaplick testified before Ms. Brooke-Devlin in D.C.'s 2015 due process hearing that FCPS officials acknowledged the extensiveness and quality of evidence supporting D.C.'s disabilities and case for a residential placement. Years later, this was corroborated by Grafton officials in a 2020 IEP meeting, who conceded in front of FCPS that D.C. "is one of, if not the, hardest case of autism and adverse behaviors that Grafton has treated in the school's history." D.C.'s disabilities and behaviors are profound and extreme and have been documented by some of the most respected clinicians in the disability area. And yet FCPS still fought his parents with litigation and refused to consider a residential placement in D.C.'s original IEP. FCPS also lowballed D.C.'s parents in pretrial negotiations with a settlement offer that would only pay for a fraction of D.C.'s educational costs and none of his residential costs.

108. As discussed below, the "unusually high number" of parental complaints to the U.S. Department of Education is evidence of VDOE's and LEAs' (like FCPS) overly aggressive posture towards parents.

109. After the due process hearing, D.C.'s parents were shocked when the presiding hearing officer, Morgan Brooke-Devlin, issued a decision on September 9, 2015, finding in favor of the school system and denying the parents' requested relief for residential placement.

110. Bill Reichhardt, counsel for D.C., and one of the most experienced special needs litigators in the Commonwealth of Virginia at the time, was so outraged by the hearing officer's

bias and irrational decision that he wrote a multiple-page letter dated October 6, 2015 to Sheila Gray who oversaw the Office of Dispute Resolution and Administrative Services of VDOE. A copy of the Reichardt letter is attached as Exhibit F.

111. In his letter, Reichhardt stated that "during my 20 years of law practice in the area of special education I have never experienced such a biased and legally misinformed opinion from a hearing officer as was apparent in this case." He noted specifically the hearing officer's lack of knowledge of the law and her willingness to misconstrue or ignore evidence. The practical effect of her ruling was to invalidate key provisions of federal law regarding D.C.'s rights under the IDEA.

112. In his letter, Reichhardt requested that Ms. Brooke-Devlin "not be appointed in any further Due Process actions."

113. Neither Mr. Reichhardt nor the Chaplick family ever received an acknowledgement or reply to Reichhardt's letter from VDOE or confirmation that VDOE investigated these concerns and took appropriate action against Ms. Brooke-Devlin. To Plaintiffs' knowledge VDOE took no action in response to this letter.

114. In the aftermath of the decision, the Chaplicks reluctantly entered into a settlement agreement with FCPS, in which the school system supported the day portion only of D.C.'s educational placement at Grafton.[27] The Chaplicks did not know, at the time they entered into this settlement agreement, that Brooke-Devlin—like over 80% of the hearing officers in Northern

[27] On December 8, 2015, and a result of the deficient system in Fairfax County and the state of Virginia, the Chaplicks entered into a Settlement Agreement with FCPS, covering the time period through December 18, 2016. As a result, the Chaplicks' and D.C.'s claims against FCPS, relating to D.C., do not include the time period prior to December 19, 2016.

Virginia—had never ruled in favor of a special needs family. For years thereafter, D.C.'s residential costs at Grafton were paid for through a combination of insurance and his parents' own personal funds.

115. During the COVID-19 pandemic, Grafton began to press D.C.'s parents to transfer D.C. to an adult group home not operated by Grafton. On September 1, 2020, D.C.'s parents, through counsel, again requested that FCPS support D.C.'s program and residential placement at Grafton, stressing that his needs had long qualified him for a residential placement.

116. FCPS convened IEP meetings with the Chaplicks and staff members from Grafton to discuss the parents' request and to update D.C.'s IEP. The meetings were held virtually and were chaired by Adam Cahuantzi, at the time the Acting Coordinator for Due Process and Eligibility for all Fairfax County Schools.

117. After only an hour and a half of discussion of placement, Mr. Cahuantzi announced that FCPS recommended the continuation of D.C.'s day placement at Grafton, and peremptorily refused his parents' request for a residential placement.

118. The school system justified its rushed decision by pointing to the alleged progress D.C. had shown through the day placement at Grafton. FCPS refused to acknowledge that D.C. had been living as a full-time resident at Grafton, and that the financial support of family and insurers, denied years earlier by FCPS, had substantially contributed to the progress he was achieving at Grafton.

119. D.C.'s parents challenged the rejection by the IEP team and pursued additional IEP meetings with FCPS.

120. D.C.'s parents requested that Mr. Cahuantzi recuse himself and that a new IEP team chairperson be appointed to replace Mr. Cahuantzi. The parents explained that Mr. Cahuantzi had

been delaying and restricting IEP discussions and decisions, had not treated them as equal IEP team participants, and in general did not have D.C.'s best interests at heart. In response to the parents' requests, Mr. Cahuantzi indicated that he would take their request for recusal under consideration "as the person authorized by Fairfax County to be in charge of all residential placements."

121. However, in the two months following the meeting there was no response to the parents' recusal request.

122. Given this second, successive rejection of their requests, D.C.'s parents commenced another due process hearing against FCPS on February 12, 2021. They again alleged that FCPS had denied D.C. the FAPE to which he is entitled under the IDEA, by failing to propose an appropriate residential program and placement for the 2020–21 school year. Citing the recent holding of the Supreme Court of the United States in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 137 S.Ct. 988 (2017), they emphasized that FCPS had failed to provide a cogent and responsive explanation for its refusal to propose a residential program.

123. After serving FCPS with a formal request for a due process hearing, in February 2021, D.C.'s parents and their counsel were advised that the very same hearing officer who had ignored the law and ruled against them in their 2015 due process hearing, Morgan Brooke-Devlin, had been appointed to serve as the hearing officer overseeing D.C.'s new due process hearing.

124. The parents immediately expressed concern as to this hearing officer's ability to be fair, impartial, and objective, in light of the issues experienced and the complaints filed against Ms. Brooke-Devlin in 2015. Counsel for D.C.'s family made an oral motion for Ms. Brooke-Devlin to recuse herself based on her prior involvement with D.C. and his family. Ms. Brooke-Devlin summarily denied the request.

125. After Ms. Brooke-Devlin denied the recusal motion, D.C.'s parents directed their counsel, Michael Eig and Paula Rosenstock, to investigate the ruling record of Ms. Brooke-Devlin as a hearing officer based on publicly available information.

126. The investigation revealed that Ms. Brooke-Devlin has been a hearing officer in Virginia since 1993. Over this twenty-eight-year period, counsel were unable to identify a single due process case in which Ms. Brooke-Devlin had ruled in favor of the family of a disabled or special needs student.

127. Counsel for D.C. promptly prepared and submitted to Ms. Brooke-Devlin a petition to disqualify her under 28 U.S.C. § 455 and Va. Code § 2.2-4024.1, also citing the hearing officer Deskbook published by the OES. Counsel argued based on this authority that Ms. Brooke-Devlin was unable to serve as an impartial hearing officer because of her prior knowledge of, and objectionable conduct towards, the petitioners.

128. In the motion, counsel further argued that a hearing officer should never accept a case that could create a conflict of interest or create the appearance of a conflict of interest. Counsel referenced both the conflict arising from the previous 2015 due process hearing and its aftermath, including the Reichhardt letter, and the fact that she had apparently never ruled in favor of a disabled student.

129. In response to the motion, counsel for FCPS failed to refute the claims regarding Ms. Brooke-Devlin's lack of rulings in favor of disabled students and failed to produce a single case in which Ms. Brooke-Devlin ruled for a student or parents. Nor did Ms. Brooke-Devlin deny during the hearing that she had never ruled in favor of a disabled or special needs child.

130. Counsel for D.C. requested and paid for the prehearing call, in which the motion for disqualification was argued and discussed, to be recorded and transcribed. The hearing

transcript reflects Ms. Brooke-Devlin's open hostility toward counsel for D.C., including interrupting and repeatedly cutting off such counsel when he tried to speak.

131. Ms. Brooke-Devlin issued a peremptory ruling against D.C.'s motion to disqualify. She provided no rationale for her decision other than to assert that the parents "failed to meet their burden of proof." In addition, she issued an order that the parties must move forward immediately with their case before her as hearing officer.

M.B.'s Due Process Hearing

132. M.B was likewise forced to take part in a due process hearing which could only ever have resulted in one outcome – denial of the special education services he so badly needs.

133. Over the course of seven days between March 9 and March 25, 2022, M.B.'s parents and advocates presented testimony regarding M.B.'s challenges and needs, and how FCPS had failed to meet them.

134. Multiple experts in the fields of special education and M.B.'s particular disorders testified to M.B.'s lack of progress while placed in public school by FCPS. Indeed, in some respects, M.B.'s assessments showed that he had regressed under FCPS' placement from Fifth through Seventh Grade.

135. An expert in school administration also opined that FCPS' recommendation that M.B. be placed at the Burke School was inappropriate, and that the Phillips School was the least restrictive environment appropriate for M.B,'s educational needs.

136. FCPS witnesses and documents also demonstrated that not all of the goals set out in M.B.'s IEP were met during school closures caused by the COVID-19 Pandemic. Among other things, teachers stopped implementing reading services for M.B. and ceased collecting data with regard to his academic and behavioral progress.

137. M.B.'s counsel also elicited testimony from FCPS teachers and administrators regarding the inappropriateness of his placement at the Burke School. Among other things, they acknowledged that no representative from the Burke School had been present at M.B.'s November 2021 IEP meeting to speak to the differences between the services offered at the Burke School and the Phillips School. FCPS administrators also acknowledged that their goal was to place M.B. at a public school, rather than accept the private placement at Phillips.

138. Despite the evidence that M.B. was being deprived of FAPE, the hearing officer concluded that FCPS' IEPs and placements had been sufficient, placement at the Phillips School was inappropriate, and M.B, and his family were not entitled to any relief,

139. In a May 17, 2022 decision, M.B.'s hearing officer exhibited bias against M.B. and made numerous errors which skewed the outcome in favor of FCPS, including:

a. Discounting parents' evidence that M.B.'s grades and progress had been inaccurately tracked and inflated by FCPS;

b. Discounting standardized testing scores which, the hearing officer acknowledged, "indicat[ed] the child's reading and math either stalled or regressed from the 5th grade to the 7th grade;" and

c. Erroneously concluding that FCPS complied with the IDEA during the COVID-19 Pandemic on the grounds that "[d]ue to the TLP's voluntary nature, there was no denial of FAPE because the LEA did not implement the child's IEP."

140. In essence, VDOE's failure to provide a fair and impartial due process hearing was a foregone conclusion, and there was nothing M.B.'s parents could do to remedy his denial of FAPE. Consequently, they were forced to pay, and continue to pay, for the special education

services M.B. needs. Through VDOE has failed to provide FAPE, M.B. receives an appropriate education – but not the free and public one the IDEA requires Defendants to provide.

D. VDOE is Responsible for the Biased Hearing Officer System It Created and Condones

141. For the IDEA to function as intended, due process hearing officers must be qualified and unbiased. Under federal law, VDOE is responsible for the supervision and monitoring of due process hearing officers. *See* 20 U.S.C. §§ 1412(a)(11)(A) and 1416(a); *See also* 20 U.S.C. § 1232d(b)(3)(A); *See also* 34 C.F.R. § 300.149(a). This includes responsibility for the evaluation, continued eligibility, and disqualification of special education hearing officers. *See* 8VAC 20-81-210.D.3.c. In considering whether a special education hearing officer will be certified or recertified, VDOE must consider whether due process hearing officers engage in:

> (1) Untimely decision-making, or failing to render decision within regulatory time frames;
> (2) Unprofessional demeanor;
> (3) Inability to conduct an orderly hearing;
> (4) Inability to conduct a hearing in conformity with the federal and state laws and regulations regarding special education;
> (5) Improper ex parte contacts;
> (6) Violations of due process requirements;
> (7) Mental or physical incapacity;
> (8) Unjustified refusal to accept assignments;
> (9) Failure to complete training requirements as outlined by the Virginia Department of Education;
> (10) Professional disciplinary action; or
> (11) Issuing a decision that contains:
>
> (a) Inaccurate appeal rights of the parents; or
>
> (b) No controlling case or statutory authority to support the findings.[28]

1. <u>VDOE Hearing Officers Fail to Follow the Law</u>

142. In contravention of its oversight duties under federal law, VDOE enables and empowers hearing officers who do not comply with the IDEA. No matter how many violations

[28] *See id.*

they commit, hearing officers who consistently rule in favor of schools are retained by VDOE. When parents, lawyers and advocates bring serious hearing officer violations to light, VDOE ignores or disregards them, fails to adequately investigate them, disclaims any direct authority over the hearing officers, and denies any need to censor or remove the culprit. Besides disregarding substantive disability rights and school law, hearing officers refuse to comply with IDEA-imposed decision deadlines, openly rely on false testimony from Virginia LEAs to rule against parents, and routinely disregard parents' expert witnesses.

Chronic Delay in Submitting Decisions

143. One of the most common ways hearing officers ignore the requirements of the IDEA, other than disregarding special education law, is to blatantly violate decision deadlines. A hearing officer is required to render a decision within 45-calendar days of the expiration of the resolution period. *See* 34 C.F.R. § 300.515(a). Any extension to the 45-calendar day deadline can only be granted if requested by a party. *See* 34 C.F.R. § 300.515(c). And even then, such an extension is only authorized if it serves the best interest of the child. VDOE hearing officers have lost sight of the fact that, to a child, time is critical. For years hearing officers have failed to resolve proceedings timely, and VDOE does nothing to rectify the problem. According to one former hearing officer, unilateral motions to extend hearing deadlines were common among hearing officers; VDOE never reprimanded hearing officers for such delays.

144. In response to numerous complaints, OSEP conducted an investigation into the VDOE in September 2020, and concluded that the state was not exercising its general supervisory and monitoring responsibilities in accordance with 20 U.S.C. §§ 1412(a)(11)(A) and 1416(a) and 20 U.S.C. § 1232d(b)(3)(A) and 34 C.F.R. §§ 300.149(a) and 300.149(b) and 300.600(a) and (d)(2). Specifically, OSEP concluded that VDOE did not ensure and document that LEAs track

the implementation of the timelines for the resolution process for due process complaints filed by parents.

145. As a result of the investigation, VDOE gently reminded hearing officers to comply with deadlines and other timelines established by law. In practice, nothing has changed. Hearing officers continue to *sua sponte* push off deadlines without agreement from the parties in flagrant disregard of what the delay means to the children whose welfare and education they are certified by VDOE to protect.

146. In addition to the "unilateral motions" for delay that are used routinely by hearing officers, others blatantly lie about their failure to meet required decision-deadlines, and VDOE does nothing to cure the violations. For example, in a 2022 case arising out of Chesterfield County, hearing officer Sarah Smith Freeman back-dated her untimely, substantively-revised decision, to make it appear as though she had delivered her decision on time. Though the parents' lawyer caught the hearing officer in her lie about the untimely decision, the delay truncated the parents' appellate timetable by two weeks (the length of the back-dating) because VDOE refused to intervene with the hearing officer or take any corrective measures.

147. Disturbed by Freeman's blatant misrepresentations, parent's counsel contacted Patrica Haymes, the Director of VDOE's Office of Dispute Resolution. Haymes expressed token sympathies but ultimately refused to resolve the issue. Haymes stated that hearing officers are "autonomous" and that VDOE's role is simply to provide "oversight." From this, parent's counsel concluded that Haymes had no authority to require Freeman to correct the document. Haymes also stated that, "to be on the safe side," counsel should consider April 15 as the operative date for appeal purposes. VDOE would do nothing and the parents were penalized by the improper shortening of their appeal deadline by more than two weeks.

Unbridled Reliance on False Testimony from Schools

148. Another way VDOE hearing officers disregard the IDEA is to rely on blatantly false testimony from Virginia LEA officials to routinely deny parents the special education services their children need. Fundamental to the exercise of due process is trust in the fact-finding mission, which necessarily assumes an effort to distinguish truth from falsehood with a goal of accepting only the truth. That is not the mission of VDOE's due process proceedings, and truth is not a goal set by the hearing officers. VDOE certifies and recertifies hearing officers who blatantly accept and rely on false testimony and patently inadmissible evidence proffered by the Virginia LEAs, while almost always ruling against children and their parents.

149. For example, during D.C.'s due process hearing, FCPS presented false testimony that D.C. could read books and count to 50 when he could do neither. When school officials observed testing of D.C. by Grafton, prior to their due process hearing testimony, they witnessed that D.C. could only count to 2 and could not decode words. Nevertheless, the school officials testified to the contrary during the hearing, and the hearing officer uncritically accepted the testimony, despite it being demonstrably false. Based at least in part on this false testimony, the hearing officer denied D.C.'s request for a residential placement at Grafton..

150. During another due process hearing in 2022 between Chesterfield County Public Schools and the parents of a special needs student, the child's math teacher, testified that (a) his student never turned in any math work, and (b) the math teacher had never communicated with the child's parents. The math teacher made these statements despite numerous email communications with the parents and academic records showing that the child had submitted work. The parents' lawyer was able to access the child's school records that controverted entirely the math teacher's testimony. Nevertheless, the parents lost the hearing, and their child was denied the special

education services they were seeking in the complaint.

151. The falsehoods hearing officers routinely accept and rely on is not limited to a single math teacher misrepresenting school assignments and parent emails. Virginia LEAs have implemented policies and practices that require teachers to inflate grades and ignore assignments, which covers up the need for greater special education services. For example, teacher Elizabeth Houston admitted during a due process hearing that she routinely does not include incomplete work or missing assignments when calculating grades for special needs students, and she never gives grades below 50% even when a student fails to submit any work, because school policy forbids it. The VDOE hearing officer heard directly from Houston that the student's grade in her class was grossly inflated and reflected false progress, yet the parents left the hearing without obtaining any relief or changes to their child's education program.

152. A special education coordinator explained in testimony before a hearing officer that a Virginia LEA principal advised her to make after-the-fact changes to service logs and teacher notes. The coordinator also explained to the hearing officer that she was responsible for making edits to the logs and notes in an attempt to show the child was "making progress" under her current education program. The hearing officer concluded the student was "making progress," despite being told by the coordinator that the records of progress were a sham, and, she denied the parents' request for additional services for their child.

Policy of Excluding Parents' Expert Witness Testimony

153. VDOE hearing officers' pretextual exclusion or discounting of parents' experts is also a widespread problem. The IDEA expressly authorizes the use of expert witnesses. Parents and advocates report that hearing officers will routinely exclude parents' qualified expert witnesses – but not the school district expert witnesses – for nonsensical reasons, including because the

expert witness resides in a different state.

154. In the same due process hearing arising out of Chesterfield County Public Schools discussed *supra* at ¶¶ 150–52, a hearing officer rejected the parent's proffered expert as lacking Virginia special education licensing credentials. To the contrary, this witness testified that she was presently a certified special education teacher who had taught virtually for FCPS the preceding year. This same witness also testified that she had offered expert testimony in ***over sixty*** prior due process hearings.

155. This three-tiered injustice – inexcusable delay of decisions, chronic reliance on LEAs' false and misleading testimony and baseless rejection of parents' expert witnesses erodes the crucial due process safeguard in the IDEA.

2. VDOE Hearing Officers Are Not Impartial

156. In addition to allowing the conflicts of interests and bias of hearing officers to go unheeded, VDOE also plays a more direct role in tilting the outcomes of due process hearings in favor of its LEAs.

Ex Parte Communications with VDOE Representatives and LEAs

157. VDOE's policies and practices facilitate *ex parte* communications among hearing officers, local education agencies, and VDOE.

