

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

LETTER OF FINDINGS

School Division Norfolk City Public Schools 800 E. City Hall Avenue Norfolk, Virginia 23510	Name of Parent(s) [REDACTED]
Division Superintendent Dr. Samuel T. King	Parent's Address [REDACTED]
Special Education Director Ms. Janice James-Mitchell	Name of Student [REDACTED]
Date Complaint Received December 4, 2013	Complainant (if other than parent) N/A
Notice of Complaint Date December 10, 2013	Findings Date January 29, 2014
Complaint Appeal Date February 28, 2014	Corrective Action Plan Due Date February 28, 2014
Complaints Specialist/Case Manager Kathleen G. Harris	Complaints Department Phone # (804) 225-2013
On-Site Visit Date: N/A	

At the time of this complaint, [REDACTED] was thirteen (13) years old and eligible for special education and related services as student with the disability category of autism in Norfolk City Public Schools (NCPS). The student attended Blair Middle School (BMS) in spring 2013; in fall 2013, she did not attend BMS but received instructional services at home, as further described in our Analysis, below.

PRELIMINARY NOTE:

The parent's complaint submission cited a due process hearing regarding the student. Our records indicate that, on August 5, 2013, NCPS filed a request for a due process hearing against [REDACTED] the student's parents, regarding their failure to consent to (i) the implementation of a proposed IEP placing the student at the Southeastern Regional Educational Program (SECEP); and (ii) completion of an observation of the student by SECEP personnel as a prerequisite to placement in SECEP's Autism Spectrum Program (ASP).

On October 23, 2013, the due process hearing officer issued a decision in favor of NCPS, and ruled that a proposed June 13, 2013, IEP placing the student at the SECEP program was appropriate. The decision specifically authorized NCPS to "implement the IEP" and to conduct the SECEP observation. Pursuant to the Virginia Regulations (8 VAC 20-81-210.T), the parties had the right to appeal the decision in federal district court within 90 calendar days of the decision (January 21, 2014), or 180 calendar days in a state circuit court.

Our records indicate that the parents filed an appeal of the hearing officer's decision with the U.S. District Court, Eastern District of Virginia (Norfolk), on December 27, 2013.

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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, reissued January 25, 2010, at 8 VAC 20-81-10 *et seq.* (the "Virginia Regulations"). Accordingly, this office will base its investigation and findings on the 2009 Virginia Regulations, which are applicable to the allegations forming the basis of the parent's complaint. The 2009 Virginia Regulations are available online at http://www.doe.virginia.gov/special_ed/regulations/state/regs_speced_disability_va.pdf.

B. Sufficiency of Complaint

Prior to the issuance of the *Notice of Complaint* in this case, this office reviewed the complaint documentation and determined that it met the filing requirements of the regulations. (See 34 C.F.R. § 300.153)

C. On-Site Visit

Based on the complainants' supporting materials and 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

- 1. Individualized Education Program (IEP)—Development, Review, and Revision.
Individualized Education Program (IEP)—Implementation.
Procedural Safeguards—Prior Written Notice.
Placement—Change in Placement Procedures.**

The parent alleges that SCPS has violated special education regulations regarding IEP implementation, development, review, and revision, prior written notice, and change in placement procedures with regard to her daughter, [REDACTED]

More specifically, the parent has alleged that:

- she "participated in two Manifestation Determination Reviews 5/9/13 and 5/17/13 for disciplinary offenses which the IEP team determined were manifestations of her [REDACTED] disability and recommended homebased [sic] [instruction] at that time. As a result of [REDACTED] acute anxiety and the manifesting behavior, NPS [NCPS] special education and

¹In a December 5, 2013, telephone conversation with this office, the parent provided clarification of her complaint submission materials; this clarification is incorporated in the allegations set forth below.

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school staff have recommended a more restrictive placement and to that end NPS [NCPS]... filed a Due Process Complaint²;

