

**VIRGINIA DEPARTMENT OF EDUCATION  
DEPARTMENT OF SPECIAL POPULATIONS  
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES  
LETTER OF FINDINGS**

<p><b>School Division</b> Fairfax County Public Schools Dr. Terri Edmunds-Heard, Acting Assistant Superintendent, Special Services Ms. Dawn Schaefer, Director, Special Education Procedural Support 8270 Willow Oaks Corporate Drive – Second Floor Fairfax, Virginia 22031 <a href="mailto:tledmundshea@fcps.edu">tledmundshea@fcps.edu</a> <a href="mailto:DMSchaefer@fcps.edu">DMSchaefer@fcps.edu</a></p>	<p><b>Parent(s)</b> N/A</p>
<p><b>Case # 24-120</b></p>	<p><b>Student</b> Systemic Complaint</p>
<p><b>Date Complaint Received</b> December 12, 2023</p>	<p><b>Complainant (if other than parent)</b> Ms. Callie Oettinger 8119 Bellingham Court Fairfax Station, Virginia 22039 <a href="mailto:Callie.oettinger@gmail.com">Callie.oettinger@gmail.com</a></p>
<p><b>Notice of Complaint Date</b> December 20, 2023</p>	<p><b>Findings Date</b> February 23, 2024<sup>1</sup></p>
<p><b>Complaint Appeal Date</b> March 25, 2024<sup>2</sup></p>	<p><b>Corrective Action Plan Date</b> March 25, 2024 <b>Send CAP to Sandra Ramsey</b> <a href="mailto:Sandra.ramsey@doe.virginia.gov">Sandra.ramsey@doe.virginia.gov</a></p>
<p><b>Director, Dispute Resolution</b> Patricia V. Haymes</p>	<p><b>Complaints Department Phone #</b> 804-750-8143</p>

This complaint was filed as a systemic complaint.

**A. Applicable Regulations**

On May 28, 2009, the Virginia Board of Education adopted revised regulations to reflect IDEA '04 and its 2006 implementing regulations. The Board's revised regulations became effective on July 7, 2009, and were reissued on January 25, 2010, and on July 29, 2015, at 8 VAC 20-81-10 *et*

<sup>1</sup> The original due date for the findings for this investigation was February 10, 2024. The 60-day timeline for issuance of findings was paused at the joint request of the parties in order for them to pursue mediation. Upon our receipt of notice of withdrawal of that consent, the 60-day timeline was restarted and the new sixty-day findings due date was established as February 23, 2024.

<sup>2</sup> The thirty-day time period for filing an appeal expires on March 24, 2024, which is a Sunday. Accordingly the appeal due date is extended to the next business day, March 25, 2024.

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*seq.* (the “Virginia Regulations”). Accordingly, this office based its investigation and findings on the Virginia Regulations, which are applicable to the allegations forming the basis of the complaint. The Virginia Regulations are available online at <https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/>

### **B. Sufficiency of Complaint (See 34 C.F.R. § 300.153)**

Prior to the issuance of the *Notice of Complaint* in this case, this office reviewed the complaint documentation and determined that it met the filing requirements of the regulations.

### **C. On-Site Visit**

Based on Complainant’s supporting materials, the school division’s response documentation, and additional information, this office determined that conducting an on-site visit would not have produced any more determinative facts than were presented in the written correspondence, and therefore, we had sufficient information to bring our investigation to closure without an on-site visit.

## **ISSUE(S) AND REGULATIONS:**

### **1. Procedural Safeguards – Records Confidentiality**

Complainant alleges that LEA has violated state and federal regulations regarding confidentiality of student records. Specifically, Complainant alleges that:

- “March 2023 - FCPS failed to take sufficient precautions to prevent inadvertent disclosure when it released PII related to more than 70 students, listing their math and/or reading SOL scores.”
- “October 17 to October 19, 2023 - FCPS failed to take sufficient precautions to prevent inadvertent disclosure when it included PII related to over 35,000 students and other records within my own kids’ records.”
- “October 30, 2023 - FCPS failed to take sufficient precautions to prevent inadvertent disclosure when it emailed me and VDOE a record for another student that FCPS failed to fully redact. VDOE stated it would address FCPS’ failure to fully redact the record. However, to date, and to my knowledge, VDOE has failed to address this issue with FCPS.”
- “November 14, 2023 - FCPS failed to take sufficient precautions to prevent inadvertent disclosure when it provided PII related to over a thousand students to a parent. Specifically, the high school emailed student report cards to a parent other than their own.”