158. VDOE employs two "monitors" named Brian K. Miller and Reginald B. Frazier to attend due process hearings as a VDOE representative. The "monitors," sometimes referred to as "VDOE evaluators," are hired by VDOE to attend all due process hearings.[29] They are also

[29] According to VDOE's July 21, 2021 request for proposal for "Evaluators and Appeal Reviewers," these evaluators play a role in how VDOE carries out its "responsibility" of oversight for the management of all hearings, evaluating the hearing officers' management of due process hearings." The RFP on to state that "the VDOE, through its hearing officer evaluators, is

included in VDOE's list of hearing officers. The presence of these VDOE evaluators in due process proceedings, coupled with their *ex parte* communications, improperly influences hearing officers to rule in favor of school districts and against parents.

159. Parents and advocates have complained that VDOE evaluators display favoritism towards schools, engage in secret conversations with hearing officers, and try to influence the outcome of due process hearings. A former hearing officer reported that one of the VDOE "monitors" advised him in several *ex parte* discussions to disregard expert testimony offered by parents. This former hearing officer stated that the unsolicited requests were made during multiple scheduling calls in which none of the other parties were present. He also indicated that the VDOE evaluator "knew he wasn't supposed to say that." The former hearing officer ultimately declined to follow the VDOE monitor's "advice" and ruled largely in favor of the parents and against the school district. This was the first time in two decades that this hearing officer had ruled against a school district. Two months after issuing his ruling, VDOE removed the hearing officer from its list.

160. In a June 2020 email exchange, hearing officer Brooke-Devlin reached out to Dawn Schaefer of FCPS indicating that she would be available for a due process hearing in the near term, but she would need Ms. Schaefer *to delay the assignment* so Brooke-Devlin could be free to handle it. [30] Delay in the hearing officer's appointment can be detrimental to the child because it delays the challenge to the lack of FAPE , but Brooke-Devlin asked FCPS to delay her appointment "as

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responsible for providing guidance in managing hearings effectively, efficiently, and within regulated mandates."

[30] *See Why did HO Morgan Brooke-Devlin Work Out of the Office of Blankingship & Keith During a Due Process Hearing?, available at* https://specialeducationaction.com/why-did-ho-morgan-brooke-devlin-work-out-of-the-office-of-blankingship-keith-during-a-due-process-hearing/ (last accessed January 20, 2023).

long as you can." FCPS, which was the local education association responding to the due process complaint at issue in the email, delayed the hearing officer appointment for the maximum time possible—five days—and then appointed Brooke-Devlin via letter dated June 9, 2020. Brooke-Devlin then reached out to Kathryn Jones of VDOE to express gratitude for the "special accommodations" she was provided by FCPS on scheduling.

161. Although VDOE and FCPS should not be coordinating selection of the hearing officer responsible for adjudicating claims against FCPS, it appears from the June 9, 2020 e-mail and subsequent follow-up that VDOE and its LEAs are, in fact, making such appointments together.[31]

162. The same June 2020 e-mail also demonstrates that, at the time she sent the e-mail, Brooke-Devlin was working from the office of FCPS' outside counsel, while conducting another due process hearing. This is the same outside counsel that FCPS would eventually retain to handle the same due process hearing for which FCPS was appointing Brooke-Devlin.

163. VDOE is charged with reviewing hearing officer performance annually, based on many factors, expressly including whether hearing officers are involved in improper *ex parte* communications. Despite repeated complaints about Brooke-Devlin, VDOE has done nothing to investigate or discipline her.

164. In another instance arising out of Loudoun County Public Schools, the Loudoun notified the hearing officer that it was making the appointment, even though the LEA was party to the dispute the hearing officer was being appointed to decide. Loudoun County also invited the

[31] This concerted conduct is inconsistent with the Virginia Administrative Code, 8VC20-81-210(H)(1)(a), which requires the Supreme Court of Virginia to make hearing officer appointments, and it underscores why *ex parte* communications are prohibited: They frustrate the very impartiality required to ensure a fair due process proceeding.

hearing officer to send it the fee bills – rather than VDOE – for payment processing. Allowing a LEA, as one party to the dispute, to have control over the compensation of hearing officers reflects the lack of impartiality that frustrates the IDEA's due process hearings in Virginia. VDOE, its local school districts, their counsel, and hearing officers collaborate closely, especially given their long-standing relationships and history working together on behalf of the same side, to achieve their common goal of truncating the IDEA's procedural safeguards.

165. In a due process hearing case arising out of Arlington Public Schools, a Washington DC based attorney represented parents in a due process hearing overseen by Peter B. Vaden. In addition to serving as a Virginia-based hearing officer, Vaden served as a Washington DC based hearing officer. The attorney was familiar with Vaden and was present in numerous Washington DC based due-process hearings in which Vaden was the appointed hearing officer.

166. According to the parents' attorney, Vaden displayed unusual behavior throughout the course of the Virginia due process hearing, was highly deferential to a "VDOE representative" present throughout the process, and seemed inappropriately reliant on his guidance. The attorney estimates that in DC, Vaden rules in favor of parents thirty to fifty percent of the time, but the same cannot be said for Virginia.

Conflicts of Interest and Open Hostility

167. VDOE is responsible for certifying and recertifying hearing officers, and it has taken steps to ensure that hearing officers have a direct and substantial pecuniary interest that affects their impartiality. This regulatory structure creates conflicts of interests and financial incentives that undermine the integrity and impartiality of the due process hearing system in Virginia. Hearing officers appointed, reviewed, and compensated by VDOE, on behalf of its LEAs, have demonstrated over many years and in many cases that they are not reliably neutral and

impartial.

168. Serving as a VDOE hearing officer with an active docket of due process cases from 2003-2006, James T. Lloyd received substantial fees from VDOE during his 6-year tenure, not once ruling in favor of a special needs child. In 2006, Lloyd entered into a public consent decree including the revocation of his law license after he was caught stealing money from a client's trust account.

169. The fees can be particularly significant for attorneys who are solo practitioners or work at small firms. Based on publicly available information, as summarized in Exhibit E, eighteen (18) of the twenty-two (22) hearing officers who served between 2010 and 2021 worked as solo practitioners, and all hearing officers based outside of Northern Virginia worked as solo practitioners. The remaining four (4) work for very small firms that have only two members or partners.

170. By targeting solo practitioners and lawyers who work at very small firms, VDOE has guaranteed itself to be the hand that feeds. And hearing officers are taught not to bite it – because VDOE has an economic stake in the outcome of each due process hearing. The less money spent on special education services as a result of decisions in favor of parents, the more money VDOE retains in its own annual budget. The system is designed in a way that stokes conflicts of interests, and VDOE has no natural incentive to improve it.

171. Instead, VDOE certifies the solo practitioners and small-firm lawyers, trains them in a manner that ensures favorable outcomes, pays them generously, appoints them (accommodating their schedules, as requested, even if it means a delay of due process), and then recertifies the same crop, with the promise of a continuous pipeline of work, steady stream of net income, and no risk of negative consequences. This is powerful financial incentive and temptation

for the hearing officers to stay captive, especially when combined with VDOE's over-arching control over the due process proceedings.

172. VDOE is not the only Defendant that uses financial incentives to pressure its hearing officers to rule against parents. LEA lawyers have likewise wielded the threat of financial harm to ensure that due process hearings result in a victory for their LEA clients.

173. In May 2011, a hearing officer accused three attorneys representing the school board in a due process hearing of making implied financial threats against him. Specifically, the hearing officer claimed that the LEA lawyers indicated that they would cause problems with his billing and compensation if he did not rule in favor of the school board. The hearing officer wrote that "(The threat of causing billing issues) has been done before in other cases by this law firm." Those same lawyers represented multiple Virginia LEAs during this time period.

174. Hearing officers also seek to maintain and benefit from their close relationships with LEA lawyers. In 2004, a hearing officer was disqualified from a due process hearing by the Supreme Court of Virginia after he enlisted a school board's attorney to help prepare his response to the parents' request for disqualification.

175. Hearing officers' school bias has a tangible, corrupting effect on children's access to FAPE. In a due process hearing arising out of Chesterfield County Public Schools, the school's attorney claimed not to have received a particular piece of evidence, a recording, from the parents. In response, parents' counsel proffered an affidavit establishing that the attorney had opened an electronic file containing the recording, which demonstrated the school's counsel had, in fact, received the evidence. In an email exchange among both sets of attorneys and the assigned hearing officer, the hearing officer "concluded" that counsel for the school did not technically "receive" the recording by the requisite deadline for its consideration because the password protecting the

file containing the recording, ostensibly, did not work. The hearing officer added that the password had not worked for her or the school's counsel. Prior to this email exchange, neither the hearing officer nor the school's counsel alerted the parents to a password problem. If they had, parents' counsel easily could have supplied a new password, and the recording would have been accessible to both the school's counsel and the hearing officer. Instead, both the school and the hearing officer set the parents up to fail, which is exactly what the hearing officer decided when she denied the requested services.

3. VDOE Stacks the Deck with Biased Hearing Officers

176. One of the most significant impacts VDOE has on the systematic denial of due process is the unimpeded control over the certification, training, compensation, and removal of hearing officers.

177. Between the late 1990s and 2009, VDOE paired down the list of hearing officers from over 100 to a carefully-curated list of twenty-two (22) hearing officers who almost never ruled in favor of disabled children or their parents. Then, for more than a decade from 2010 into 2021, VDOE has declined to add or remove a single hearing officer. In other words, VDOE manages to stack the deck and then close the door to new hearing officers.

E. Parents and Children Have no Viable Alternative to Due Process Hearings

178. In theory, parents and children could challenge violations of the IDEA by filing a special education complaint with VDOE. As described by VDOE: "A complaint is generally an expression of some disagreement with a procedure or a process regarding special education programs, procedures or services. A formal complaint is considered a request that this division investigate an alleged violation of a right of a parent and/or child with disabilities who is eligible, or believed to be eligible, for certain services based on federal and state laws and regulations

governing special education."[32]

179. However, in practice, the VDOE special education complaint procedure offers no real relief. This alternative process, and the resulting investigation by VDOE, is merely another means by which VDOE delays and ultimately denies providing FAPE to children.

180. The systematic failures of VDOE's state complaint system are so severe that they have caught the attention of the United States Department of Education ("USDOE"). As discussed further *infra*, in May 2020, the USDOE issued a differentiated monitoring and support letter which highlighted, among other issues, deficiencies in VDOE's state complaint system. As of a September 1, 2022 follow-on letter, USDOE remained concerned that Virginia "is not addressing the complaints it receives in a timely manner." Indeed, VDOE produced to USDOE a log of incoming communications and how they were handled, which outlines that ***of approximately 1,843 communications received, VDOE reported only 29 outcomes.***

181. Parents who do get a response from VDOE find themselves stuck in yet another rigged VDOE process. VDOE officials tasked with investigating complaints have demonstrated significant bias in favor of LEAs like FCPS, and against parents and children seeking services. Among other things, VDOE officials have willfully misconstrued families' complaints in order to avoid investigating the alleged misconduct and – after investigating conduct different than the conduct alleged – find that no violations have occurred. And even in those rare instances where hearing officers do identify a violation, they have failed to take necessary corrective action.

[32] "Special Education Complaints," available at https://www.doe.virginia.gov/programs-services/special-education/resolving-disputes/resolving-disputes (last accessed January 11, 2023).

182. In one instance in Arlington Public Schools (APS), a family brought a state VDOE complaint challenging that the denial of FAPE to their child during the COVID-19 Pandemic. The parents had requested placement at a private school which offered the in-person education their child needed for the duration of COVID-19 public school closures. Their child faced significant academic and emotional challenges with distance learning. APS rejected these requests for a change of placement and likewise rejected in-person learning. Denial of in-person learning had drastic consequences for the child, including hospitalization for suicidal ideation brought on by a deterioration of his autism. During VDOE's complaint process, the VDOE official "investigating" the complaint repeatedly displayed bias against the family and in favor of APS, including by:

a. Engaging in *ex parte* communications with APS representatives and denying the parents' request to take part in such communications, even though the VDOE representative instructed the parents to include APS on all of their communications with VDOE;

b. Adopting APS's false account of the student's return to "in-person" learning despite the contradictory contemporaneous evidence provided by the parents;

c. Ultimately concluding in an April 2022 Letter of Findings that APS was in compliance because it made a "good faith effort" to implement the child's IEP(s), which is not the standard under the IDEA.

183. When the parents expressed their dismay that the hearing officer had uncritically accepted APS's narrative of events, despite unequivocal contrary evidence, the VDOE officer claimed that she was not a decider of fact, and if they wanted an adjudicator to make a credibility determination, they would need to file for a due process hearing.

184. Unbeknownst to the parents, this same VDOE representative also had *ex parte*

communications with APS in April 2022 concerning the IEP for the parents' other child, who also has recognized disabilities. APS's IDEA compliance officer reported in an internal email to other APS employees that the hearing officer recommended that ***APS consider taking the family to a due process hearing*** to challenge an IEP that APS had already put in place for that child.

185. In other words, VDOE's hearing officer was acting not as an impartial adjudicator for the IDEA system, as required under federal law, but as an advocate for the school district, advising them to take action against the parents by filing a due process hearing. This is part of VDOE's and the Virginia LEAs' substitute system of delaying and denying services.

186. VDOE's systematic failure to properly implement the state complaint process further deprives children and their families of the protections afforded by the IDEA.

F. VDOE's Ongoing and Systematic Practice of Rigging Due Process Hearings Makes it Futile to Seek Relief Through Due Process Hearings

187. Defendants' carefully cultivated system designed to bias its hearing officers—much of which is ostensibly conducted in accordance with state law—cannot be remedied by way of a due process hearing overseen by the very hearing officers, LEAs, and VDOE whose conduct is at issue.

188. Even assuming that a hearing officer could fairly adjudicate a parent's claim that VDOE is depriving them and their child of rights under the IDEA, that officer could not provide the kind of systemic solution that is both badly needed and sought through this Complaint. Given the systemic nature of Plaintiffs' allegations and requests for relief, it would be futile for them to pursue these claims through a state administrative process.

189. Pursuing relief from VDOE or FCPS is futile. The manifestation of bias and ill-will toward the petitioners and their attorneys falls below the standards required under federal statutes and regulations governing the conduct of due process hearings in IDEA cases. Hearing

officers' records of seldom, if ever ruling in favor of a family, demonstrates that D.C. and M.B. were not the only people who suffered at the hands of a hearing officer who evidenced no interest in neutrality.

190. Moreover, any parent who would seek to appeal a due process hearing officer's adverse decision, no matter how biased and erroneous, would face an uphill battle. Hearing officers and their decisions enjoy a presumption of impartiality under the IDEA, despite the evidence that, in Virginia, such a presumption is not grounded in fact. Nevertheless, this unwarranted presumption provides yet another barrier that makes the administrative route futile.

191. Thus, these allegations of structural shortcomings that resulted in the systemic denial of impartial hearings are appropriately addressed in this litigation, not before a Virginia hearing officer. Defendants' biased hearing-officer requires this Court's intervention in order to ensure Virginia children with disabilities the FAPE guaranteed by the IDEA.

VII. VDOE and Virginia School Districts Systematically Fail to Evaluate Children with Disabilities

192. The IDEA requires that VDOE and Virginia School Districts evaluate any student who is suspected to have a disability. VDOE is also required to oversee and monitor these school districts to ensure they are complying with their obligations under the IDEA.

193. Under the IDEA, state education agencies, like VDOE, and LEAs are responsible for evaluating any child suspected to have a disability. *See* 34 C.F.R. § 300.111(c). "conduct[ing] a full and individual initial evaluation" before providing special education and related services to a child with a disability. 20 U.S.C §1414(a)(1)(A). Such evaluations must "(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent," "(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or

determining an appropriate educational program for the child," and "(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors."

194. A parent also has a right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to certain conditions. *See* 34 C.F.R. § 300.502. If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either: (1) Initiate Due Process Procedures under 34 C.F.R. § 300.507 through 300.513 to show that its evaluation is appropriate; or (2) Ensure that an IEE is provided at public expense, unless the school district shows that the evaluation obtained by the parent does not meet agency criteria. 34 C.F.R. § 300.502(b). If a parent requests an independent educational evaluation, the school district may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to defend the public evaluations.

A. VDOE Permits Virginia LEAs to Exploit a Policy and Practice of Avoiding, Limiting and Delaying the Student Evaluations Required Under the IDEA

195. FCPS has repeatedly and systematically denied students FAPE by improperly denying, limiting and delaying evaluations. In the circumstances in which Defendants agree to evaluations, it often takes months or even years for Defendants to grant such requests and actually perform or authorize the evaluations. When evaluations or IEEs reveal serious issues and deficits in a child's learning, FCPS administrators will often downplay or completely ignore the results to bar additional accommodations and private placements.

196. In FCPS, a former teacher reports that during her tenure at FCPS, educators were repeatedly instructed not to write "dyslexia" in IEP documents. The teacher further indicated that FCPS asserts that there is a difference between "educational models" and "medical models" for

evaluations. On this basis, FCPS often rejects the findings of independent evaluations and trains its educators to put medical diagnoses to the side and give higher deference to school diagnoses. This former teacher also reports that FCPS does not collect baseline data in evaluations that include all five components of reading, leading to highly distorted and inaccurate data sets.

197. As one example of FCPS' policy in practice, FCPS denied a child an evaluation three times between first and sixth grade. Frustrated with the school, the child's parent paid for an independent evaluation in sixth grade. Among other things, the child was reading on a third-grade level and had numerous other low or borderline impaired scores. When the parent presented the results of the evaluation to the school, the school psychologist told her orally (but not in writing) that he would not accept the outside expert evaluation, claiming that the evaluation was "anecdotal" and that he would have to perform his own evaluation. The parent discovered later on, through a FERPA request, that the principal of the school told the psychologist not to respond to the parent in writing.

198. The school ultimately performed their own evaluation. While the evaluation revealed that the child had areas of need, it was not comprehensive. After expressing her concerns about the non-comprehensive nature of the evaluation, the school principal responded that "We only test for eligibility." This is inconsistent with the requirements of the IDEA and its enforcing regulations, which require LEAs to utilize a "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child," such that "the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." *See* 34 CR 300.304.

199. From seventh to tenth grade, the parent continued to press for a more complete

evaluation that would comply with the requirements of the IDEA. Unsatisfied with FCPS' repeated failures, the parent requested independent evaluations. In tenth grade and eleventh grade, the child was independently evaluated, and speech language deficiencies and visual processing issues were identified. FCPS had successfully avoided and delayed a complete evaluation of this child for nearly the entire period of this child's primary education.

200. And this child is not alone. As the gatekeeper of special education services, FCPS routinely denies and delays initial evaluations and reevaluations, essentially waiting out the children because eventually, they age out of eligibility for services. FCPS uses a variety of excuses to justify the delay or outright denial of an initial evaluations. In another case, FCPS refused to conduct an initial evaluation of a child suspected to have autism, ADHD, and dyslexia. FCPS claimed the child was performing on grade level obviating the need for an evaluation. To provide additional support for their assessment, one of the child's teachers presented an example of the child's writing work that could not have been completed without extensive coaching. This was done to justify the denial of the parents' evaluation requests.

201. These are just a few examples of FCPS' ongoing practice of delaying and denying the complete evaluations to which disabled students are entitled under the IDEA.