- in late summer 2013, the parent submitted requests to NCPS for homebound instruction for [REDACTED] which were “accepted,” but never considered by [REDACTED] IEP team;
- [REDACTED] received “instruction in our home beginning 9/3/13 to 10/31/13 [sic]....The IEP team did convene on 10/3/13 to discuss [REDACTED] access to related services which are speech and occupational therapy,” but that the IEP team “did not meet to discuss homebound services or hours but to discuss how the student’s related services would be provided. Only after receiving the Proposed Action Page [from an October 3, 2013, IEP meeting] did we notice that a change in placement had been made – the IEP team NEVER [emphasis in the original] discussed or proposed the change”;
- the parent did not sign a proposed October 3, 2013, IEP addendum, which indicated a “home” setting, and that “[t]he Case Manager has not contacted either of us to complete this IEP since 10/22/13”;
- on November 1, 2013, the parent submitted a request for homebound instruction for [REDACTED] to NCPS, and that NCPS responded on November 2, 2013, that “[h]omebased services will be provided until enrollment into the SECEP Autism Spectrum Program has been completed”;
- “[a]ccording to the homebound teacher assigned to instruct [REDACTED] the NPS Special Education Director, [sic] denied the homebound application submitted and instead placed [REDACTED] on homebased [sic] services pending the implementation of a due process hearing decision”;
- “this change constitutes a change in placement which should have been discussed via [an] IEP meeting. Neither my husband nor I were included in an IEP meeting to discuss and change placement....[NCPS] has not followed Federal, State or Local regulations related to homebound instructional services for students with disabilities” with respect to her daughter;
- on November 18, 25, and 27, 2013, she requested that NCPS provide an “explanation of why the homebound application was denied. I also requested Prior Written Notice,” and that, as of December 4, 2013, NCPS “has not responded to any of my communication related to my request for information nor my appeals”; and
- as of December 4, 2013, [REDACTED] continues to receive homebound services.

Applicable Regulations:

- 34 C.F.R. § 300.101; 8 VAC 20-80-100.

²See Preliminary Note, above.

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- 34 C.F.R. § 300.17.
- 34 C.F.R. § 300.112; 8 VAC 20-81-110.
- 34 C.F.R. § 300.23; 8 VAC 20-81-10.
- 8 VAC 20-81-110.B.4.
- 8 VAC 20-81-110.B.6.
- 34 C.F.R. § 300.324; at 8 VAC 20-81-110.
- 34 C.F.R. § 300.324(a); 8 VAC 20-81-110.F.1.
- 34 C.F.R. § 300.324(a); 8 VAC 20-81-110.F.
- 34 C.F.R. § 300.324(a)(iv); 8 VAC 20-81-110.F.1.d.
- 34 C.F.R. § 300.501(b) and (c); 8 VAC 20-81-170.A.
- 34 C.F.R. § 33300.322(a); 8 VAC 20-81-110.E.
- 8 VAC 20-81-10.
- 8 VAC 20-131-180 (Regulations Establishing Standards for Accrediting Public Schools in Virginia (Standards of Accreditation)).
- 34 C.F.R. § 300.503; 8 VAC 20-80-170.C.
- 8 VAC 20-81-210.

Findings:

The Office of Dispute Resolution and Administrative Services finds the school division to be in noncompliance with regard to Subissues 1A and 2B.

Analysis:

A review of the record indicates the following chronology:

Date	Event
February 22, 2013	• Parent signed IEP providing for transition from home-based services to special education services in a “special education setting” commencing

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	March 4, 2013, to "help her behaviors stabilize." ³
April 29, 2013	<ul style="list-style-type: none">• IEP meeting conducted.
May 6, 2013	<ul style="list-style-type: none">• Parent signed IEP providing for special education services in general and special education settings. IEP noted behavioral concerns (physical aggression).
June 13, 2013	<ul style="list-style-type: none">• NCPS proposed IEP providing for student's placement at Southeastern Regional Cooperative Education Program (SECEP).• Parent did not sign IEP.
August 5, 2013	<ul style="list-style-type: none">• NCPS filed for due process hearing regarding June 13, 2013, proposed IEP providing for placement at SECEP and parents' refusal of consent.
August 28, 2013	<ul style="list-style-type: none">• Ms. Anne Polk, NCPS homebound specialist, advised parent that she would be providing homebound services for student and requested time to meet with parent.
August 30, 2013	<ul style="list-style-type: none">• NCPS received parent's August 27, 2013, request for homebound instruction.• NCPS contacted parent via e-mail advising of need to convene IEP meeting to address homebound instruction and requesting possible meeting dates.• Parent responded via e-mail indicating limited availability and inquiring about IEP discussion.
September 3, 2013	<ul style="list-style-type: none">• First day of 2013-2014 school year for students.⁴• Student did not attend school; instruction commenced in [REDACTED] home.⁵• NCPS homebound program specialist contacted parent via e-mail to schedule IEP meeting to review homebound request and requested meeting dates and times.
September 4, 2013	<ul style="list-style-type: none">• NCPS advised BMS regarding "activation" of homebound instruction for [REDACTED] from September 3, 2013, through October 3, 2013, for 1.5 hours of instruction daily four (4) days per week.• Parent and homebound instructor exchanged e-mail correspondence regarding instructional plan and time.
September 5, 2013	<ul style="list-style-type: none">• Parent inquired via e-mail regarding reference to "services" in NCPS' e-mail correspondence.
September 6, 2013	<ul style="list-style-type: none">• NCPS advised via e-mail that "meeting is to discuss related services

³See Prior Written Notice, February 22, 2013, IEP meeting.