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### Applicable Regulations:

- The 2006 implementing regulations of the IDEA '04, at 34 C.F.R. § 300.611(b), and the Virginia Regulations, at 8 VAC 20-81-10, define “Education record” as “those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term also has the same meaning as ‘scholastic record.’ In addition to written records, this also includes electronic exchanges between school personnel and parent regarding matters associated with the child’s educational program (e.g., scheduling of meetings or notices). This term also includes the type of records covered under the definition of ‘education record’ in the regulations implementing the Family Education Rights and Privacy Act. (20 USC § 1232g(a)(3); § [22.1-289](#) of the *Code of Virginia*).
- The 2006 implementing regulations, at 34 C.F.R. § 300.101, and the Virginia Regulations, at 8 VAC 20-81-100, mandate that all individuals with disabilities, from age 2 to 21 inclusive, residing in Virginia, shall have available a free and appropriate public education (FAPE). Further, the 2006 implementing regulations, at 34 C.F.R. § 300.17, and the Virginia Regulations, at 8 VAC 20-81-10, define FAPE to mean special education and related services that, among other things, are provided in conformity with an IEP that meets applicable regulatory requirements.
- The 2006 implementing regulations, at 34 C.F.R. §§ 300.32 and 300.622, and the Virginia Regulations, at 8 VAC 20-81-170.G.10, state that “Parental consent shall be obtained before personally identifiable information is disclosed to anyone other than officials of the local educational agency unless the information is contained in the education records, and the disclosure is authorized without parental consent under the Family Education Rights and Privacy Act.
- The 2006 implementing regulations, at 34 C.F.R. § 300.623, and the Virginia Regulations, at 8 VAC 20-81-170.G.11, state that “each local educational agency shall protect the confidentiality of personally identifiable information at the collection, storage, disclosure, and destruction stages.”

### Findings:

The Office of Dispute Resolution finds LEA to be in noncompliance with regard to this issue.

### Analysis:

- As the parties have both acknowledged, this case is the latest in a series of complaints concerning LEA’s policies, procedures and practices relating to student records and personally identifiable information. These previous cases have resulted in both findings of compliance and noncompliance. In the instant case, we need not dwell on an examination of the factual

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allegations, as it is clear that unauthorized persons received or had access to confidential student information in contravention of the applicable regulations.

- Instead, we are asked to determine whether the violations warrant a systemic finding of noncompliance. In this regard, LEA argues that Complainant “has taken four isolated mistakes based on human error into evidence of alleged systemic violations of policies and procedures at FCPS. However, Complainant does not allege any deficiencies in FCPS’ policies or procedures that give rise to systemic issues. Rather, Complainant takes human error and tries to build a case around it.”
- In its complaint response, LEA has cited applicable legal precedent describing the types of claims that can result in a finding of systemic noncompliance generally and with regard to breaches of confidentiality obligations specifically. The parties are in possession of the school division’s response, and we will not repeat the case citations here. In short, the school division urges us to find that releases of information constitute simple human error, rather than a deficiency in a policy or procedure. We acknowledge that in a December 11, 2023, Appeal Decision involving the parties, “there is no authority that prescribes a serious of mistakes necessarily establishes a systemic violation.”
- The Complaint Appeal reviewer’s decision, and the cited caselaw, however, only go so far. We disagree that flaws in the division’s policies and procedures are the only factor that can result in a finding of systemic noncompliance. A perfect policy is of no use if people ignore it; perfect procedures are meaningless if no one follows them.
- This is not to suggest that every instance in which we have found the school division to have improperly released information in the past several years shows a reckless disregard or indifference to the policies and procedures. Rather, the pattern of disclosures suggests that staff is not sensitized to the issue or is not aware of precautions that should be taken to protect the information. The difficulty is in finding the point where repeated instances of human error indicate a systemic flaw.<sup>3</sup>
- In analyzing the issue, we are influenced by the action that the school division itself has taken, and by the evidence of admission by school administration of the existence of a problem. In its complaint response, the school division provided as follows:

Immediately upon learning of the publication of this information via the news media article on November 1, 2023, FCPS Superintendent Dr. Michelle Reid engaged a law firm

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<sup>3</sup> As an additional matter, we must note that the school division attempts to shift some of the blame for the disclosure by arguing that Complainant knowingly took possession of information to which she was not entitled. While such arguments might have weight in a different forum, in the context of regulatory compliance, it is clear that the school division left confidential information in a place and in a format where it could be accessed by people not entitled to see it, and thus, must be found to be in noncompliance.

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specializing in data privacy and cybersecurity – Woods Rogers – to conduct an independent investigation into the October Incident (the “Independent Investigation”). FCPS also took immediate steps to notify all individuals whose information was reasonably believed to have been disclosed, with notifications beginning as soon as possible after review of relevant information on December 7, 2023.