B. VDOE Sanctions and Supports Virginia LEAs' Policy and Practice of Refusing IEEs as Required under the IDEA

202. VDOE is obligated under the IDEA and related regulations to ensure that FCPS and other LEAs are complying with their obligation to provide an IEE at public expense unless the relevant LEA has initiated a due process hearing. 20 U.S.C. § 1414. VDOE has repeatedly ignored its oversight obligation. More than simply turning a blind eye, VDOE took the position, documented in Virginia Regulations, that school districts do not have to provide an IEE at public expense, unless the school district has previously conducted its own evaluation of the child on the

same specific issue and the parent disagreed with the results.[33] Under VDOE's application of the IDEA, Virginia school districts could refuse to conduct an evaluation in the first place, in violation of its legal obligation to do so, and then refuse to provide an IEE at public expense, creating an almost absolute barrier to FAPE.

203. On June 23, 2020, the US DOE's Office of Special Education Programs (OSEP) cited VDOE for its violation of these provisions of the IDEA. *See* OSEP June 2020 Letter, at 14-17. The DOE ordered VDOE to change the regulation, comply with the IDEA, and ensure that Virginia LEAs do not limit a parent's right to obtain an IEE at public expense. In response, VDOE defiantly made a one-word change to the regulation but failed to require the implementation of that change by the LEAs and even failed to notify the LEAs of the change.

204. In a chart attached to a follow-up letter to VDOE's Superintendent of Public Instruction dated February 8, 2022, the Director of OSEP noted:

> The State had to submit to OSEP a copy of a memorandum that the State has issued to all LEAs, parent advocacy groups, and other interested parties instructing LEAs to comply with 20 U.S.C. 1415(b)(1) and 34 C.F.R. § 300.502(b) by also providing an IEE at public expense in areas where the LEA previously has not conducted its own evaluation, unless the LEA has demonstrated, through a due process hearing decision, that its evaluation is appropriate; and advising that the State will be revising Virginia Administrative Code 8VAC20-81-170(B)(2)(a) and (e), to, at a minimum, remove the word "component" following the word "evaluation"…***The Memorandum submitted did not ensure compliance with the required action because the memorandum only relayed the language of the statute and regulation*** found at 20 U.S.C. §1415(b)(1) and 34 C.F.R. 300.502(b)]". The memorandum did not mention the specific issue or practice of an LEA not granting IEEs in areas where the LEA had not previously conducted their own evaluations.

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[33] *See* Letter Dated June 23, 2020 from, Laurie VanderPloeg, Director, Office of Special Education Programs, to James Lane, then Superintendent of VDOE, *available at* https://www2.ed.gov/fund/data/report/idea/partbdmsrpts/dms-va-b-2020-letter.pdf (last accessed January 19, 2023).

See DOE OSEP Findings and Required Actions, at 14.[34]

205. VDOE's failures to fulfill its oversight obligations under the IDEA has facilitated FCPS' pattern and practice of delaying and denying evaluations and refusing IEEs.

C. VDOE Permits Virginia LEAs' Policy and Practice of Manipulating Student Evaluations and Assessments to Avoid Providing Special Education Services

206. Virginia LEAs routinely prevent parents and children from receiving the services to which they are entitled under the IDEA by generating and relying upon false records and testimony regarding children's education, services, and academic progress. For example, FCPS and other Virginia LEAs have a policy and practice of manipulating student academic records, including grade inflation, for the sake of arguing that the child is "making progress" under an existing education program. These falsehoods prevent parents from detecting when children need to be evaluated for disability services and when schools have failed to properly implement IEPs. This inaccurate information also prevents parents from collaborating with schools to find solutions that have a better chance of providing FAPE to their children.

207. FCPS routinely inflates the grades of children who have IEPs to further paint a false picture of progress.

208. In one instance, M.B. was given an 85% score on an English test, even though he had only answered 7 out of 20 questions correctly. When the Binghams sought clarification of this grade, they were informed that it was FCPS' practice to start grading at 50% and add points for correct answers from that artificially inflated baseline. In other words, although M.B. only answered 35% of the questions correctly, FCPS pretended as though he had answered an additional

[34] *See* "U.S. Dept. of Education Finds Virginia at Fault for Continued Noncompliance", available at https://specialeducationaction.com/u-s-dept-of-education-finds-virginia-at-fault-for-continued-noncompliance/

10 of the questions correctly and gave him a score of 85% on this evaluation. In another case, M.B. was awarded "A" grades on assignments for which he only completed one out of five necessary slides. And, on other occasions, he was given "A" grades while teachers were simultaneously documenting that M.B. was not participating or completing his work for much of the school day.

209. To effectuate its grade inflation practice, FCPS' tactics include false representations in student IEP's, combined with coached-teacher affirmations, that students are "making progress," when there is no legitimate support for these statements. FCPS makes patently false statements to parents in IEPs and in due process hearings. As discussed *supra*, during D.C.'s due process hearing, FCPS presented false testimony that D.C. could read books and count to 50 when, in reality, he could do neither. Prior to their testimony in D.C.'s due process hearing, school officials observed D.C. being tested at Grafton, and they witnessed that he could only count to 2 and could not decode words. Their false testimony was brought into stark relief when school officials, in the years following, signed off on IEPs for D.C. that have never described – to this day – any such capabilities in math or reading. Remarkably, nowhere in D.C.'s latest proposed IEP is there any mention at all of D.C.'s reading and math skill levels; nor are there any stated goals for D.C. to pursue with respect to reading or basic math skills. FCPS has completely abandoned any attempt to teach D.C. how to read, write, or county even though D.C. has another two years to attend Grafton for his education. FCPS' testimony regarding D.C.'s "progress" at his due process hearing was unequivocally false.

210. Virginia LEAs' policies and practices of exaggerating the progress made by children with IEPs enable them to falsely claim they are meeting a child's IEP goals, when often, the child has not actually been making the progress the school touts. Were the child's progress (or

lack thereof) accurately described, the school could be required to provide additional services, potentially at greater cost, in order to comply with the IDEA.

211. The obvious effects of these insidious practices is evidenced by the experiences of a Prince William County eligible child who was routinely fed correct answers on classroom assessments by teachers and special education aids. Though the special needs child received an "A" in the IEP-assigned sixth grade math class, the child was unable to independently complete second-grade math problems.

212. FCPS is not the only Virginia LEA that employs grade inflation and similar tactics to make it appear as though children are making progress, when in reality they are not. As one example, Prince William County teachers and aids have repeatedly steered a disabled child towards thecorrect answers on tests, which has resulted in that child receiving artificially high grades. Consequently, this child received an "A" in their Sixth-Grade math class while simultaneously requiring assistance to complete math problems at a Second-Grade level.

213. FCPS and other LEAs' pattern and practice of exaggerating the progress made by children with IEPs enables FCPS to falsely claim that it is meeting IEP goals, when in reality, it is falling well short of its obligations under the IDEA.

214. FCPS also systematically fails to disclose challenges faced by eligible students in a school setting. Because of the errors, omissions, and falsehoods included in children's evaluations, parents do not have a real "opportunity to inspect and review all education records with respect to — (1) The identification, evaluation, and educational placement of the child; and (2) The provision of FAPE to the child," as required by the IDEA and its enforcing regulations. 34 C.F.R. § 300.501.

215. M.B. is one of the children impacted by FCPS and VDOE's failures to create and

maintain accurate records of his progress. As M.B.'s parents eventually learned, M.B.'s teachers failed to grade or even administer some of his assignments. And, they inflated his performance on several occasions. During a 2022 due process hearing, they also learned that M.B.'s special education teacher had no certification nor training as a behavior specialist, a critical requirement to assess and support M.B.'s need. And, at times, she was forced to attempt to collect behavioral data for M.B.'s Functional Behavioral Assessments while simultaneously instructing M.B.'s multi-disability classroom. FCPS thus put M.B. in a situation where it could not, and did not, gather the data necessary to identify, assess, and respond to his behavioral needs.

216. At a January 31, 2020 IEP meeting, the FCPS team recognized that M.B.'s teachers had failed to accurately record his progress. Notes from that meeting reflect that FCPS recommended "going back and look at the previous level tests, *score ungraded tests*, and re-teach until masters," as well as "additional coaching sessions for staff implementing this program." Nevertheless, inaccurate reports regarding M.B.'s progress would be repeated in subsequent IEPs.

217. These are just a few examples of FCPS employees misrepresenting, falsifying and concealing information related to disabled children within their schools. This practice is widespread at FCPS and other Virginia LEAs.

218. On information and belief, Virginia LEA employees are also trained to not create records or disclose information regarding LEAs' failures to comply with the IDEA. Among other things, LEA employees are advised to instruct teachers and other employees not to create written records of concerns that the IDEA requirements are not being met.

219. For example, in one such training document, a lawyer for Reed Smith (who was outside counsel for several Virginia LEAs at the time) instructed trainees not to failures to provide

FAPE and failures to implement IEPs in writing.[35] This training indicated in quotes what "not-to-say" in special education meetings and then gave instructions for how to handle these situations, including by not documenting these issues in writing:

a. **Dear Special Education Director: I have just learned that the student's IEP has not been implemented for the past six months. What do I do? Frustrated Teacher."** "This type of statement is not a good one to put in writing. It is a good statement to address orally with the administration and to discuss strategies for the provision of compensatory education services."

b. **"Dear Special Education Director: I do not believe that this student is making progress and am writing this e-mail to document my concerns. Sincerely, Puzzled Teacher."** . . . "Do not document in writing the failure to provide FAPE."

As demonstrated above, Virginia LEAs' counsel have established written training in which they instruct LEA employees to avoid documenting information which would show that the LEA is not meeting its obligations under the IDEA"[36]

220. FCPS' and other LEAs' policy of exaggerating children's progress, including

[35] *See* Mehfoud, Kathleen, "Things Not to Say at Special Education Meetings," (Last Accessed January 7, 2023), *available at*, https://wyominginstructionalnetwork.com/wp-content/uploads/2018/05/Things-Not-to-Say-in-Special-Education-Meetings.pdf. Mehfoud drafted this document as an attorney at Reed Smith, who at the time was outside counsel for numerous Virginia LEAs. On information and belief, Virginia school officials received this document as part of IDEA trainings. A similar training prepared by Mehfoud, while at Reed Smith, called "More Things not to Say in Special Education Meetings" was presented to the Virginia School Board Association. *See* "More Things not to Say in Special Education Meetings", *available at* https://kipdf.com/updated-more-things-not-to-say-in-special-education-meetings_5aca6d611723dd38f4c9617e.html (Last Accessed January 16, 2023).

[36] *See id.*

through grade inflation, makes it all the more difficult to identify and rectify their violations of the IDEA and the Constitution of the United States. These practices skew the administrative record at any due process hearing and on appeal from any adverse hearing officer decision. Defendants' manipulation of children's academic and behavioral records violates the IDEA and adds to the futility of raising a challenge to FCPS' and other LEAs' conduct through a due process hearing.

221. VDOE itself goes to great lengths to hide relevant information and records related to Due Process hearings and other administrative procedures. Among other things, they have obstructed parents and advocates efforts to access documents and information concerning disabled children both by unduly burdensome FOIA procedures and otherwise.[37]

222. This pattern and practice of manipulating student records and barring access to the same thus hinders families' efforts to challenge Defendants' conduct by making it impossible to discover that their rights have been violated until well after the fact, if ever.

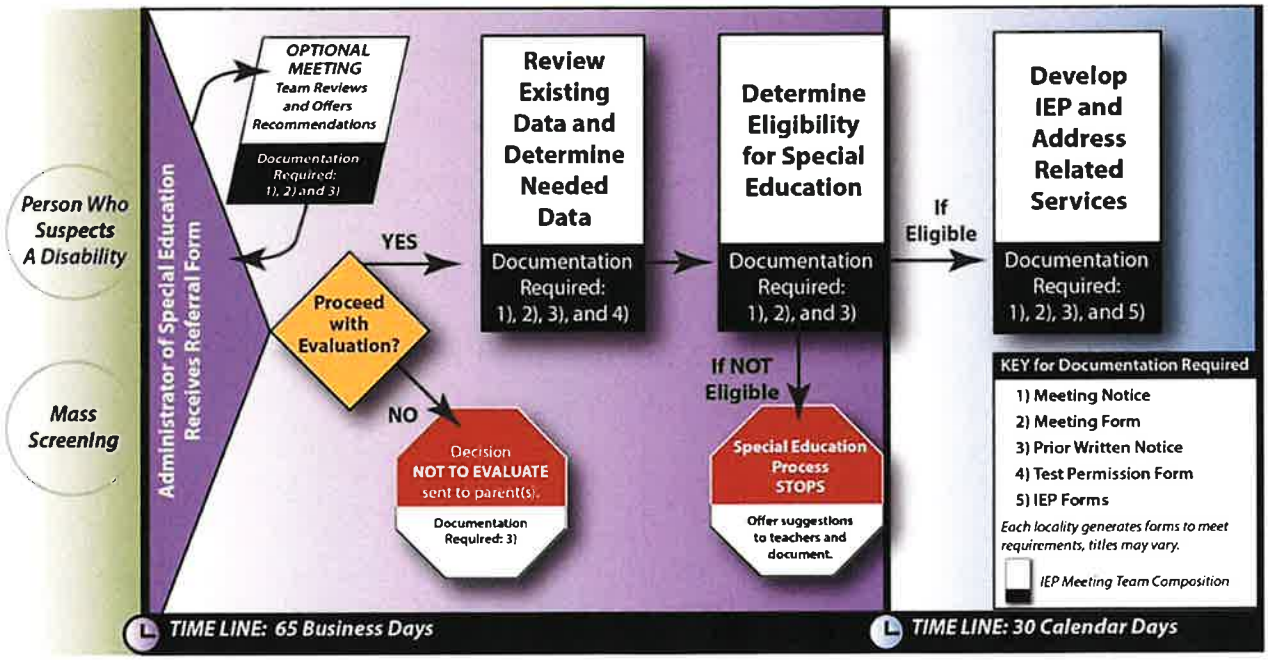
D. VDOE's Student Evaluation Policies Violate the IDEA

223. VDOE's failure to comply with the IDEA is not limited to the rigged due process hearing officer system. Rather, VDOE is both itself depriving children and families of services to which they are entitled under the IDEA, and failing to prevent LEAs from across the Commonwealth of Virginia from depriving children and families of federally-mandated services as well.

224. Despite the clear mandate under the IDEA that a "[s]tate educational agency, other State agency, or local educational agency *shall* conduct a full and individual initial evaluation," to determine if "a child is a child with a disability," 20 U.S.C. § 1414(a), VDOE has implemented an

[37] FOIA issues are discussed in greater detail *infra* at the section titled "VDOE has Failed to Require LEAs to Provide Parents with Records to Which They are Entitled under the IDEA."

express policy and procedure that frustrates the very purpose of the IDEA to ensure FAPE by placing illegitimate eligibility requirements on the right to receive an initial evaluation. Under VDOE policy, eligibility for an initial evaluation, which is a non-discretionary right under the IDEA, must first be authorized through VDOE's "special education process," which requires a "referral for evaluation"[38] before an initial evaluation will be conducted. In Virginia, a request for evaluation can come from any source or individual, including a parent; however, the special education process reflects the path illustrated in Figure 2:



225. However, nothing in the IDEA contemplates the committee process that must precede an initial evaluation in Virginia. Once the initial evaluation request is made, it is either referred to another special education committee for consideration, approved, or rejected with

[38] *See* Supplemental Guidance for Evaluation and Eligibility *available at*, www.doe.virginia.gov/programs-services/special-education/evaluation-and-eligibility (last accessed January 7, 2023).

notice sent to the parents. VDOE does not have the legal right to put in place a gatekeeping policy and practice that denies an initial evaluation under the IDEA, and this policy is inadequate to meet VDOE's statutory obligation to ensure that students with disability-related behaviors receive a free appropriate public education.

226. Independently, VDOE's systematic failure to comply with the IDEA's non-discretionary requirement to conduct initial evaluations is detrimental to the provision of FAPE, and in combination with its failure to require Virginia LEAs to approve independent education evaluations ("IEEs") pursuant to 34 C.F.R. § 300.502, VDOE's systematic failures preclude Virginia children from accessing the special education they so desperately need.

227. Parents have the right to an IEE at public expense unless the public education agency files a due process complaint to show an IEE is not necessary. *See* 34 C.F.R. § 300.502. Very few Virginia LEAs file their own due process complaints, which would require them to carry an affirmative burden of proof in the process, so parents should regularly be afforded the right to an IEE. VDOE's application of IEE regulations is, however, inconsistent with federal law because it restricts parents' rights to an IEE at public expense to those choice areas in an initial evaluation or reevaluation in which the education agency had previously evaluated the child.

228. So, for example, when a Virginia LEA fails or refuses to do a comprehensive initial evaluation in a manner that addresses multiple suspected disabilities, and instead, decides to conduct only a partial evaluation, Virginia parents are denied their right to an IEE because the Virginia LEA failed in the first place to conduct the complete evaluation. The Virginia LEA system of blocking access to an IEE, which is an important procedural safeguard for disabled children and their parents, while simultaneously controlling access to initial evaluations, frustrates the IDEA's fundamental mandate to "ensure that children with disabilities residing in [Virginia]

... and who are in need of special education and related services, are identified, located, and evaluated." 34 C.F.R. § 300.111. Without proper identification and evaluation, Virginia special needs children are completely cut off from FAPE.

VIII. VDOE Systematically Fails to Carry Out its Obligation to Oversee Virginia LEA Compliance with the IDEA

A. VDOE is Required to Ensure Compliance with the IDEA

229. As the state education agency for the Commonwealth of Virginia, VDOE is obligated to ensure that the Virginia LEAs comply with the requirements of the IDEA. *See* 20 U.S.C. § 1416(f). For years, VDOE has failed to effectively monitor the LEAs to ensure Virginia educators are making FAPE available to all eligible students pursuant to the IDEA.

230. VDOE uses three components to evaluate LEA compliance with the IDEA:

a. On-site "comprehensive" reviews: VDOE conducts a risk assessment to select local educational agencies (LEAs) for on-site visits.

b. Desk Audits: Desk audits are conducted of all LEAs annually to collect SPP/APR compliance indicator data.

c. Dispute Resolution: State complaints, mediation, and due process hearings are used to address allegations of noncompliance.

231. These oversight tools are woefully insufficient to ensure that Virginia LEAs comply with the IDEA. For example, VDOE has reported that it only conducts on-site monitoring of 4 to 6 of its 132 LEAs annually. This means that VDOE, which is required to maintain continuous oversight to ensure that the various LEAs comply with the IDEA, ***is in fact doing an on-site comprehensive review of each school district, on average, once every 22 to 33 years.*** Moreover, VDOE effectively relies on LEAs' own self-reporting and self-evaluation to perform the "risk

assessment" to determine which LEAs require an on-site visit.[39] VDOE's dispute resolution monitoring method is patently inadequate as well, as demonstrated by Virginia LEAs' systematic noncompliance with the procedural safeguards required by section 1415 of the IDEA.

B. VDOE's Faulty Oversight Enables FCPS and other Virginia LEAs to Regularly Ignore Their IDEA Obligations

232. VDOE's faulty compliance mechanisms have been broadly criticized by parents, advocates, and, most notably, by USDOE, as woefully inadequate to ensure that LEAs' comply with the IDEA. In a June 2020 letter and enclosed Differentiated Monitoring and Support Report, USDOE stated that it "had received communications from numerous parents and advocates alleging that the Virginia Department of Education (VDOE) was not fulfilling its general supervisory responsibilities under IDEA Part B." [40] During the resulting investigation, USDOE confirmed parents' accounts that "VDOE does not have procedures in place, outside of formal dispute resolution procedures, to identify whether noncompliance has occurred, even in situations where it appears that the State was provided with credible information about potential noncompliance . . . ."[41] Moreover, USDOE noted: "***[G]iven that the State does not appear to have any other mechanism for including, in its monitoring system, the ability to consider and address credible allegations of LEA noncompliance, the State is not reasonably exercising its***

[39]VDOE's characterization of its LEA oversight and compliance process as "risk assessment" underscores that it is designed to fail. The purpose of the oversight requirement is to ensure that Virginia special needs children are afforded their legally protected and humane right to FAPE, not to gauge the risk of VDOE and its LEAs being sued.