⁴See Norfolk City Public Schools 2013-2014 Academic Year Calendar <http://www.npsk12.com/pdf/2013-2014_Calendar.pdf>

⁵In her January 14, 2014, response to a request for clarification from this office, [REDACTED] stated that "[d]ue to her medical issues, [REDACTED] has not attended classes held at Blair Middle School this school year instead receiving instruction in our home beginning September 3, 2013 until services were terminated by Ms. James Mitchell [sic] on December 6, 13 [sic]."

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	<p>[emphasis added] to include speech and occupational therapy.”</p> <ul style="list-style-type: none">• Parent advised of lack of availability due to work responsibilities “until October” and inquired about “conference call” to discuss “supported services 10/3 or 10/4 during my lunch break.”• Parent advised that “any attempt to hold a meeting prior to the dates provided without me or my husband present is unacceptable and violates our rights to be a participant in our child’s IEP.”
September 30, 2013	<ul style="list-style-type: none">• NCPS sent notice of IEP meeting to “develop or review your child’s IEP.”
October 1, 2013	<ul style="list-style-type: none">• Laura A. Charette, M.D., addressed letter “to whom it may concern” requesting extension of student’s homebound instruction “for an additional 4 [sic] weeks.”
October 3, 2013	<ul style="list-style-type: none">• IEP meeting conducted; parents participated via conference call.• NCPS proposed IEP providing for homebound services, including speech/language and occupational therapy services.• NCPS advised BMS personnel via e-mail of continuation of “homebound services through 11/01/13.”• Parent did not sign IEP providing for special education in “home” setting.
October 23, 2013	<ul style="list-style-type: none">• Due process hearing officer issued ruling that June 13, 2013, proposed IEP was “reasonably calculated to provide educational benefit to the Student” and constituted least restrictive environment (LRE) for [REDACTED]• Hearing officer authorized NCPS to “implement the [June 13, 2013] IEP” and “permitted [NCPS] to conduct and/or permit a SECEP observation of the student...a prerequisite for placing the student in the SECEP Autism Spectrum Program in a classroom appropriate for the student.”
November 1, 2013	<ul style="list-style-type: none">• Parent submitted request for homebound instruction to NCPS via email.
November 2, 2013	<ul style="list-style-type: none">• Ms. Janice James-Mitchell, NCPS Senior Director, Learning Support-Special Education Services, sent letter to parents advising of (i) hearing officer decision (ii) [REDACTED] placement at SECEP; (iii) need to schedule SECEP observation; and (iv) provision of “homebased [emphasis added] services “until enrollment into the SECEP Autism Spectrum Program has been completed.”
November 6, 2013	<ul style="list-style-type: none">• NCPS homebound specialist discussed appeal process for denial of homebound services with parent via telephone.
November 7, 2013	<ul style="list-style-type: none">• SECEP contacted parent regarding five (5) possible dates for scheduling required observation.
November 13, 2013	<ul style="list-style-type: none">• SECEP contacted parent via e-mail regarding scheduling observation.• Parent responded regarding “juggling appointments”; no observation scheduled.
November 27, 2013	<ul style="list-style-type: none">• NCPS sent letter to parents advising of repeated attempts by SECEP to

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	<p>schedule required observation, NCPS' intention to "effectuate placement" at SECEP pursuant to hearing officer decision, and termination of home-based services on December 6, 2013.</p> <ul style="list-style-type: none">• NCPS homebound specialist advised parent via telephone regarding appeal process for denial of homebound services.• Via e-mail, parents advised NCPS of their intention to appeal the hearing officer decision and requested that NCPS "accept this advance notice that my daughter will not be available for observation."
December 2, 2013	<ul style="list-style-type: none">• Parents refused SECEP observation.• Parents advised SECEP personnel via email that they "were not comfortable with [SECEP] doing an observation of our daughter at this time. We do not feel that the process has been at all collaborative and inclusive."
December 3, 2013	<ul style="list-style-type: none">• Via telephone, NCPS homebound specialist discussed appeal process for denial of homebound services with parent.
December 4, 2013	<ul style="list-style-type: none">• ODRAS received complaint submission.
December 12, 2013	<ul style="list-style-type: none">• ODRAS issued Notice of Complaint.
December 27, 2013	<ul style="list-style-type: none">• Parents filed appeal of hearing officer decision with U.S. District Court.