On December 21, 2023, FCPS shared with the FCPS community that the Independent Investigation had concluded and provided a summary of the Independent Investigation’s findings. FCPS also shared that the Independent Investigation recommended certain remedial changes to protect FCPS from an event like the October Incident occurring in the future.

In particular, FCPS announced that the Independent Investigation recommended sweeping changes to augment FCPS’ safeguards around the confidentiality of student information and human error in protecting that confidentiality, including the following: (1) FERPA response-related changes (including direct oversight of any in-person or nonstandard review by the Office of Division Counsel and direct review of records by attorneys prior to inspection as well as indexing and labeling of all files made available prior to inspection); (2) training-related changes including updated training on safeguarding of confidential information; and (3) organizational structure-related changes including placing the Office of Public Records (which includes the FERPA office) under the supervision of the Office of Division Counsel.

- We are further persuaded by evidence submitted by Complainant relating to a December 20, 2023, telephone call between the Division Superintendent and Complainant regarding the matter and addressing the independent review. In that call, the Division Superintendent states: “...this letter says we're implementing all of their recommendations. So it's clear that we have systemic changes we needed to make, and I'm owning that....”
- As a result of the foregoing, we find LEA to be in noncompliance with regard to this issue.

### **CORRECTIVE ACTION PLAN:**

To address the finding of noncompliance, the LEA is directed to:

1. Promptly train all school division staff and administrators on IDEA’s procedural safeguards of confidentiality of information, FERPA and record maintenance for school years 2023 - 2024 and 2024 - 2025. Provide documentation of the completed training from the required staff members. We understand that the division has indicated that it is already undertaking certain efforts to improve its compliance with the applicable regulations. The LEA should contact VDOE to determine whether such

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- planned training is sufficient to satisfy the CAP or whether additional training is necessary.
2. Provide ODRAS a list of students whose information was released in the events described in this letter of findings and verification of when Students' families were notified of the disclosure.
  3. It should be noted that LEA is currently subject to corrective action requirements resulting from disclosure of information relating to other students that arose out of the same sequence of events which are identical to the corrective action required in the instant case. The corrective action may be satisfied through completion of the previously ordered activities. The LEA should coordinate with the Corrective Action Specialist to ensure coordination and satisfaction of the corrective action for each case.
  4. Provide the CAP specialist with a monthly report outlining the school division's progress in implementing the recommendations outlined in the Independent Investigation.

The school division must complete the corrective action plan and submit supporting documentation to the CAP specialist no later than the date set forth above, or if no date is specified, no more than thirty calendar days from the date of this Letter of Findings. In the event the school division anticipates that any portion of the corrective action will require more than thirty days for completion, school division must contact the CAP specialist to provide documentation of the status of the corrective action, and to obtain approval for a revised completion schedule. Any subsequent steps required to satisfy the corrective action should be documented, and such documentation submitted to this office on a schedule to be established by the Corrective Action Specialist in consultation with the LEA but should be completed no later than [30 business days from the LOF date unless circumstances warrant otherwise].<sup>4</sup>

### **APPEAL INFORMATION:**

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

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<sup>4</sup> In accordance with 8 VAC 81-200.F, "such plan shall include timelines to correct violations not to exceed 30 business days unless circumstances warrant otherwise." The plan of action should include a description of all changes contemplated and is subject to approval of the Virginia Department of Education. Failure to provide a plan of action which is subsequently approved by this office that may include corrective actions extending beyond 30 business days may result in a referral to the Superintendent of Public Instruction or designee for review and may result in a referral to the Virginia Board of Education. (8 VAC 81-200.G)

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Either party to this complaint has the right to appeal these findings within 30 calendar days of our office's issuance of the Letter of Findings. Any appeal must be received by our office no later than **March 25, 2024**.

Enclosed is a copy of the appeal procedures. Written appeals should be sent directly to:

Patricia V. Haymes

Director - Office of Dispute Resolution and Administrative Services

Virginia Department of Education

P. O. Box 2120

Richmond, Virginia 23218

An appeal may also be filed via e-mail correspondence to [ODRAS@doe.virginia.gov](mailto:ODRAS@doe.virginia.gov), or via facsimile transmission to (804) 786-8520.

A copy of the appeal, along with any submitted documentation, must be sent simultaneously to the non-appealing party. Questions regarding these procedures should be addressed to Ms. Sheila Gray at 804-750-8143, or e-mail at: [Sheila.gray@doe.virginia.gov](mailto:Sheila.gray@doe.virginia.gov).

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Patricia V. Haymes, J.D.  
Director, Dispute Resolution

Attachment - Appeal Procedures