[40] Letter Dated June 23, 2020 from, Laurie VanderPloeg, Director, Office of Special Education Programs, to James Lane, then Superintendent of VDOE, *available at* https://www2.ed.gov/fund/data/report/idea/partbdmsrpts/dms-va-b-2020-letter.pdf (last accessed January 19, 2023).

[41] *Id.*(emphasis added)

general supervisory and monitoring responsibilities to ensure LEA compliance consistent with the requirements in IDEA."[42] Notwithstanding USDOE's admonition to VDOE that it must "revise its general supervision and monitoring system to include procedures and practices that are reasonably designed, as appropriate, to consider and address credible allegations of LEA noncompliance in a timely manner,"[43] VDOE's compliance monitoring system remains deficient.

233. VDOE's pervasive lack of oversight has real world consequences for Named Plaintiffs and the classes they seek to represent.

234. As explained in the proceeding sections, LEAs across the Commonwealth of Virginia take advantage of VDOE's negligible oversight to violate the rights of children with disabilities and their families under the IDEA. VDOE has failed to correct systemic, policy-driven violations of the IDEA in Virginia schools.

1. VDOE Fails to Ensure that FCPS and Other LEAs Provide Families Complete and Accurate Student Records

235. The IDEA requires disclosure of student records upon parental request: "Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part." *See* 34 C.F.R. § 300.613; *see also* 20 U.S.C. §1415(b).

236. LEAs in the Commonwealth of Virginia do not comply with this most fundamental obligation, and VDOE does nothing to deter or rectify the noncompliance.

237. As a standard means of addressing parents' record requests, some LEAs have gone so far as to adopt a policy of complete refusal followed by an instruction to use the Virginia FOIA

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[42] *Id.*

[43] *Id.*

process to access their child's education records.

238. Rather than admonish LEAs for refusing to provide parents with access to their students' records, VDOE has abetted this practice by making efforts to seek records under Virginia's FOIA as exhausting, expensive, and fruitless as possible.

Virginia's FOIA

239. The Virginia FOIA provides access to *government* information from the public record. Pursuant to a FOIA request, agencies like VDOE are required to disclose information relevant to their functions, formal or informal procedures, and their rules of procedure. 5 U.S.C. § 552(a); *see also* Virginia Code §2.2-3704. FOIA requests are governed by detailed administrative rules and procedures. Individual student records are not typically (or legally) required to be accessed through a FOIA record request.

VDOE Makes a Burdensome FOIA Process Worse

240. Under the IDEA parents are entitled to access their child's complete and accurate education records from the child's LEA, but when the LEA fails and refuses to comply with federal law and instead forces parents to go through a FOIA request, VDOE further obstructs parents' efforts to obtain records by making the FOIA process considerably more laborious and difficult than is warranted. VDOE drastically impedes the FOIA process by delaying responses, claiming (falsely) a lack of responsive information, demanding large payment deposits before collecting and producing documents, charging cost-prohibitive amounts to produce even partial records, withholding relevant information on bogus privilege grounds, and misrepresenting their legal obligations to provide information.

241. In response to a 2022 FOIA request regarding Virginia IEPs and hearing officers, VDOE demanded the requestor pay $25,000 for production of the requested materials, and before

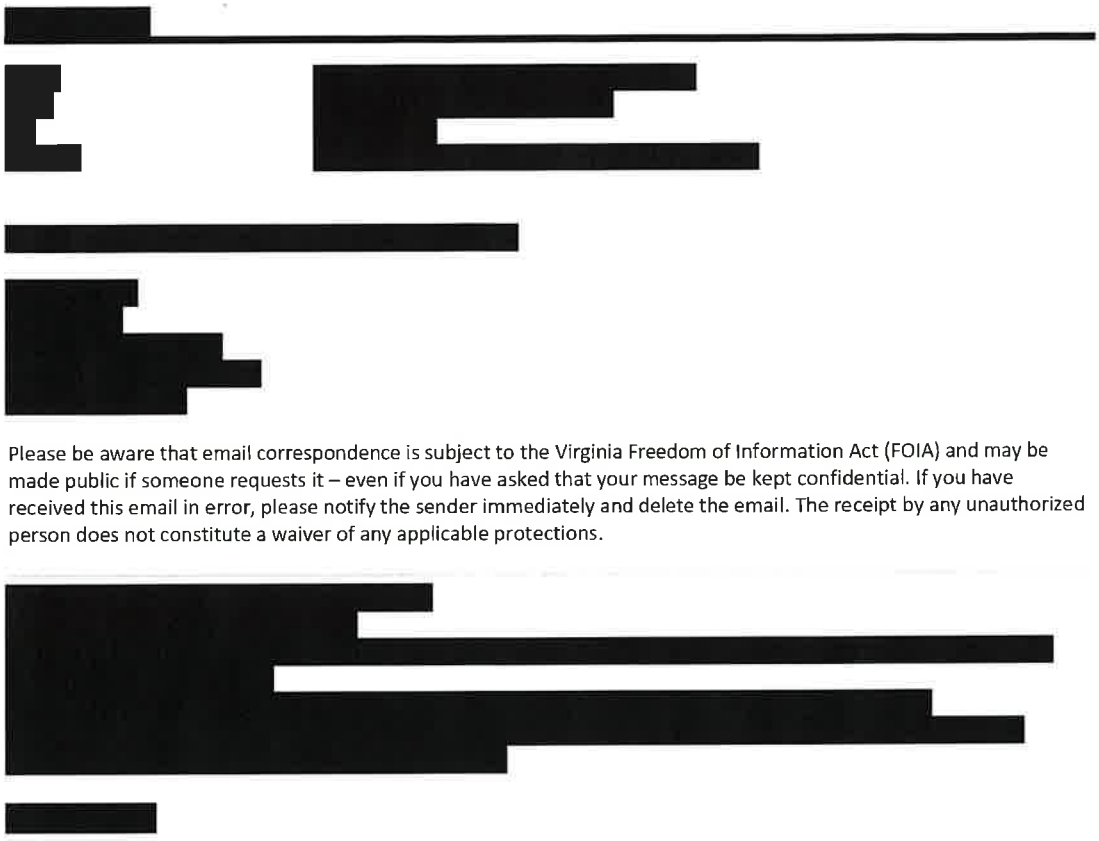
VDOE would begin to search and gather any responsive documents, it demanded a $12,500 deposit. Ultimately VDOE returned the $12,500 deposit check to the requester because the actual cost for the FOIA production was $2,000, less than 1/10th of the initial charge Similarly, in response to a FOIA request for VDOE reports on due process hearings and other information relating to the IEP and hearing officer process, VDOE demanded $43,000. VDOE insisted on a $21,000 deposit before it would even begin to collect the documents.

242. In another round of FOIA requests concerning the hiring and training of hearing officers, VDOE responded that it could not produce such documents because VDOE does not hire or employ hearing officers. VDOE is responsible for determining hearing officers' qualifications, certifying them, recertifying them each year, and training them. *See* 8VAC20-81-210. [44]

243. After one due process hearing, a FOIA request was made for all notes from before and during the hearing, but VDOE denied any such materials existed, although the requested notes were witnessed, in public, during a due process hearing.

244. Even when material is produced by VDOE or LEAs, it is often provided in an illegible document format or heavily, and inexplicably, redacted to the point of non-disclosure. An example of such improper redaction by an LEA is excerpted below:

[44].VDOE's Annual Report of the Dispute Resolution Systems and Administrative Services specifically addresses, among other things, VDOE's training of hearing officers, recertification of hearing officers, and officer performance.



By Making FOIA Requests Overly Burdensome, VDOE Helps its LEAs Conceal Records

245. LEAs' efforts to route parents' requests for their child's education records through an unduly burdensome FOIA process not only amounts to a violation of the IDEA, it enables VDOE to assist LEAs in their efforts to conceal the complete and accurate education records of special needs children while covering up VDOE's other failures to comply with the IDEA.

2. VDOE Fails to Require FCPS and other LEAs to Develop and Amend IEPs in Accordance with the IDEA

246. As part of its obligations under the IDEA, the Commonwealth of Virginia is also required to ensure that LEAs carry out their duties with respect to the development and amendment of IEPs. *See, e.g.,* 20 U.S.C. § 1412(a)(4). In Virginia, that oversight responsibility rests with VDOE. More specifically, VDOE is required to "ensure that each local school division develops

an IEP for each child with a disability served by that local school division. . . ." VAC20-81-20(2). VDOE has failed in its oversight.

247. LEAs are required to "have in effect, for each child with a disability within its jurisdiction, an IEP" at the beginning of the school year. 34 C.F.R. § 300.323(a); *see also* 20 U.S.C. § 1414(2)(A). They are likewise responsible for assembling an IEP team for each child with a disability that must include the child's parents, one or more of the child's educators, and a qualified and knowledgeable representative of the school district. *See* 34 C.F.R. § 300.321(a). In some circumstances, the team may also include additional individuals who can interpret the instructional implications of evaluation results and other individuals "who have knowledge and special expertise regarding the child." *Id.*

248. Each student's IEP team is tasked with developing the child's IEP based on considerations of:

"a. The strengths of the child;

b. The concerns of the parent for enhancing the education of their child;

c. The results of the initial or most recent evaluation of the child; and

d. The academic, developmental, and functional needs of the child."

34 C.F.R. § 300.324(a). In addition, LEAs must ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals are being achieved and to revise its provisions, as appropriate." *See* 34 C.F.R. § 300.324(b). In addition, "[e]ach public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate." 34 C.F.R. § 300.322. A collaborative IEP process among parents, educators, and other informed stakeholders is set out in the IDEA.

IEPs are Improperly Treated as Adversarial

249. In practice, IEPs often are not the product of a consensus-driven deliberative process among the members of a child's IEP Team, but, instead, school administrators often drive the IEP process towards their predetermined outcome that results in the denial of services the child needs in order to benefit from FAPE.

250. As a matter of general policy, school personnel are instructed to treat the IEP process as an adversarial dispute. Before parents can raise any substantive objection to their child's education program, the LEAs hire teams of lawyers to draft the child's IEP, coach teachers and other educators how and when to speak, and how to behave during IEP Team meetings to avoid divulging information the LEAs would consider too risky or adverse to their own interests.

FCPS' Mistreatment of M.B and his Parents

251. On August 21, 2018, M.B.'s parents met with FCPS to establish a new IEP. M.B.'s parents requested that the IEP team consider placement at a specific FCPS special education program called a Comprehensive Service Site ("CSS"), which is located at the Armstrong School. At the time, this would have been the most an appropriate placement for M.B. But during the IEP Team meeting, the LEA-based team inexplicably would not consider CSS placement for M.B.

252. When M.B.'s parents toured the CSS site at Armstrong, a school administrator reiterated that M.B. would not be placed at the CSS. Unlike the IEP Team members, the administrator was upfront about the reason why: there were already several children in M.B.'s grade at CSS, and the administrator did not want M.B.'s placement there to affect the development of the other children. The preferred IEP placement for M.B. did not have capacity, but the LEA would not be honest about the circumstances or make appropriate accommodations for M.B. in CSS. Instead, FCPS determined the appropriate IEP was to keep M.B. in his then-current school

where he did not enjoy the benefits of FAPE.

253. M.B.'s parents continued to request modification of his IEP so that he could be placed at a CSS location in Spring and Fall of 2019. Despite mounting evidence of M.B.'s worsening academic and behavioral challenges, FCPS denied that IEP modification.

254. During the IEP team meeting on May 26, 2020, M.B.'s parents requested that FCPS consider a private or multi-agency placement outside of FCPS where M.B. would have access to much needed services beyond what his current school or CSS provided and a small group setting that could address his behavioral and academic needs. FCPS rejected their request. Instead, it recommended that M.B. be placed in a CSS setting, despite having rejected his parents' earlier request for such a placement. FCPS did not consider M.B.'s individual academic and behavioral needs in making this decision. Rather, it simply did "not believe that all options had been exhausted in FCPS."

255. Following FCPS' multiple refusals to properly place M.B. in a setting where he would receive FAPE, his parents opted for private placement placed him at the Phillips School.

256. On November 4, 2021, the FCPS IEP team again met to consider M.B.'s placement. Ignoring M.B.'s most recent assessments from the Phillips School, including M.B.'s demonstrable and recorded progress in that setting, FCPS arbitrarily concluded the Phillips School was not necessary. Rather, the FCPS IEP team continued to recommend placement at the Burke CSS – despite the fact that FCPS had long resisted a CSS placement. Again, this decision was not based on an individualized assessment of M.B.'s needs, but because the school was public, the least expensive, and available..

257. In other words, from 2018 to 2021 FCPS, resisted providing M.B. with the services and academic setting which he required for FAPE, and only relented in offering additional services

when those services were no longer adequate to meet his needs. This pattern and practice of denial and delay typifies Defendants' system for depriving children and families of their rights under the IDEA. LEAs' failures to properly develop IEPs, and VDOE's failure to provide the oversight necessary to prevent such failures.

FCPS' Mistreatment of D.C. and His Parents

258. In 2020, FCPS convened an IEP meeting to discuss the Chaplicks' request to modify D.C.'s IEP. FCPS' then-Acting Coordinator for Due Process and Eligibility for all Fairfax County Schools, Adam Cahuantzi, chaired the sessions. After no more than an hour and a half of discussing D.C.'s placement, Mr. Cahuantzi announced the end of consideration and FCPS' recommendation to continue day-placement, only, at Grafton – peremptorily refusing the parents' request for a residential placement. FCPS' abrupt end to the IEP modification meeting, stone-wall refusal to engage with D.C.'s parents, and disinterest in giving due consideration to the requested placement, in light of D.C.'s well-documented needs, did not comply with the IDEA. Despite its awareness of D.C.'s painful predicament and FCPS' refusal to engage, VDOE would do nothing to enforce FCPS' obligation to provide a fair and appropriate IEP.

259. LEAs are required to follow a prescribed process when revising a child's IEP outside of an IEP team meeting: "In making changes to a child's IEP after the annual IEP team meeting for the school year, the parent and the local educational agency may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP." *See* 20 U.S.C. § 1414(d)(3)(D).

260. Nevertheless, FCPS unilaterally imposes changes to children's IEPs without holding an ordinary IEP meeting or obtaining parental consent. For example, on April 9, 2021, the Fairfax County Community Services Board ("CSB") notified D.C.'s parents that D.C. was

eligible to be awarded DD Waiver funds to provide certain residential services but did not include coverage of D.C.'s residential costs. Over the next six months, the family took the requisite actions to qualify D.C. for DD Waiver, including identifying and reaching out to ResCare, a provider of adult group homes.

261. ResCare had an opening in an adult group home in Winchester. This Winchester group home would (i) allow D.C. to continue attending Grafton for his education if he had an appropriate service to take him to and from his home to school, and (ii) provide the same level of care and support on a 24-hour basis that Grafton had been providing D.C.

262. On August 4, 2021, after fighting the parents so hard for over eight years on their residential placement request for D.C., FCPS agreed that D.C. required a residential placement and placed him at Grafton, the school where he had been residing and receiving his education for the last seven years. Relying on FCPS' decision that D.C. would be entitled to a residential placement to cover his residential costs, because the DD Waiver program did not cover D.C.'s room and board costs at the ResCare group home, D.C.'s parents made arrangements to move D.C.

263. On September 16, 2021, the parents notified FCPS that D.C. would be moving on October 7, 2021, to his new group home that would be partially funded by the DD Waiver. D.C.'s parents asked FCPS if another IEP meeting was necessary to formalize the change in location. Despite the impending move date, FCPS did not respond. On September 29, D.C.'s parents' counsel again raised this question with FCPS, asking where things stood and if they needed to meet again to address the change in location.

264. FCPS did not respond until nearly three weeks after D.C.'s parents' original inquiry. At 7:56 pm on Tuesday evening October 5, 2021, without notice or meaningful explanation and less than 48 hours before the move was scheduled to occur, FCPS sent an email

to the family informing the parents that D.C.'s placement was being changed without his parents' consent from a residential to a day program. FCPS stated, in a letter attached to the October 5 email:

265. On September 7, 2021, the IEP team was informed that D.C.'s parents are in process of transitioning D.C. to an adult group home through his Community Living Waiver, with a tentative move-in of October 7, 2021. Once D.C. moves into this group home, FCPS will no longer be able to implement the IEP as agreed-upon and D.C. will access Grafton as a day school student. The group home, ResCare, is not associated with Grafton's residential program."

266. FCPS did not respond to D.C's parents' or their counsel's inquiry about whether a new IEP was necessary to effectuate the move. FCPS instead simply decided that a location change was unnecessary for D.C. Although FCPS did not respond to the Chaplick's inquiry in that letter, FCPS sent another email later that day, refusing to hold an IEP meeting to address this issue and stating, "[a]n IEP meeting is not necessary at this time."

267. D.C.'s parents through counsel immediately objected to FCPS' refusal to approve D.C.'s change in location. In a letter dated October 12, 2021, addressed to outside counsel for FCPS, the parents stated that such unilateral action taken by FCPS was in violation of D.C.'s current IEP and a violation of the IDEA and D.C.'s federal rights.

268. In response to FCPS' false assertion that D.C.'s residential placement was being paid for by the DD Waiver, the family countered in a separate email that (i) the DD Waiver was only paying for certain services and was not paying for D.C.'s residential costs, and (ii) nothing had changed in D.C.'s circumstances other than moving from the Grafton group home to an adult group home managed by ResCare, with both locations in Winchester so that D.C. could continue attending Grafton for his education.

269. D.C.'s family moved him into the ResCare group home because they believed the move was in his best long-term interest. To date, FCPS has not responded substantively to the October 12, 2021 letter from the family's attorneys, and FCPS has provided no explanation for its refusal to hold an IEP meeting before unilaterally changing D.C.'s IEP from a residential to day placement. Likewise, VDOE has failed to provide any assistance and continues to fail in the necessary oversight to ensure LEAs like FCPS are properly developing IEPs through the IEP meeting process. Cf. 34 C.F.R. § 300.600.

3. VDOE Fails to Prevent FCPS' and other LEAs' Pattern and Practice of Making Misrepresentations During the IDEA Process

270. LEA lawyers and administrators also train and instruct LEA employees to give parents a false impression of how their children's IEPs are developed. On information and belief, Virginia teachers and school officials are routinely coached on "things not to say at special education meetings." [45]

271. For example, IEP team members are coached to conceal the fact that LEA administrators have ongoing involvement in decisions to deny private school placements, while simultaneously disavowing any decision-making authority about private school placement. LEA employees are instructed not to say: "We cannot make a decision about a private school placement unless someone from central office is present."[46] IEP team members are trained to instead deflect and delay by saying: "The IEP team has the authority to make the placement decision but before

[45] According to one school district's board minutes, a presentation titled "More Things Not to Say at Special Education Meetings" was presented at the 2013 Virginia School Board Association School Law Conference. A powerpoint version of a presentation of the same name, authored by School Law attorney Kathleen Mehfoud of Reed Smith (counsel to several Virginia school districts), was located at https://kipdf.com/updated-more-things-not-to-say-in-special-education-meetings_5aca6d611723dd38f4c9617e.html (Last Accessed January 16, 2023).

[46] *See id.*

we decide whether a private school placement is needed, we would like to obtain more information about the private program. Let's schedule a follow up IEP meeting."[47]

272. LEA employees have also been instructed to conceal their lack of qualifications necessary to develop and implement IEPs. LEA lawyers advise employees not to expressly acknowledge that they "don't have the necessary training" or "have not worked with this type of condition before."[48] Rather, LEA lawyers have scripted a party line for Virginia educators, suggesting that they tell parents that they are "qualified to work with your child and am continually receiving additional training."[49]

273. The concealment and coaching from LEA lawyers and administrators is designed to minimize liability risk for Virginia LEAs (and VDOE) and maximize uncertainty and clarity for parents. They instruct LEA employees *not* to tell parents when the schools are failing to provide appropriate services, and they coach educators to minimize the roles of administrators, when in reality, LEA administrators are the ones driving the process. LEA lawyers explicitly advise LEA employees not to document incidents that expose a failure to provide an eligible child with FAPE – particularly via email communications. LEA lawyers suggest that such acts or omissions should be relayed, if at all, only in an oral communication with school administrators.[50]

274. Another document prepared by LEA lawyers and presented to LEA employees explains: "Often the administrator will say 'no' [to requested special education services] in order

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[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] *See id.*

to end up with an appropriate IEP and protect the school division."[51] Protection of "school divisions" is not within the mission of the IDEA, and this "explanation" from Virginia LEAs acknowledges that their goal is to avoid providing services where possible.

275. Further reflecting the Virginia education system's self-protection mission, LEA lawyers and administrators also coach employees on when and how to reject requests for special education services. In a document titled "How To Say 'No' the Legal Way,"[52] Virginia educators are supplied scripted phrases to use during IEP team meetings to give false impressions of concern and compliance, such as: "The request will infringe in an improper way on the day-to-day decision making of the teacher or in the administration of the school," and "There are professional concerns about the request and granting the request is against your better judgment."[53] In reality, there is no "legal way" to deny an eligible child services that are needed to provide FAPE, but VDOE turns a blind eye while its LEAs try to get away with doing just that.

4. VDOE's Use of IEP "Facilitators" Enables, Rather than Prevents, LEAs' Violations of the IDEA

276. VDOE has failed to provide the necessary oversight to ensure that LEAs like FCPS are properly developing IEPs through the IEP meeting process. *Cf.* 34 C.F.R. § 300.600. In at least some respects, VDOE has facilitated LEAs' efforts to cut children and parents out of the collaborative IEP development process envisioned by the IDEA.

277. VDOE has established a system of IEP Facilitators who are available to "assist

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[51] Mehfoud, Kathleen, "How to say 'no' the legal way," (Last Accessed January 7, 2023), *available at*, https://wyominginstructionalnetwork.com/wp-content/uploads/2018/05/Saying-_No_-in-a-Legal-Manner-by-Mehfoud.pdf. On information and belief, Virginia educators received this document as part of IDEA trainings.

[52] *See id.*

[53] *See id.*

keeping the IEP meeting on track with regard to content and progress." [54] According to VDOE, these facilitators are supposed to be "substantively neutral, impartial" and serve as "[a]n advocate for the IEP process."[55]

278. However, VDOE IEP Facilitators have instead demonstrated bias in favor of LEAs and against parents seeking services. On information and belief, in some instances, IEP Facilitators have pressured parents to accept IEPs that do not provide FAPE. IEP Facilitators has also held *ex parte* communications with LEA employees about specific IEP recommendations.

279. VDOE's use of IEP Facilitators does not fulfill its oversight obligation or otherwise ensure IEP-process compliance. Instead, it is another means by which the IEP development process is used to curtail the provision of services required by the IDEA.

5. VDOE Fails to Ensure that FCPS and other LEAs Provide Children with the Services to Which They Are Entitled under the IDEA

280. Once an IEP has been developed, FCPS and other LEAs continue to resist providing services to eligible children by failing to properly implement that IEP. VDOE fails to provide the necessary oversight to prevent these failures, and indeed facilitates them by depriving parents viable avenues of relief through adequate due process hearings. This glaring failure to enforce Virginia LEA implementation of student IEPs was highlighted, though not begun, during the Pandemic.

281. On March 13, 2020, FCPS schools closed due to the COVID-19 pandemic. M.B.'s IEP team met and developed a temporary learning plan (TLP) for the remainder of the school year. M.B.'s TLP addressed only four goals in distance learning (out of fifteen goals on his IEP), and

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[54] Facilitated IEPS," *available at* https://www.doe.virginia.gov/programs-services/special-education/resolving-disputes/facilitated-ieps (last accessed January 7, 2023).

[55] *Id.*

otherwise reduced M.B.'s services for math and language arts to 120 minutes per day, which could include anything from telephone contact, emails, pre-recorded videos, and videoconferencing sessions. The TLP was woefully inadequate to provide M.B. with FAPE.

282. M.B. by no means is the only child impacted by FCPS' failures during the COVID-19 Pandemic. On November 30, 2022, the U.S. Department of Education's Office for Civil Rights announced resolution of an investigation into FCPS' provision of services to children with disabilities during the COVID-19 Pandemic.[56] It found that FCPS "failed to provide thousands of students with services identified in the students' Individualized Education Programs (IEPs) and 504 plans during remote learning."[57]

283. OCR's findings hauntingly parallel many of the allegations in this Complaint, including:

a. That FCPS ignored existing IEPs in favor of newly developed "Temporary Learning Plans" in the form of one-page letters to parents that FCPS conceded to OCR would not contain the same level of services and accommodations as such students' IEPs and would not meet their educational needs;

b. "Categorical reduc[tion] and/or limited . . . services and special education that students were entitled to receive through their IEPs" based on considerations other than the students' individual educational needs (e.g.

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[56] "U.S. Department of Education's Office for Civil Rights Announces Resolution of Investigation into Fairfax County Public Schools in Virginia, Related to the Needs of Students with Disabilities During the COVID-19 Pandemic," November 30, 2022, *available at* https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-investigation-fairfax-county-public-schools-virginia-related-needs-students-disabilities-during-covid-19-pandemic (last accessed January 8, 2023).

[57] *Id.*

"FAPE *in light of the circumstances*" in the context of remote learning and the pandemic).

c. That FCPS lowered thresholds for testing performance against standards agreed to in students' IEPs, and not only concealed such actions, but misinformed the public that "it did not expect the materials covered that year to change."[58]

d. Failure to develop and implement a plan adequate to remedy the instances in which students with disabilities were not provided FAPE during remote learning, and failure to track such violations so necessary compensatory services could be delivered in the future.[59]

e. That FCPS inaccurately informed staff that the school division was not required to provide compensatory education to students with disabilities who did not receive FAPE during the COVID-19 pandemic because the school division was "not at fault."[60]

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[58] *Id. See also* Hannah Nathanson, *What you need to know about Fairfax public schools this year*, Wash. Post (August 30, 2020), *available at* https://washingtonpost.com/education/2020/30/fairfax-public-schools-faq/ (asked in August 2020 whether "the school system curriculum changed as a result of the pandemic", a FCPS spokesperson reportedly told the *Washington Post* that "[t]he Standards of Learning set by the Virginia Department of Education [would] remain the foundation of what [was to be] taught in Fairfax classrooms").

[59] *See* Letter dated November 30, 2022, from Emily Frangos, Regional Director of the Office of Civil Rights to Dr. Michelle Reid, the Superintendent of Schools for Fairfax County, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11215901-a.pdf (last accessed January 18, 2023).

[60] *Id.* OCR observed that FCPS "administrators were explicitly advising their IEP and Section 504 teams to steer parents away from conversations about compensatory services , and to discuss only "recovery services" instead" that the OCR found inadequate.

f. Failure to provide "recovery services" that were significantly less than compensatory services and only provided such reduced services to approximately 1,070 disabled students out of 25,000 disabled students served by FCPS.[61]

284. FCPS also produced email correspondence to OCR confirming that FCPS administrators were aware that disabled students were not receiving all of the required supports and services required under their IEPs. These failures had measurable adverse impacts on disabled students. By its own study published in November 2020, FCPS estimated that the number of disabled students with disabilities learning remotely during the pandemic who failed one or more classes more than doubled during the pandemic.[62]

285. OCR observed that "by refusing to discuss compensatory services, [FCPS] appears to be ***applying the same erroneous standard*** that it used to deny students FAPE in the first place." (emphasis added). Notably, the OCR observed that students who made "***any progress at all***, no matter how minimal, would apparently **not** be eligible for recovery services." (emphasis added).

286. FCPS' abject failure to comply with the IDEA during the COVID-19 Pandemic is merely a symptom of the broader systemic ills outlined in this Complaint. FCPS misused erroneous standards and inflated evaluations to deny services to children with disabilities well before schools shut their doors in 2020, and continues to use these same tactics to deny services to children today. Unfortunately, M.B. is one such child who has been deprived, and remains deprived of his rights under the IDEA.

287. M.B. received his first IEP in Fall of 2013. However, from the outset, FCPS failed

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[61] *Id.*

[62] *Id.*

to properly implement M.B.'s IEP. Among other issues, FCPS did not provide M.B. with movement breaks and other support required under his IEP to manage his ADHD and related disorders.

288. Faced with FCPS' failure to provide M.B. with the support and resources required under his IEP, M.B.'s parents decided to place him at a private school to begin First Grade. M.B.'s parents paid for this placement by themselves without assistance from FCPS.

289. After M.B. re-enrolled in public school in the Fall of 2018, FCPS continued to improperly implement his IEP. Among other things, he was deprived of use of a calculator during math classes that he required to aid him with his dyscalculia.

290. As time went on, FCPS also isolated M.B. from his peers. During Fifth Grade, M.B. was placed in general education classes for all subjects except for reading and math. However, in Sixth Grade, he was placed in a multi-disabilities classroom. M.B. was sequestered in this separate classroom with younger students who had different cognitive and emotional challenges for the majority of his school day.

291. Unsurprisingly, M.B. struggled in the inappropriate public-school placements imposed on him by FCPS. From Fifth Grade through Seventh Grade, he continued to fall further and further behind his grade level in several metrics even as his FCPS IEP team reported that he was making progress.

292. As M.B. fell behind academically, his behavioral challenges worsened as well. And, these behavioral challenges further impacted his ability to learn – compounding M.B.'s academic and emotional struggles. Nevertheless, during an October 15, 2019 Functional Behavior Assessment, and over the disagreement of M.B.'s parents, M.B.'s school-based IEP team determined that the data did not indicate that M.B. required a Behavioral Intervention Plan ("BIP").

293. When confronted with its failures to properly implement M.B.'s IEP, FCPS did not change course and attempt to offer the services to which he was entitled under the IDEA. Instead, during an April 2020 IEP meeting, an FCPS administrator expressed concern that M.B.'s IEP had too many goals on it given his lack of progress and behavioral struggles. In other words, rather than provide the services or placement necessary to meet M.B.'s educational needs, FCPS sought instead to lower the bar.

294. It was not until M.B.'s parents saw the writing on the wall and decided unilaterally to place him at the private Phillips School, at their own expense, that M.B. received a proper and properly-implemented IEP that addressed his academic and behavioral needs. Although he now receives an appropriate education, it is neither free, nor public, as guaranteed by the IDEA. The ongoing deprivation of M.B.'s right to FAPE is the direct result of VDOE's ongoing failures to carry out its oversight of LEAs including FCPS.

6. VDOE Fails to Prevent FCPS and other LEAs from Bullying Parents and Advocates When They Attempt to Exercise Their Rights under the IDEA

295. Within due process hearings and beyond, Virginia LEAs employ outrageously aggressive and retaliatory tactics against parents and advocates in an obvious attempt to bully and silence those seeking to justice for disabled children. VDOE does nothing to try to prevent this type of retribution or punish it.

296. For example, in September 2021, an advocate filed a FOIA request seeking information about how much money FCPS was spending on its lawyers. Over 1,500 pages of electronic documents were produced as a result of the FOIA request, which the advocate shared with another fellow advocate. After reviewing the documents and carefully redacting confidential information about students and employees, the second advocate published certain of the pages on her website.

297. In response, FCPS threatened to take legal action if the advocates did not return the properly-requested and properly-disclosed documents and if they continued to share the documents and FCPS-related information disclosed in the documents. FCPS demanded the advocates disclose any and all recipients of the documents and remove all online postings about the documents.[63] In short, FCPS demanded the advocates curb their speech about the information exposed through the FOIA request. The advocates refused to comply with the demands, and in response, FCPS sued them.[64]

298. The Court delivered a crushing defeat to FCPS, holding that its attempt to prevent the advocates from disseminating the documents and information about FCPS' tactics amounted to an unconstitutional prior restraint of free speech.[65] Though the Court protected their rights, VDOE failed them.

C. VDOE's Systematic Failures Enable and Encourage FCPS and Other LEAs' Concerted and Ongoing Violations of the IDEA

299. The IDEA was designed so that state agencies, school districts, and parents would work together to ensure that each disabled student receives a free appropriate public education, including any necessary support or accommodations. Rather than work with parents to provide an appropriate public education, VDOE and FCPS have repeatedly violated, ignored, or fought against, their obligations under the IDEA and related statutes, even in the face of federal enforcement actions.

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[63] *See* "Update on Fairfax County School Board's Legal Action Against Parents" (December 27, 2021), *available at* https://specialeducationaction.com/update-on-fairfax-county-school-boards-legal-action-against-parents/ (last accessed January 20, 2023).

[64] *See id.*

[65] *See id.*

300. As noted above, from June 23, 2020 through the present USDOE has repeatedly informed VDOE that its policies and procedure do not comply with the IDEA in several respects. Nevertheless, according to USDOE's September 1, 2022 follow-on letter to Superintendent Balow, VDOE has still failed "to demonstrate it has corrected the identified noncompliance related to State Complaint Procedures, Due Process Complaint and Hearing Procedures, and Independent Educational Evaluations."

301. VDOE and FCPS also failed to ensure school district compliance with the IDEA during the COVID-19 Pandemic, as USDOE's findings related to Virginia's largest school district (described above) clearly show.

302. FCPS also violated disabled students' rights in other ways. It was sued in this District in October 2019 because of its practice of excessively using physical restraint and seclusion against special needs students, a primitive practice which violates state and federal law. For more than two years, FCPS fought this litigation and continued these practices. Finally, on December 2, 2021, FCPS entered into a settlement agreement and consent order, in which it agreed to eliminate these practices.

303. The investigations and litigation described in this complaint are symptomatic of the deep underlying problems of IDEA noncompliance and civil rights violations by VDOE, FCPS and other local school systems in Virginia.

304. Prohibiting a challenge to these systematic problems outside the administrative process would only serve to insulate the state procedures from review—an outcome that would undermine the system Congress selected for the protection of the rights of children with disabilities.

305. Accordingly, Named Plaintiffs seek class-wide relief in this Court, as follows.

COUNT I

42 U.S.C. § 1983 Claims for Due Process Violations of the Fourteenth Amendment to the United States Constitution

(On behalf of Named Plaintiffs and VDOE Class against Defendant Balow and on behalf of Named Plaintiffs and the FCPS Class against Defendants Balow and Reid)

306. Plaintiffs incorporate all allegations set forth in paragraphs 1–305, as if alleged herein.

307. Defendants Balow and Reid have committed constitutional violations against Plaintiffs, who are citizens of the United States, under color of law.

308. Under 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

309. Defendants Balow and Reid have deprived Plaintiffs of their Fourteenth Amendment rights under color of law by depriving them of due process of law and denying them educational opportunities equal to non-disabled students.

310. The Fourteenth Amendment mandates that all persons born in the United States are entitled to due process before restriction of their liberty or property, and to equal protection of the laws. U.S. Const. amend XIV.

311. Plaintiffs have a constitutionally protected property interest in being provided with an IEP consistent with the requirements of the IDEA.

312. Plaintiffs have a constitutionally protected liberty interest in receiving an "Impartial Due Process Hearing" when challenging or contesting a proposed IEP.

313. Plaintiffs have a clearly established right under the Fourteenth Amendment to the

United States Constitution to be free from government interference with, or deprivation of, their property and liberty interest in FAPE, their property interest in an adequate IEP, and their liberty interest in an Impartial Due Process Hearing consistent with adequate due process of law.

314. Constitutionally, adequate due process of law requires an objective proceeding, including proper notice and a fair opportunity to be heard.

315. A fair opportunity to be heard means neutral procedures applied by an impartial and unbiased decision maker, free from self-interest, self-dealing, malice, vindictiveness, or other illegitimate motives.

316. Procedures that are neutral on their face and in theory, but biased at their core and in fact are a sham do not satisfy the procedural due process requirements of the Fourteenth Amendment.

317. By way of illustration and not limitation, Named Plaintiff M.B.'s due process hearing was not adjudicated by an impartial factfinder, but by an individual who demonstrated a lack of knowledge of federal law, disengagement from the evidence, and open hostility toward the persons seeking relief. This manifestation of bias and ill-will toward the petitioners and their attorneys fell below the standards required under federal law and regulations governing the conduct of due process hearings in IDEA cases.

318. By way of further illustration and not limitation, in 2021 hearing officer Brooke-Devlin was assigned to adjudicate Named Plaintiff D.C.'s due process complaint. D.C.'s parents had previously submitted complaints against Ms. Brooke-Devlin for her failures to properly conduct D.C.'s 2015 due process hearing, which created an obvious source of bias for Ms. Brooke-Devlin against D.C. and his parents. Despite this glaring conflict, Ms. Brooke-Devlin refused to recuse herself and denied D.C.'s meritorious motion to disqualify her as the hearing officer on his

complaint. During the contentious hearing on D.C.'s motion for disqualification, Ms. Brooke-Devlin repeatedly displayed the very bias and open hostility towards D.C. which made it inappropriate for her to adjudicate his due process complaint.

319. VDOE's and FCPS' other actions, described above, also contributed to these sham due process proceedings.

320. As a result of these sham proceedings, Named Plaintiffs M.B. and D.C. were denied a fair opportunity to be heard in pursuit of their property and liberty interest in a free appropriate public education, their property interest in an IEP, and their liberty interest in an impartial Due Process Hearing in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

321. The foregoing actions and omissions of Defendants Balow and Reid constitute a policy, practice, pattern, and/or custom of discriminating against Plaintiffs in violation of their constitutionally protected liberty and property interests.

322. Defendants Balow and Reid acted intentionally or with reckless indifference to the constitutional rights of the Plaintiffs.

323. The foregoing actions of Balow and Reid have injured and will continue to irreparably harm Plaintiffs, unless and until prospectively enjoined by this Court as permitted by *Ex Parte Young,* 209 U.S. 123 (1908) and *Antrican v. Odom*, 290 F.3d 178, 186 (4th Cir. 2002).

COUNT II

42 U.S.C. § 1983 Claims for Equal Protection Violations of the Fourteenth Amendment to the United States Constitution

(On behalf of Named Plaintiffs and VDOE Class as against Defendant Balow and on behalf of Named Plaintiffs and the FCPS Class as against Defendants Balow and Reid)

324. Plaintiffs incorporate by reference each averment set forth in paragraphs 1–323 above, and reallege each as if fully set forth herein.

325. Plaintiffs are citizens of the United States, and Defendants are acting under color of law for purposes of 42 U.S.C. § 1983.

326. Plaintiffs have a constitutionally protected fundamental right to procedural due process under the Fourteenth Amendment to the United States Constitution.

327. Defendants violated Plaintiffs' fundamental due process rights by singling them out as classes and depriving them of neutral procedures applied by an impartial and unbiased decision maker, free from self-interest, self-dealing, malice, vindictiveness, or other illegitimate motives.

328. Defendants' denial of Plaintiffs' fundamental right to procedural due process was arbitrary, capricious, and not rationally related to any legitimate interest.

329. Plaintiffs also have a constitutionally protected property interest in "a system of free public elementary and secondary schools," as enshrined in the Constitution of Virginia. Va. Const. art. VIII, § 1.

330. Defendants Balow and Reid have singled out Plaintiffs as a class based on Plaintiffs' status as individuals with disabilities and parents of children with disabilities and denied them their constitutionally protected right to a free public education. Simultaneously, Defendants Balow and Reid have provided other children without disabilities and their parents with the free public education required by the Constitution of Virginia.

331. Defendants' denial of Plaintiffs' right to a free public education is arbitrary, capricious, and not rationally related to any legitimate state interest.

332. The foregoing actions of Balow and Reid have injured and will continue to irreparably harm Plaintiffs, unless and until prospectively enjoined by this Court as permitted by *Ex Parte Young,* 209 U.S. 123 (1908) and *Antrican v. Odom*, 290 F.3d 178, 186 (4th Cir. 2002).

COUNT III

Declaratory Judgment for VDOE's Failure to Comply with Federal Law

(On behalf of Named Plaintiffs and the VDOE Class against the Virginia Department of Education)

333. Named Plaintiffs and the VDOE Class incorporate by reference each averment set forth in paragraphs 1–332 above, and reallege each as if fully set forth herein.

334. Defendant VDOE is obligated under 20 U.S.C. § 1407(a)(1) to ensure that Virginia's local school districts comply with the IDEA. One of the stated purposes of the IDEA, set forth in 20 U.S.C. § 1400(d)(1)(B) is to ensure that the rights of children with disabilities and parents of such children are protected. As a department of the Commonwealth of Virginia, VDOE is not immune under the 11th Amendment from a suit in this Court to remedy a violation of the IDEA, as provided in 20 U.S.C. § 1403.

335. Defendant VDOE has failed and continues to fail to ensure that all children with disabilities residing in the Commonwealth of Virginia receive a free appropriate public education pursuant to 20 U.S.C § 1414. VDOE has displayed a firm purpose to circumvent existing federal law and regulations and has consistently employed the IDEA's due process hearings to frustrate the legal rights of Named Plaintiffs and the VDOE Class. In doing so, it has also failed and continues to fail to ensure that appropriate procedural safeguards are put in place as required by 20 U.S.C. § 1415, including a fair and impartial due process hearing before a qualified and impartial hearing officer, as required by federal law and regulations.

336. The foregoing failures of Defendant VDOE to comply with federal law and regulations and to bring Virginia local school districts into compliance with federal law and regulations have injured Plaintiffs, and will continue to injure plaintiffs if they persist. However, VDOE's acts and omissions in violation of the IDEA have been concealed by its refusal to disclose to parents the true and accurate records pertaining to their children, its obstruction of parents and

advocates' efforts to obtain information about VDOE's due process hearing system, and its systematic efforts to frustrate disable children's access to a free and appropriate public education in Virginia.

337. As set forth above, an actual controversy exists between Named Plaintiffs and the VDOE Class and VDOE with respect to VDOE's actions, policies, and procedures concerning the provision of special education services required under the IDEA and enforcing regulations. This controversy is ongoing and is likely to continue. Accordingly, Named Plaintiffs and VDOE Class seek a judicial determination and declaration of the respective rights and duties of the parties with respect to the IDEA.

338. Such a declaration is necessary and appropriate at this time so that the parties may ascertain their respective rights and duties with respect to the matters set forth above.

COUNT IV

Injunction for VDOE's Failure to Comply with Federal Law

(On behalf of Named Plaintiffs and the VDOE Class against the Virginia Department of Education)

339. Named Plaintiffs and VDOE Class incorporate by reference each averment set forth in paragraphs 1–338 above, and reallege each as if fully set forth herein.

340. Defendant VDOE is obligated under 20 U.S.C. § 1407(a)(1) to ensure that Virginia's local school districts comply with the IDEA. One of the stated purposes of IDEA, set forth in 20 U.S.C. § 1400(d)(1)(B) is to ensure that children with disabilities are provided FAPE and that the rights of children with disabilities and parents of such children are protected. As a department of the Commonwealth of Virginia, VDOE is not immune under the 11th Amendment from a suit in this Court to remedy a violation of the IDEA, as provided in 20 U.S.C. §1403.

341. Defendant VDOE has failed and continues to fail to ensure that all children with disabilities residing in the Commonwealth of Virginia receive a free appropriate public education

pursuant to 20 U.S.C § 1414. VDOE has displayed a firm purpose to circumvent existing federal law and regulations and consistently employed the IDEA's due process hearings to frustrate the legal rights of Named Plaintiffs and the VDOE Class. In doing so, it has failed and continues to fail to ensure that appropriate procedural safeguards are put in place as required by 20 U.S.C. § 1415, including a fair and impartial due process hearing before a qualified and impartial hearing officer, as required by federal law and regulations. These ongoing and continual failures, which previously had been concealed from Plaintiffs, include, but are not limited to, the following acts or omissions:

a. VDOE fails to conduct comprehensive evaluations and reevaluations of any child suspected of having a disability and to ensure that all Virginia LEAs conduct comprehensive evaluations and reevaluations of any child suspected of having a disability,

b. VDOE fails to ensure Virginia LEAs compose appropriate "Individualized Education Program Teams" as required by federal law and regulations,

c. VDOE fails to ensure Virginia LEAs develop appropriate Individualized Education Programs that are based on the individual needs of the child,

d. VDOE fails to ensure Virginia LEAs implement consistently and completely Individualized Education Programs,

e. VDOE fails to ensure Virginia LEAs authorize and pay for an appropriate independent educational evaluation ("IEE") when requested by a parent, unless the LEA has promptly initiated an appropriate Due Process hearing,

f. VDOE fails to require Virginia teachers, education administrators, and any other Virginia education employees to create and maintain accurate,

complete, and timely records of a child's academic, emotional, and behavioral progress according to the child's IEP,

g. VDOE fails to provide to the child's parents the complete and unaltered records of the child's academic, emotional, and behavioral progress according to the child's IEP,

h. VDOE is failing to adequately investigate complaints regarding the failure of local school districts, including defendant FCPS, to provide a free appropriate public education to all children with disabilities, and to otherwise comply with federal law and regulations that protect children with disabilities,

i. VDOE is failing to implement and enforce procedures to afford due process to children with disabilities and their parents in resolving disputes as to program placements, individualized education programs, tuition eligibility and other matters as defined by federal statutes and regulations,

j. VDOE is failing to implement an impartial special education due process hearing system to resolve disputes between parents and local educational agencies as required by federal law and regulations, and

k. VDOE is failing to adequately implement and enforce procedural safeguards required to be afforded to children with disabilities and their parents by 20 U.S.C. § 1415(d) and (f), as further implemented by 34 C.F.R. § 300.121, including ensuring that every hearing officer be qualified and impartial.

342. The foregoing failures of VDOE, including their failure to bring the Virginia special education due process hearing system into compliance with federal law have injured and will continue to irreparably harm Named Plaintiffs and the VDOE Class, unless and until prospectively

enjoined by this Court. *See* 20 U.S.C. § 1403.

COUNT V

Declaratory Judgment for FCPS' Failure to Comply with Federal Law

(On behalf of Named Plaintiffs and the FCPS Class against the Fairfax County School Board)

343. Plaintiffs incorporate by reference each averment set forth in paragraphs 1–342 above, and reallege each as if fully set forth herein.

344. Defendant FCPS is obligated to comply with the IDEA. One of the stated purposes of IDEA, set forth in 20 U.S.C. § 1400(d)(1)(B) is to ensure that children with disabilities are provided FAPE and that the rights of children with disabilities and parents of such children are protected. FCPS is not immune under the 11th Amendment from a suit in this Court to remedy a violation of the IDEA.

345. Defendant FCPS has failed and continues to fail to ensure that all children with disabilities residing in Fairfax County receive a free appropriate public education pursuant to 20 U.S.C § 1414. FCPS has displayed a firm purpose to circumvent existing federal law and regulations and consistently employed the IDEA's due process hearings to frustrate the legal rights of Named Plaintiffs and the FCPS Class. In doing so, FCPS has also failed and continues to fail to comply with the procedural safeguards under 20 U.S.C. § 1415, including a fair and impartial due process hearing before a qualified and impartial hearing officer, as required by federal law and regulations.

346. Not only has Defendant FCPS engaged in a systematic and pervasive failure to comply with the substantive rights and procedural safeguards afforded by the IDEA, it has also behaved in a manner intent on concealing the violations by, among other things, hiding and refusing to disclose information to parents, excluding parents from meetings and hearings pertaining to the rights of the child, and providing parents incorrect information.

347. As set forth above, an actual controversy exists between Named Plaintiffs and the FCPS Class and Defendant FCPS with respect to FCPS' actions, policies, and procedures concerning the provision of special education services required under the IDEA and enforcing regulations. This controversy is ongoing and is likely to continue. Accordingly, Named Plaintiffs and the FCPS Class seek a judicial determination and declaration of the respective rights and duties of the parties with respect to the IDEA.

348. Such a declaration is necessary and appropriate at this time in order that the parties may ascertain their respective rights and duties with respect to the matters set forth above.

COUNT VI

Injunction for FCPS' Failure to Comply with Federal Law

(On behalf of Named Plaintiffs and the FCPS Class against the Fairfax County School Board)

349. Plaintiffs incorporate by reference each averment set forth in paragraphs 1–348 above, and reallege each as if fully set forth herein.

350. Defendant FCPS is obligated to comply with the IDEA. One of the stated purposes of the IDEA, set forth in 20 U.S.C. §1400(d)(1)(B) is to ensure that the rights of children with disabilities and parents of such children are protected. FCPS is not immune under the 11th Amendment from a suit in this Court to remedy a violation of the IDEA.

351. Defendant FCPS has failed and continues to fail to ensure that all children with disabilities residing in Fairfax County receive a free appropriate public education pursuant to 20 U.S.C § 1414. FCPS has displayed a firm purpose to circumvent existing federal law and regulations and consistently employed the IDEA's due process hearings to frustrate the legal rights of Named Plaintiffs and the FCPS Class. In doing so, it has also failed and continues to fail to comply with the procedural safeguards under 20 U.S.C. § 1415, including a fair and impartial due process hearing before a qualified and impartial hearing officer, as required by federal law and

regulations. These ongoing and continual failures include, but are not limited to, the following acts or omissions:

a. Defendant FCPS fails to conduct comprehensive evaluations and reevaluations of any child suspected of having a disability, as required by 20 U.S.C. § 1414(a)-(c),

b. Defendant FCPS fails to compose appropriate Individualized Education Program Teams,

c. Defendant FCPS fails to develop appropriate Individualized Education Programs that are based on the individual needs of the child, by placing arbitrary limits on special needs services, failing to include parents in development of the IEP, concealing information pertinent to the development of the IEP and reevaluation process, and using inflated grades and false indicia of progress in order to manipulate the IEP and reevaluation process,

d. Defendant FCPS fails to implement consistently and completely IEPs under 20 U.S.C. § 1414, *et seq.*,

e. Defendant FCPS fails to authorize and pay for an appropriate independent educational evaluation ("IEE") when requested by a parent, when FCPS has not promptly initiated an appropriate Due Process hearing,

f. Defendant FCPS fails to require teachers, administrators, and other FCPS employees to create and maintain accurate, complete, and timely records of a child's academic, emotional, and behavioral progress according to the child's IEP,

g. Defendant FCPS fails, upon request, to immediately provide to the child's

parent the complete and unaltered records of the child's academic, emotional, and behavioral progress according to the child's IEP,

h. Defendant FCPS, in an attempt to circumvent existing federal law and regulations, systematically and consistently delays implementation of the IEP and procedural safeguards designed to protect the legal rights of Named Plaintiffs and the FCPS Class,

i. Defendant FCPS systematically uses the IDEA's procedural safeguards in a manner that unnecessarily and drastically increases the costs to parents, and

j. Defendant FCPS has displayed a firm purpose to circumvent existing federal law and regulations by engaging in bullying and threats of retaliation to frustrate the legal rights of Named Plaintiffs and the FCPS Class under the IDEA.

352. The foregoing acts and omissions of Defendant FCPS in violation of the IDEA have long been concealed by Defendants so that it could continue to perpetrate its scheme to withhold the special education services and procedural safeguards that are necessary to provide FAPE to disabled children in Fairfax County. The acts and omissions of FCPS have injured and will continue to irreparably harm Named Plaintiffs and the FCPS Class, unless and until prospectively enjoined by this Court. *See* 20 U.S.C. § 1403.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

353. Certify each of the proposed classes under Federal Rule of Civil Procedure 23(a) and 23(b)(2), with Plaintiffs serving as Class Representatives of both the FCPS Class and VDOE Class, and with Plaintiffs' counsel serving as Class Counsel.

354. Declare that FCPS is out of compliance with the IDEA by systematically failing to

comply with the IDEA, including failing to carry out its obligations to conduct evaluations pursuant to section 1414 of the IDEA and frustrating the procedural safeguards of section 1415 of the IDEA, including due process hearings.

355. Enter an injunction against FCPS immediately requiring it to comply with its obligations under 20 U.S.C. § 1400, *et seq.*, including to:

a. Conduct comprehensive evaluations and reevaluations of any child suspected of having a disability, as required by 20 U.S.C. § 1414(a)-(c),

b. Approve independent educational evaluations upon parental request, as required by 54 C.F.R. § 300.502, without requiring a prior public agency evaluation,

c. Require teachers, administrators, and other FCPS employees to create and maintain accurate, complete, and timely records of a child's academic, emotional, and behavioral progress according to the child's IEP;

d. Provide immediately upon parental request the complete and unaltered records of the child's evaluations, assessments, reviews, and academic, emotional, and behavioral progress, without requiring the submission of a FOIA request ;

e. Cease and eliminate immediately practices and procedures that result in the inaccurate measurement of a student's performance, including padding of grades, disregarding grades, inflating grades, assisting students in answering tests or evaluations, and reporting that a student is making progress without a defined, reported, and recorded measurement to demonstrate such progress,

f. Cease and eliminate immediately practices, procedures, counseling, advising,

or training of FCPS personnel that conceals or encourages concealment or non-disclosure of any violation of the IDEA,

g. Cease and eliminate immediately any practice or procedure that delays the implementation, course, or resolution of any IDEA procedural safeguards[66], including postponing the assignment of hearing officers, the conclusion of the due process hearings, disclosure of education records to parents, or approval of IEEs,

h. Cease and eliminate immediately any policy or procedure that conceals information or provides false information to parents concerning a child with disabilities to delay or deny the provision of special education services,

i. Cease and eliminate immediately conduct that unnecessarily and drastically increases costs surrounding the exercise of the procedural safeguards, and

j. Cease engaging in, approving of, or encouraging the use of bullying or threats against parents of children with disabilities who seek to exercise their IDEA rights.

356. Declare that VDOE is out of compliance with section 1415 of the IDEA by systematically failing to carry out its obligation to provide procedural safeguards, including due process hearings, to Virginia children with disabilities and their parents by systematically failing to oversee Virginia LEA compliance with the substantive rights and procedural safeguards of the IDEA, and by failing to ensure that Virginia children with disabilities are provided a free and appropriate public education as required by the IDEA.

[66] The term "procedural safeguards" as used in this prayer for relief means and refers to the safeguards set forth in section 1415 of the IDEA and enforcing regulations.

357. Enter an injunction against VDOE immediately requiring it to comply with 20 U.S.C. § 1414, including to:

a. Conduct comprehensive evaluations and reevaluations of any child suspected of having a disability, as required by 20 U.S.C. § 1414(a)-(c), and ensure that all Virginia LEAs conduct comprehensive evaluations and reevaluations of any child suspected of having a disability,

b. Ensure Virginia LEAs compose appropriate "Individualized Education Program Teams" in accordance with the defined term in 20 U.S.C. § 1414(d)(1)(B),

c. Ensure Virginia LEAs develop appropriate Individualized Education Programs that are based on the individual needs of the child,

d. Ensure Virginia LEAs implement consistently and completely Individualized Education Programs under 20 U.S.C. § 1414, *et seq.*,

e. Ensure Virginia LEAs authorize and pay for an appropriate independent educational evaluation ("IEE") when requested by a parent, unless the LEA has promptly initiated an appropriate due process hearing,

f. Require Virginia teachers, education administrators, and all other Virginia education employees to create and maintain accurate, complete, and timely records of a child's academic, emotional, and behavioral progress according to the child's IEP, and

g. Upon request, immediately provide to a child's parent the complete and unaltered records of the child's evaluation, assessments, reviews, and academic, emotional, and behavioral progress, without requiring the

submission of a FOIA request .

358. Declare that VDOE is not in compliance with the IDEA because it has failed to establish and maintain procedures in accordance with 20 U.S.C. § 1415 and 34 C.F.R. § 300.500, *et seq.*, to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education, and instead, has engaged in a systematic and harassing scheme to undermine the procedural safeguards of the IDEA.

359. Enter an injunction against VDOE immediately requiring it to comply with its obligations under 20 U.S.C. § 1400, *et seq*, including to:

a. Establish and implement procedures to ensure fair and impartial due process hearings pursuant to 34 C.F.R. § 300.511 & 300.512,

b. Certify and recertify only knowledgeable and impartial hearing officers,

c. Ensure that hearing officers are in compliance with 20 U.S.C. § 1415 and the policies and procedures set forth in 34 C.F.R. § 300.500, *et seq.*,

d. Dismiss hearing officers who have failed to comply with 20 U.S.C. § 1415 and the policies and procedures set forth in 34 C.F.R. § 300.500, *et seq.*,

e. Oversee and supervise the hearing officer and due process hearing system, independently, in a manner that ensures a fair due process hearing, as required by the 20 U.S.C. § 1415 and 34 C.F.R. § 300.511(c),

f. Establish and implement procedures to allow parties to disputes under the IDEA, to resolve disputes through the mediation process according to 20 U.S.C. § 1415 and 4 C.F.R. § 300.506, without improper influence or interference by VDOE representatives,

g. Ensure that parents of a child with a disability are afforded an opportunity to inspect and review all education records and attend all meetings with respect to identification, evaluation, and educational placement of the child and the provision of FAPE to the child, in accordance with 34 C.F.R. § 300.501, and

h. Provide the requisite notice pursuant to 34 C.F.R. § 300.500, *et seq*.

360. Declare that Defendant Balow's failure to ensure the procedural safeguards required by the IDEA, including the hearing officer system administered by VDOE, deprives Plaintiffs of procedural due process as provided by the Fourteenth Amendment to the Constitution of the United States.

361. Declare that Defendant Balow has violated Plaintiffs' rights to equal protection under law, as provided by the Fourteenth Amendment to the Constitution of the United States, by establishing and allowing to persist systematic and pervasive efforts to deprive children with disabilities and their parents of their rights to due process under law and to a free public education.

362. Enter an injunction against Defendant Balow in her official position prohibiting her from depriving children with disabilities and their families due process and equal protection under the law and requiring her to:

a. Establish and implement procedures to ensure fair and impartial due process hearings pursuant to 34 C.F.R. §§ 300.511 & 300.512, including:

i. establish an independent board to oversee the hearing officer system composed of knowledgeable educators and parents of disabled or special needs children to ensure balance and fairness, including overseeing the appointment, recertification, compensation, and training of hearing officers,

ii. collect, assemble, and make publicly available monthly and annual individual and aggregate hearing officer ruling statistics, with sufficient detail to determine the ruling record of each hearing officer for the time period at issue,

iii. collect, assemble, and publicly report individual and aggregate hearing officer statistics, on at least a quarterly basis and annual basis, in a manner that is readily accessible to the public,

iv. investigate hearing records and rulings of each hearing officer whose has ruled in favor of disabled students and parents less than 30% of the time over the last ten (10) years, to determine whether each such hearing officer has demonstrated that he or she has been knowledgeable and impartial in their rulings and publish a summary of the findings for each hearing officer,

v. remove any hearing officer who has a demonstrated history of unfairly ruling against disabled students and parents in due process hearings;

vi. publish a detailed explanation of the process going forward for qualifying, certifying, recertifying, training, and appointing hearing officers for due process hearings in the Commonwealth of Virginia, including the steps to be taken to ensure that hearing officers are knowledgeable and impartial in their rulings,

b. Certify only knowledgeable and impartial hearing officers,

c. Ensure that hearing officers are in compliance with 20 U.S.C. § 1415 and the policies and procedures set forth in 34 C.F.R. § 300.500, *et seq.*,

d. Dismiss hearing officers who fail to comply with 20 U.S.C. § 1415 and the policies and procedures set forth in 34 C.F.R. § 300.500, *et seq.*,

e. Oversee and supervise the hearing officer and due process hearing system in a manner that ensures a fair due process hearing with a knowledgeable and impartial hearing officer, as required by the 20 U.S.C. § 1415 and 34 C.F.R. § 300.511(c),

f. Cease and eliminate the policy and practice of assigning or allowing VDOE representatives to serve as "monitors" or "facilitators" in due process hearings or mediations under the IDEA,

g. Establish and implement procedures to allow parties to disputes under the IDEA to resolve disputes through the mediation process according to 20 U.S.C. § 1415 and 34 C.F.R. § 300.506, without improper influence or interference by VDOE representatives,

h. Ensure that parents of a child with a disability are afforded an opportunity to inspect and review all education records and attend all meetings with respect to identification, evaluation, and educational placement of the child and the provision of FAPE to the child, in accordance with 34 C.F.R. § 300.501, without the requirement of submitting a FOIA request, and

i. Provide all requisite notice pursuant to 34 C.F.R. § 300.500, *et seq.*

363. Declare that Defendant Reid has violated, and continues to violate, the due process rights of the FCPS Class by establishing and allowing to persist systematic and pervasive efforts within FCPS to undermine the procedural safeguards in the IDEA.

364. Declare that Defendant Reid's failure to ensure the procedural safeguards required

by the IDEA, deprives families of due process under the law as provided by the Fourteenth Amendment to the Constitution of the United States.

365. Declare that Defendant Reid has violated the equal protection rights of the FCPS Class by establishing and allowing to persist systematic and pervasive efforts to deprive children with disabilities and their parents of their rights to due process under law and to a free public education.

366. Enter an injunction against Defendant Reid in her official capacity prohibiting her from depriving children with disabilities and their families equal protection and due process under the law, by requiring her to:

a. Establish and maintain procedures in accordance with 20 U.S.C. § 1415 and 34 C.F.R. § 300.500, *et seq.*, to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education:

b. Implement the above-mentioned procedural safeguards without undue delay,

c. Implement policies and procedures to prevent FCPS employees from concealing information and providing false information to parents ,

d. Cease unnecessarily and drastically increasing costs surrounding the exercise of the procedural safeguards,

e. Implement policies and procedures to prevent FCPS employees from bullying and threatening retaliation for exercising any of the procedural safeguards.

f. Prevent FCPS administrators and other employees from discriminating against children with disabilities and their families when providing free public education services,

g. Prevent FCPS administrators and other employees from concealing information and providing false information to parents,

h. Prevent FCPS from evading the requirement to evaluate and reevaluate any child suspected of having a disability, as required by 20 U.S.C. § 1414(a)-(c),

i. Ensure FCPS creates appropriate "Individual Education Program Teams" in accordance with the defined term in 20 U.S.C. §1414(d)(1)(B),

j. Preclude FCPS from modifying children's IEPs without complying with the notice and consent requirements of 20 U.S.C. §1414,

k. Preclude teachers, administrators, and other FCPS employees from creating and maintaining, incomplete, inaccurate, and misleading records of a child's academic, emotional, and behavioral progress, and

l. Preclude FCPS administrators and educators from improperly influencing the conduct and outcome of due process hearings.

367. Award Plaintiffs' their attorney's fees and other costs of litigation to the maximum extent allowed under the IDEA, 42 U.S.C. § 1988, and any other applicable law, and any other relief to which they are entitled.

Dated: January 20, 2023

Respectfully submitted,

By: */s/ R. Braxton Hill, IV*

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EXHIBIT A

Hearing Officer Ruling Results for the Period from 2010 through July 2021

Key Statistics	Northern Virginia Officers	Pct	Virginia Officers	Pct
Number of Hearing Officers with Zero Rulings for Parents	10	83.33%	14	63.64%
Outcomes of Cases Initiated	Cases	Pct	Cases	Pct
Withdrawn	191	48.35%	433	51.12%
Settled	68	17.22%	115	13.58%
Dismissed or in Ruling in Favor of Schools	127	32.15%	266	31.40%
Partial Decision for Parents and School District	6	1.52%	20	2.36%
Ruled in Favor of Parents	3	0.76%	13	1.53%
Total Cases	395	100%	847	100%

Details

	Withdrawn		Settled		Dismissed		Ruled in Favor of School District		Split Decision		Ruled in Favor of Parents		Total
Northern Virginia Region	Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases
Individual Hearing Officer													
Richard Alvey	23	43.40%	7	13.21%	19	35.85%	2	3.77%	2	3.77%	0	0.00%	53
Frank Aschmann	23	53.49%	8	18.60%	5	11.63%	4	9.30%	2	4.65%	1	2.33%	43
Morgan Brooke-Devlin	26	59.09%	5	11.36%	4	9.09%	9	20.45%	0	0.00%	0	0.00%	44
Bill Dangoia	11	50.00%	8	36.36%	2	9.09%	1	4.55%	0	0.00%	0	0.00%	22
Alan Dockterman	16	41.03%	5	12.82%	12	30.77%	5	12.82%	1	2.56%	0	0.00%	39
Robert Hartsoe	24	42.11%	12	21.05%	8	14.04%	11	19.30%	0	0.00%	2	3.51%	57
James Mansfield	5	27.78%	4	22.22%	3	16.67%	5	27.78%	1	5.56%	0	0.00%	18
William Rollow	8	47.06%	6	35.29%	2	11.76%	1	5.88%	0	0.00%	0	0.00%	17
Jane Schroeder	12	48.00%	3	12.00%	10	40.00%	0	0.00%	0	0.00%	0	0.00%	25
David Smith	10	58.82%	2	11.76%	1	5.88%	4	23.53%	0	0.00%	0	0.00%	17
George Towner	21	51.22%	6	14.63%	11	26.83%	3	7.32%	0	0.00%	0	0.00%	41
Anthony Vance	12	63.2%	2	10.53%	5	26.32%	0	0.00%	0	0.00%	0	0.00%	19
Total Northern Virginia	191	48.35%	68	17.22%	82	20.76%	45	11.39%	6	1.52%	3	0.76%	395
Outside of Northern Virginia													
Individual Hearing Officer													
Lorin Costanzo	22	66.7%	1	3.03%	8	24.24%	2	6.06%	0	0.00%	0	0.00%	33
Raymond Davis	0	0.00%	2	40.00%	2	40.00%	1	20.00%	0	0.00%	0	0.00%	5
William Francis	29	53.7%	5	9.26%	16	29.63%	2	3.70%	1	1.85%	1	1.85%	54
Sarah Freeman	19	35.2%	10	18.52%	16	29.63%	5	9.26%	1	1.85%	3	5.56%	54
Robin Gnatowsky	20	55.6%	8	22.22%	7	19.44%	1	2.78%	0	0.00%	0	0.00%	36
Ternon Galloway-Lee	29	44.6%	7	10.77%	15	23.08%	8	12.31%	5	7.69%	1	1.54%	65
Rhonda Mitchell	38	63.3%	10	16.67%	4	6.67%	3	5.00%	4	6.67%	1	1.67%	60
Krysia Carmel Nelson	11	84.6%	0	0.00%	1	7.69%	1	7.69%	0	0.00%	0	0.00%	13
John Robinson	37	50.7%	0	0.00%	22	30.14%	11	15.07%	1	1.37%	2	2.74%	73
Peter Vaden	37	62.7%	4	6.78%	8	13.56%	6	10.17%	2	3.39%	2	3.39%	59
Total Outside Northern Virginia	242	53.5%	47	10.40%	99	21.90%	40	8.85%	14	3.10%	10	2.21%	452
Total Virginia	433	51.1%	115	13.58%	181	21.37%	85	10.04%	20	2.36%	13	1.53%	847

EXHIBIT B

Hearing Officer Ruling Results for the Period 1 Oct 2022 through 2009

Key Statistics	Northern Virginia Officers	Pct	Virginia Officers	Pct
Number of Hearing Officers with Zero Rulings for Parents	12	75.00%	30	75.00%
Outcomes of Cases Initiated	Cases	Col. Pct.	Cases	Col. Pct.
Withdrawn	70	38.25%	227	41.73%
Settled	23	12.57%	58	10.66%
Dismissed or in Ruling in Favor of Schools	81	44.26%	232	42.65%
Partial Decision for Parents and School District	5	2.73%	15	2.76%
Ruled In Favor of Parents	4	2.19%	12	2.21%
Total Cases	183	100%	544	100%

Details

Northern Virginia Region	Withdrawn Cases	Withdrawn Pct of Tot.	Settled Cases	Settled Pct of Tot.	Dismissed Cases	Dismissed Pct of Tot.	Ruled in Favor of School District Cases	Ruled in Favor of School District Pct of Tot.	Split Decision Cases	Split Decision Pct of Tot.	Ruled in Favor of Parents Cases	Ruled in Favor of Parents Pct of Tot.	Total Cases
	[19]	[20] =[19]/[21]	[1]	[3] =[1]/[21]	[4]	[6]= [4]/[21]	[7]	[9]= [7]/[21]	[10]	[12] =[11]/[21]	[13]	[15] =[13]/[21]	[21] =[16]+[19]
Individual Hearing Officer													
Richard Alvey	6	37.50%	2	12.50%	3	18.75%	3	18.75%	1	6.25%	1	6.25%	16
Frank Aschmann	8	42.11%	4	21.05%	3	15.79%	4	21.05%	0	0.00%	0	0.00%	19
Morgan Brooke-Devlin	2	18.18%	5	45.45%	2	18.18%	2	18.18%	0	0.00%	0	0.00%	11
Bill Dangola	6	54.55%	2	18.18%	2	18.18%	0	0.00%	1	9.09%	0	0.00%	11
Alan Dockterman	5	35.71%	1	7.14%	2	14.29%	5	35.71%	0	0.00%	1	7.14%	14
Robert Hartsoe	4	30.77%	0	0.00%	4	30.77%	5	38.46%	0	0.00%	0	0.00%	13
James Mansfield	4	33.33%	1	8.33%	3	25.00%	3	25.00%	1	8.33%	0	0.00%	12
William Rollow	6	42.86%	3	21.43%	2	14.29%	3	21.43%	0	0.00%	0	0.00%	14
Jane Schroeder	5	62.50%	2	25.00%	0	0.00%	0	0.00%	1	12.50%	0	0.00%	8
David Smith	2	25.00%	0	0.00%	2	25.00%	4	50.00%	0	0.00%	0	0.00%	8
George Towner	6	46.15%	1	7.69%	3	23.08%	3	23.08%	0	0.00%	0	0.00%	13
Anthony Vance	5	45.45%	0	0.00%	5	45.45%	1	9.09%	0	0.00%	0	0.00%	11
Joe McGrail	6	46.15%	0	0.00%	6	46.15%	0	0.00%	0	0.00%	1	7.69%	13
Lawrence Lindeman	1	12.50%	1	12.50%	4	50.00%	2	25.00%	0	0.00%	0	0.00%	8
Louis S. Papa	2	33.33%	0	0.00%	3	50.00%	0	0.00%	1	16.67%	0	0.00%	6
Joseph B. Kennedy	2	33.33%	1	16.67%	1	16.67%	1	16.67%	0	0.00%	1	16.67%	6
Total Northern Virginia	70	38.25%	23	12.57%	45	24.59%	36	19.67%	5	2.73%	4	2.19%	183
Outside of Northern Virginia													
Individual Hearing Officer													
Lonn Costanzo	35	58.33%	3	5.00%	14	23.33%	8	13.33%	0	0.00%	0	0.00%	60
Raymond Davis	2	25.00%	2	25.00%	3	37.50%	1	12.50%	0	0.00%	0	0.00%	8
William Francis	3	27.27%	1	9.09%	5	45.45%	2	18.18%	0	0.00%	0	0.00%	11
Sarah Freeman	19	55.88%	2	5.88%	3	8.82%	8	23.53%	1	2.94%	1	2.94%	34
Robin Gnatowsky	6	40.00%	4	26.67%	3	20.00%	2	13.33%	0	0.00%	0	0.00%	15
Vernon Galloway-Lee	18	42.86%	2	4.76%	12	28.57%	6	14.29%	3	7.14%	1	2.38%	42
Rhonda Mitchell	7	36.84%	3	15.79%	6	31.58%	2	10.53%	1	5.26%	0	0.00%	19
Krysia Carmel Nelson	4	80.00%	0	0.00%	0	0.00%	1	20.00%	0	0.00%	0	0.00%	5
John Robinson	15	42.86%	0	0.00%	11	31.43%	7	20.00%	0	0.00%	2	5.71%	35
Peter Vaden	11	33.33%	5	15.15%	8	24.24%	5	15.15%	2	6.06%	2	6.06%	33
Matt Archer	12	48.00%	1	4.00%	4	16.00%	7	28.00%	1	4.00%	0	0.00%	25
John Hooe	2	50.00%	0	0.00%	2	50.00%	0	0.00%	0	0.00%	0	0.00%	4
Edward Johnson	3	33.33%	4	44.44%	2	22.22%	0	0.00%	0	0.00%	0	0.00%	9
James Eichner	3	37.50%	0	0.00%	0	0.00%	4	50.00%	0	0.00%	1	12.50%	8
Richard E. Smith	2	16.67%	4	33.33%	5	41.67%	0	0.00%	1	8.33%	0	0.00%	12
Urchie B. Ellis	5	38.46%	0	0.00%	2	15.38%	5	38.46%	0	0.00%	1	7.69%	13
Alfred Bernard	1	20.00%	0	0.00%	2	40.00%	2	40.00%	0	0.00%	0	0.00%	5
James T. Lloyd	5	41.67%	2	16.67%	2	16.67%	3	25.00%	0	0.00%	0	0.00%	12
Ayodele M. Ama	0	0.00%	0	0.00%	1	50.00%	1	50.00%	0	0.00%	0	0.00%	2
Wanda N. Allen	1	100.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	1
Stuart H. Dunn	1	100.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	1
Henry H. Howell III	0	0.00%	0	0.00%	0	0.00%	1	100.00%	0	0.00%	0	0.00%	1
Franklin Michaels	0	0.00%	2	50.00%	1	25.00%	0	0.00%	1	25.00%	0	0.00%	4
C. Gilbert Hudson	2	100.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	2
Total Outside Northern Virginia	157	43.49%	35	9.70%	86	23.82%	65	18.01%	10	2.77%	8	2.22%	361
Total Virginia	227	41.73%	58	10.66%	131	24.08%	101	18.57%	15	2.76%	12	2.21%	544

EXHIBIT C

Hearing Officer Ruling Results for the Period from 2003 through July 2021

Key Statistics	Northern Virginia Officers	Pct	Virginia Officers	Pct
Number of Hearing Officers with Zero Rulings for Parents	10	62.50%	26	65.00%

Outcomes of Cases Initiated	Cases	Col. Pct.	Cases	Col. Pct.
Withdrawn	261	45.16%	660	47.45%
Settled	91	15.74%	173	29.93%
Dismissed or in Ruling in Favor of Schools	208	35.99%	498	86.16%
Partial Decision for Parents and School District	11	1.90%	35	6.06%
Ruled in Favor of Parents	7	1.21%	25	4.33%
Total Cases	578	100%	1391	100%

Details

	Withdrawn		Settled		Dismissed		Ruled in Favor of School District		Split Decision		Ruled in Favor of Parents		Total
Northern Virginia Region	Cases	Pct of Tot.	Cases	Pct of Tot.	Cases	Pct of Tot.	Cases	Pct of Tot.	Cases	Pct of Tot.	Cases	Pct of Tot.	Cases
Individual Hearing Officer													
Richard Alvey	29	42.03%	9	13.04%	22	31.88%	5	7.25%	3	4.35%	1	1.45%	69
Frank Aschmann	31	50.00%	12	19.35%	8	12.90%	8	12.90%	2	3.23%	1	1.61%	62
Morgan Brooke-Devlin	28	50.91%	10	18.18%	6	10.91%	11	20.00%	0	0.00%	0	0.00%	55
Bill Dangoia	17	51.52%	10	30.30%	4	12.12%	1	3.03%	1	3.03%	0	0.00%	33
Alan Dockterman	21	39.62%	6	11.32%	14	26.42%	10	18.87%	1	1.89%	1	1.89%	53
Robert Hartsoe	28	40.00%	12	17.14%	12	17.14%	16	22.86%	0	0.00%	2	2.86%	70
James Mansfield	9	30.00%	5	16.67%	6	20.00%	8	26.67%	2	6.67%	0	0.00%	30
William Rollow	14	45.16%	9	29.03%	4	12.90%	4	12.90%	0	0.00%	0	0.00%	31
Jane Schroeder	17	51.52%	5	15.15%	10	30.30%	0	0.00%	1	3.03%	0	0.00%	33
David Smith	12	48.00%	2	8.00%	3	12.00%	8	32.00%	0	0.00%	0	0.00%	25
George Towner	27	50.00%	7	12.96%	14	25.93%	6	11.11%	0	0.00%	0	0.00%	54
Anthony Vance	17	56.67%	2	6.67%	10	33.33%	1	3.33%	0	0.00%	0	0.00%	30
Joe McGrail	6	46.15%	0	0.00%	6	46.15%	0	0.00%	0	0.00%	1	7.69%	13
Lawrence Linderman	1	12.50%	1	12.50%	4	50.00%	2	25.00%	0	0.00%	0	0.00%	8
Louis S. Papa	2	33.33%	0	0.00%	3	50.00%	0	0.00%	1	16.67%	0	0.00%	6
Joseph B. Kennedy	2	33.33%	1	16.67%	1	16.67%	1	16.67%	0	0.00%	1	16.67%	6
Total Northern Virginia	261	45.16%	91	15.74%	127	21.97%	81	14.01%	11	1.90%	7	1.21%	578
Outside of Northern Virginia													
Individual Hearing Officer													
Lorin Costanzo	57	61.29%	4	4.30%	22	23.66%	10	10.75%	0	0.00%	0	0.00%	93
Raymond Davis	2	15.38%	4	30.77%	5	38.46%	2	15.38%	0	0.00%	0	0.00%	13
William Francis	32	49.23%	6	9.23%	21	32.31%	4	6.15%	1	1.54%	1	1.54%	65
Sarah Freeman	38	43.18%	12	13.64%	19	21.59%	13	14.77%	2	2.27%	4	4.55%	88
Robin Gnatzwsky	26	50.98%	12	23.53%	10	19.61%	3	5.88%	0	0.00%	0	0.00%	51
Ternon Galloway-Lee	47	43.93%	9	8.41%	27	25.23%	14	13.08%	8	7.48%	2	1.87%	107
Rhonda Mitchell	45	56.96%	13	16.46%	10	12.66%	5	6.33%	5	6.33%	1	1.27%	79
Krysta Carmel Nelson	15	83.33%	0	0.00%	1	5.56%	2	11.11%	0	0.00%	0	0.00%	18
John Robinson	52	48.15%	0	0.00%	33	30.56%	18	16.67%	1	0.93%	4	3.70%	108
Peter Vaden	48	52.17%	9	9.78%	16	17.39%	11	11.96%	4	4.35%	4	4.35%	92
Matt Archer	12	48.00%	1	4.00%	4	16.00%	7	28.00%	1	4.00%	0	0.00%	25
John Hooe	2	50.00%	0	0.00%	2	50.00%	0	0.00%	0	0.00%	0	0.00%	4
Edward Johnson	3	33.33%	4	44.44%	2	22.22%	0	0.00%	0	0.00%	0	0.00%	9
James Eichner	3	37.50%	0	0.00%	0	0.00%	4	50.00%	0	0.00%	1	12.50%	8
Richard E. Smith	2	16.67%	4	33.33%	5	41.67%	0	0.00%	1	8.33%	0	0.00%	12
Urchie B. Ellis	5	38.46%	0	0.00%	2	15.38%	5	38.46%	0	0.00%	1	7.69%	13
Alfred Bernard	1	20.00%	0	0.00%	2	40.00%	2	40.00%	0	0.00%	0	0.00%	5
James T. Lloyd	5	41.67%	2	16.67%	2	16.67%	3	25.00%	0	0.00%	0	0.00%	12
Ayodele M. Ama	0	0.00%	0	0.00%	1	50.00%	1	50.00%	0	0.00%	0	0.00%	2
Wanda N. Allen	1	100.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	1
Stuart H. Dunn	1	100.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	1
Henry H. Howell III	0	0.00%	0	0.00%	0	0.00%	1	100.00%	0	0.00%	0	0.00%	1
Franklin Michaels	0	0.00%	2	50.00%	1	25.00%	0	0.00%	1	25.00%	0	0.00%	4
C. Gilbert Hudson	2	100.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	2
Total Outside Northern Virginia	399	49.08%	82	10.09%	185	22.76%	105	12.92%	24	2.95%	18	2.21%	813
Total Virginia	660	47.45%	173	12.44%	312	22.43%	186	13.37%	35	2.52%	25	1.80%	1391

EXHIBIT D

Virginia Department of Education
Division of Special Education and Student Services
Office of Dispute Resolution and Administrative Services

Special Education Hearing Officer System
Time Record / Invoice

VDOE Case #: 21-009

H.O. Name: RHONDA J. S. MITCHELL

EIN/SS#: See attached IRS form W-9
eVA number: VC0000161913

Student's Name:

School Division: FAIRFAX COUNTY PUBLIC SCHOOLS (FCPS)

Please Note: List the specific date and amount of time for each service. DO NOT aggregate the time.

Date	*Description of Activity*	*Hours x $125*
August 27, 2020	notification of appointment	
August 31, 2020	formal appointment; confirmation letter; notice of 1st prehearing conference; reviewed complaint; amended notice of first prehearing conference; VDOE appointment of evaluator and case #	1.40
September 1, 2020	reviewed FCPS subpoenas; reviewed timeline requirements; prehearing report (draft); issue identification; conference call prep; conference call; reviewed complaint enclosures	5.10
September 2, 2020	final prehearing report; notice of hearing; notice of 2nd prehearing conference; prehearing order	4.40
September 3, 2020	research; reviewed parent objections to subpoenas and other concerns; reviewed FCPS' response	2.45
September 4, 2020	reviewed parent response to FCPS response to parent concerns; reviewed parent objections to IEP team; decision letter re parent concerns; emails re parent concerns about resolution session members	6.45

September 5, 2020	emails re subpoenas, resolution session and confidentiality; reviewed parent's subpoena	2.15
September 8, 2020	emails re subpoenas; notices for 2nd and 3rd conference calls; emails re resolution session and confidentiality	1.05
September 9, 2020	reviewed emails; reviewed FCPS Motion to Quash; research	2.15
September 11, 2020	reviewed mails; prep for conference call; 2nd conference call	2.45
September 12, 2020	amended formal notice of hearing; reviewed parent's email dated September 11th with enclosures	2.10
September 13, 2020	2nd prehearing order; reviewed FCPS insufficiency and response; decision on notice of insufficiency and SOL; research; emails	8.30
September 14, 2020	entered protective order; notice of 3rd prehearing conference call; revised previous notice of call; decision addendum	2.40
September 15, 2020	reviewed parent's September 13, 2020 email re burden of proof and attorney misconduct allegations	1.10
September 16, 2020	prep for conference call; 3rd conference call; hearing agenda; 3rd prehearing order ; notice of 5th prehearing conference call	2.05
September 17, 2020	reviewed parent's email response to FCPS' Motion to Dismiss, Objection to Sufficiency, and Response; reviewed back and forth emails between parent and BK re drop box access' answered parent's email re her FOIA	2.20
September 20, 2020	reviewed parent's motions for sanctions; reviewed parent's enclosures including VDOE letter of findings; reviewed FCPS' response to motion for sanctions; reviewed parent's request to delay submission of exhibit books; research	4.15
September 21, 2020	reviewed parent's request for hearing delay and enclosures; prep for conference call; conference call; parent emails	2.15
September 22,2020	parent emails re privacy violations and alleged FCPS misrepresentations; emergency conference call; amended hearing notice	2.00
September 23,2020	notice of 6th conference call; 4th prehearing order; reviewed emails; received exhibit books	4.40
September 25, 2020	reviewed exhibit books; prep for conference call; conference call; emails	5.35
September 26, 2020	reviewed exhibit books; 5th prehearing order; emails	7.05

September 27, 2020	emails; reviewed exhibit books	6.35
September 28, 2020	reviewed exhibit books; emails	7.15
September 29, 2020	emails; reviewed exhibit books; prep for hearing	3.25
September 30, 2020	prep for hearing; hearing	6.00
October 1, 2020	prep for hearing; hearing	8.10
October 2, 2020	prep for hearing; hearing	9.00
October 3, 2020	review evidence	2.10
October 6, 2020	emails; amended hearing notice; notice of mid-hearing conference call	.55
October 7, 2020	mid-hearing conference call; drafted order re transcripts; emails	2.50
October 8, 2020	emails; research	.50
October 9, 2020	completed order re transcripts; research	2.45
October 10, 2020	reviewed exhibits; emails	1.30
October 12, 2020	prep for hearing; organize hearing notes	1.15
October 13, 2020	prep for hearing; hearing	8.20
October 14, 2020	prep for hearing; hearing	8.50
October 15, 2020	prep for hearing; hearing	4.00
October 16, 2020	hearing notice extension	.15
October 17, 2020	review exhibits; organized hearing notes; research	2.35
October 18, 2020	prep for hearing	.20

October 19, 2020	prep for hearing; hearing	12.00
October 20-21, 2020	email traffic and message search	1.40
October 22, 2020	research; review exhibits; emails back and forth re post hearing issues	4.10
October 23, 2020	decision: cover sheet, intro and history	4.30
October 24, 2020	post hearing decision; emails	1.55
October 25, 2020	decision: intro and history; issues; burden of proof	5.45
October 26, 2020	emails re transcripts; decision: intro and history	5.00
October 28, 2020	reviewed transcripts	2.15
October 29, 2020	reviewed transcripts; decision: ; intro and history; witness appearances	5.20
October 31, 2020	decision: synopsis and facts; transcripts	5.35
November 1, 2020	petitioner's brief; transcripts	5.00
November 2, 2020	petitioner's brief; transcripts	7.15
November 4, 2020	read briefs	9.00
November 5, 2020	research; transcripts; emails	7.20
November 6, 2020	decision: revisions; emails	8.10
November 7, 2020	decision: edits and additions	1.50
November 9, 2020	decision letter 2; research	5.20
November 10, 2020	decision letter 2	2.30

November 11, 2020	completed decision letter 2; decision: intro additions	5.35
November 12, 2020	decision: synopsis	6.00
November 13, 2020	decision: synopsis	5.10
November 15, 2020	decision: synopsis; witnesses	10.30
November 17, 2020	decision: witnesses; research	3.35
November 18, 2020	review briefs; decision: arguments	6.45
November 19, 2020	decision: arguments; legal analysis and findings	11.30
November 20, 2020	decision: legal analysis and findings	4.30
November 21, 2020	decision: findings summary; research; edits	3.45
November 22, 2020	decision: orders; appeal rights; edits	7.45
November 23, 2020	decision: legal analysis; edits; review SEA-STARS correspondence; letter SEA-STARS	6.15
November 24, 2020	decision: additions; edits; research	10.00
November 25, 2020	decision: edits	2.30
November 27, 2020	decision: edits, additions	5.15
November 28, 2020	decision: edits; additions	3.35
November 29, 2020	decision: edits	1.45
November 30, 2020	decision: final edits, decision sent; case closure report	6.40

December 1-3, 2020	post hearing emails from petitioner	
December 6, 2020	W-9, timesheet (invoice)	1.00

Subtotal: 346.9 HOURS

Minute calculation guide: .15 = 15 minutes; .30 = 30 minutes; .45 = 45 minutes, etc.

TOTAL AMOUNT DUE: $43,325.00

All administrative duties and postal costs were performed Gratis.

Please remit payment within 30 days to:
RHONDA MITCHELL
5001 LIPPINGHAM DRIVE
CHESTER, VIRGINIA 23831

/s/
Signed: _____
Dated: December 7, 2020

EXHIBIT E

September 2, 2022

Summary of Hearing Officer Information and Ruling Record

This matrix summarizes publicly available information for individuals appointed as Hearing Officers to preside over due process cases brought by parents of disabled or special needs children in Virginia under the Individuals with Disabilities and Education Act ("**IDEA**") for the period from 2010 to June 2021. The chart also provides the ruling record of each officer for the time period from 2003 through June 2021. The information in the chart below is based on public searches and information provided in response to a request for information under the Virginia Freedom of Information Act. This chart also indicates the year such individual was formally approved and certified to serve as a Hearing Officer based on the Special Education Hearing Officer listing published in June 2021 by Virginia ("**Hearing Officer Listing**").

Hearing Officer	Publicly Available Professional Background	Number of Rulings in Favor of Parents in last twenty years
Northern Virginia		
Richard M. Alvey	Certified as a Hearing Officer in 1996. Based on LinkedIn profile, practices law in Stafford, Virginia as a sole practitioner.	1 out of 69 cases (1.4%)
Frank G. Aschmann	Certified as a Hearing Officer in 1994. Based on a Martindale law firm summary, Aschmann works in a two-member law firm Aschmann & Aschmann in Alexandria Virginia with Charles Aschmann, Jr. The firm's practices include personal injury and employment law.	1 out of 62 cases (1.6%)
Morgan Brooke-Devlin	Certified as a Hearing Officer in 1993. Based on a Dunn & Bradstreet report, Morgan Brooke-Devlin works for a two-person law firm Brooke-Devlin & Nester based in Falls Church, Virginia.	0 out of 55 cases (0%)
William J Dangoia	Certified as a Hearing Officer in 1999. Based on multiple legal listing services, Dangoia works as a sole practitioner in Occoquan, VA.	0 out of 33 cases (0%)
Alan Dockterman	Certified as a Hearing Officer in 1997. Based on multiple legal listing services, Dockterman works a sole practitioner in Alexandria, Virginia.	1 out of 53 cases (1.9%)
Robert Hartsoe	Certified as a Hearing Officer in 1999. Based on his firm's website, Hartsoe works for a two-member law firm Hartsoe & Morgan based in Fairfax, Virginia. The firm also employs one other attorney.	2 out of 70 cases (2.9%)

Hearing Officer	Publicly Available Professional Background	Number of Rulings in Favor of Parents in last twenty years
James M. Mansfield	Certified as a Hearing Officer in 1999. Based on multiple legal listing services, Mansfield works as a sole practitioner in Fairfax, Virginia.	0 out of 30 cases (0%)
William E. Rollow	Certified in 1996. Based on the Hearing Officer Listing and his LinkedIn profile, Rollow worked for a two-member firm Rollow and Giroux based in Great Falls, Virginia. Rollow died in 2021.	0 out of 31 cases (0%)
Jane Schroeder	Certified in 1999. Based on multiple legal listing services, Schroeder is a sole practitioner based in Reston, Virginia.	0 out of 33 cases (0%)
David R. Smith	Certified in 2000. Based on multiple legal listing services, David R. Smith is a sole practitioner based in Fairfax, Virginia.	0 out of 25 cases (0%)
George C. Towner, Jr.	Certified in 1993. Based on multiple legal listing services, Towner worked as a sole practitioner based in Arlington, Virginia. Towner died in 2021.	0 out of 54 cases (0%)
Anthony C. Vance	Certified in 1987. Based on multiple legal listing services, Vance worked as a sole practitioner based in McLean, Virginia. Vance died in 2020.	0 out of 30 cases (0%)
Outside of Northern Virginia		
Lorin A. Costanzo	Certified in 1995. Based on multiple legal listing services, Costanzo is a sole practitioner based in Vinton, Virginia.	0 out of 93 cases (33%)
Raymond E. Davis	Certified in 1989. Based on his obituary, Davis was retired since 2010 and did not appear to have any other sources of income from employment other than hearing officer fees. Davis died in 2017.	0 out of 13 cases (0%)
William S. Francis, Jr.	Certified in 1985. Based on multiple legal listing services, Francis is a sole practitioner based in Richmond, Virginia.	1 out of 65 cases (1.5%)
Sara S. Freeman	Certified in 1989. Based on multiple legal listing services, Freeman is a sole practitioner based in Norfolk, Virginia.	4 out of 88 cases (4.5%)

Hearing Officer	Publicly Available Professional Background	Number of Rulings in Favor of Parents in last twenty years
Robin S. Gnatowsky	Certified in 1997. Based on multiple legal listing services, Gnatowsky is a sole practitioner based in Glen Allen, Virginia.	0 out of 51 cases (0%)
Ternon Galloway Lee	Certified in 2001. Based on multiple legal listing services, Galloway Lee is a sole practitioner based in Williamsburg, Virginia.	2 out of 107 cases (1.9%)
Rhonda J.S. Mitchell	Certified in 2001. Based on multiple legal listing services, Mitchell is a sole practitioner based in Chester, Virginia.	1 out of 79 cases (1.3%)
Krysia Carmel Nelson	Certified in 2001. Based on multiple legal listing services, Carmel Nelson is a sole practitioner based in Keswick, Virginia.	0 out of 18 cases (0%)
John V. Robinson	Certified in 1997. Based on multiple legal listing services, Robinson is a sole practitioner based in Richmond, Virginia.	4 out of 108 cases (3.7%)
Peter Vaden	Certified in 1996. Based on multiple legal listing services and his publicly available resume, Vaden is a sole practitioner based in Charlottesville, Virginia. Based on his resume, he appears to receive income as a hearing officer for several Virginia state agencies.	4 out of 92 cases (4.3%)

EXHIBIT F

LAW OFFICE OF
WILLIAM B. REICHHARDT
1940 DUKE STREET, SUITE 200
ALEXANDRIA, VIRGINIA 22314

WILLIAM B. REICHHARDT (VA, MD)
GRACE E. KIM (VA), Of Counsel

TELEPHONE (443) 949-7290
FACSIMILE (703) 548-9446

EMAIL: wbr@wbrlaw.com

October 6, 2015

Sheila T. Gray, Administrative Coordinator
Office of Dispute Resolution and Administrative Services
Department of Education
Commonwealth of Virginia
P. O. Box 2120
Richmond, VA 23218-2120

Re: Due Process Evaluation-

Dear Ms. Gray:

I am the attorney who represented the parents in this recent Due Process action against the Fairfax County Public Schools. Ms. Morgan Brooke-Devlin was the presiding Hearing Officer. I am compelled to write this letter because during my 20 years of law practice in the area of special education I have never experienced such a biased and legally misinformed opinion from a Hearing Officer as was apparent in this case.

This Due Process case involved placement of a significantly disabled 11-year-old boy to the Grafton residential school in Winchester through the actions of the CSA in Fairfax County. Before the child was recommended to return home, the CSA unilaterally closed the case and ceased funding for the Grafton School. The parents sought relief through the IDEA and IEP process. When resolution could not be reached with the school district, the Due Process action was filed.

This was a complicated case which involved four full days of hearing and over 200 exhibits were filed. The complexity of the case notwithstanding, it was apparent that the Hearing Officer was continually confused about the law and Virginia Regulations that govern school district responsibility in cases involving placements of children for non-educational reasons. In addition, in her final determinations of "fact" and conclusions of law, Ms. Brooke Devlin misconstrued or ignored clear and convincing evidence presented in the parents' case. She excused the school district's failure to provide services (even after the school district witness admitted such mistakes during the hearing). She suggested that literally all of the parents' expert witnesses were not credible even though a number of them have impressive reputations in their fields and had conducted more thorough evaluations than any material submitted by the school district.

This hearing officer invalidated a key provision of the Virginia Administrative Code (8 VAC 20-81-30), believing it to be in conflict with federal law and therefore preempted. It should be noted that neither party made this argument at the hearing nor. I submit that this was clearly a wrong conclusion. In fact, this Administrative Code section was a pivotal consideration for the stay- put and ultimate determination in this case. Not only did the hearing officer fail to address the facts in relation to this code section, she did not later reconsider her position when it was pointed out to her in writing. The hearing officer made a stay put determination for this child that he be placed in a public day program that was not proposed by either the school district or the parents and is over 75 miles from the residential placement where he was enrolled.

I have participated in numerous Due Process actions. I have settled many special education cases with school districts throughout Virginia and I lecture regularly to attorneys and advocates throughout the state regarding settlement negotiations and special education litigation. I have argued cases in federal courts at the district and appellate level. I have certainly experienced adverse rulings from hearing officers and judges, but I have never seen a judicial officer work so hard to avoid plain facts on the record in an apparent attempt to rule against the parents, misconstrue the law, and excuse literally every adverse action of the school district. Unfortunately, it was clear right after Ms. Brooke-Devlin's preliminary ruling on the stay put motion that she did not know the applicable law and was either unable or unwilling to review her ruling after her omission was brought to her attention. As a result, the parents in this case have no alternative but to file appeals to federal court for relief.

It is imperative that the Due Process procedure be perceived as fair and unbiased. Ms. Brooke Devlin's performance in this case jeopardized that goal. Please consider this letter to be a formal complaint and I ask that she not be appointed in any further Due Process actions. I am happy to share more specific aspects of this record with you or any member of your staff should you wish to conduct an independent review of this case. You might also be concerned that a Hearing Officer has now ruled that 8 VAC 20-81-30 is invalid and in direct conflict with federal law.

Thank you for your consideration in this matter.

Sincerely,

William B. Reichhardt

cc: Mr. and Mrs. Trevor Chaplick