- Federal and state special education regulations mandate that all individuals with disabilities, from age two to 21 inclusive, residing in Virginia, shall have available a free appropriate public education (FAPE). These regulations define FAPE to mean special education and related services that, among other things, are provided in conformity with an individualized education plan (IEP) that meets the applicable regulatory requirements.
- Special education regulations also set forth the school division's responsibility to ensure that an IEP is developed and implemented for each student with a disability served by that school division, and identify the responsibility of the IEP team for IEP development, review, and revision. In the IEP development and revision process, the IEP team is to consider the student's strengths and academic, developmental, and functional needs, as well as the results of the most recent evaluations. Additionally, the IEP team is to consider the parent's concerns for enhancing the student's education. The Virginia Regulations also set forth the parent's right to ask for revisions of the child's IEP.
- The Virginia Regulations, at 8 VAC 20-81-10, define "homebound instruction" as "academic instruction provided to students who are confined at home or in a health care facility for periods that would prevent normal school attendance based upon certification of need by a licensed physician or licensed clinical psychologist. For a child with a disability, the IEP team shall determine the delivery of services, including the number of hours of services." "Home-based instruction" is defined as "services that are delivered in the home setting (or other agreed upon setting) in accordance with the child's individualized education program."

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- Similarly, the Regulations Establishing Standards for Accrediting Public Schools in Virginia (the Standards of Accreditation or SOA), at 8 VAC 20-131-180, provide that homebound instruction “shall be made available to students who are confined at home or in a health care facility for periods that would prevent normal school attendance based upon certification of need by a licensed physician or licensed clinical psychologist. For students eligible for special education or related services, the Individualized Education Program committee must revise the IEP, as appropriate.”

Subissue 1A: *August 30, 2013, request for homebound instruction; October 3, 2013 meeting*

- In its *Homebound Instruction Services Guidelines*,⁶ the Virginia Department of Education (VDOE) has recommended that local school divisions adopt policies and procedures governing homebound instruction—for all students, regardless of special education eligibility status—including provisions addressing required documentation, timelines for services, and other matters. The *Guidelines* state that “[e]ligibility for homebound instructional services should be a collaborative decision between the treating health care provider, parent/guardian, and school personnel....If homebound services are needed, approval of services is based upon a completed [emphasis added] medical certification of need.”
- The *Guidelines* further state that “the certification [or application] must be fully completed, **including** [emphasis in original] parental permission to contact the treating physician or licensed clinical psychologist, in order for the student to be considered for homebound services. The school division [emphasis added] reviews all requests for completeness of information and appropriateness of the request and will follow up with the treating physician or licensed clinical psychologist to clarify the need for homebound instruction versus school-based instruction with appropriate accommodations, as necessary.”
- Pursuant to the *Guidelines*, consideration of requested homebound instruction for students receiving special education services is the responsibility of the IEP team. Specifically, the *Guidelines* state that, “[a]s part of its review and determination of a change in placement, the IEP team must review the approved [emphasis added] medical certification of need for homebound instruction and determine the appropriate placement for the student based on the student’s educational needs. Parental consent must be obtained to amend the IEP, prior to initiation of homebound services....If the IEP team determines that homebound services are appropriate [emphasis added], the team must include language in the IEP that clearly defines the time period for the frequency and duration of the homebound services.”
- Neither special education regulations nor VDOE’s *Guidelines* vest the IEP team with responsibility for the initial “approval” of the sufficiency of the submitted application form; local school divisions may establish procedures—including provisions addressing mode of transmission as well as required signatures and content, and identifying the entity responsible

⁶Virginia Department of Education, Homebound Instruction Services Guidelines (February 2012) < http://www.doe.virginia.gov/instruction/homebound/homebound_instructional_services.pdf>

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for determining the sufficiency of the submitted application. The IEP team is responsible for determining the appropriateness of homebound instruction, once the school division has approved the application for sufficiency.

- In this case, the parent has alleged that (i) [REDACTED] IEP team never considered the parent's August 30, 2013, request for homebound instruction, which had been "accepted"; (ii) the parents did not agree to the proposed October 3, 2013, IEP addendum, providing for homebound instruction; and (iii) NCPS did not contact the parents after October 22, 2013, to finalize the proposed IEP addendum.
 - In a January 14, 2014, telephone conversation with this office, [REDACTED] further clarified this allegation, stating that she was not advised that an IEP meeting was necessary to review her August 30, 2013, request, and that she wanted and accepted the delivery of homebound services for her daughter, commencing September 3, 2013. [REDACTED] further clarified this allegation by asserting that NCPS violated procedures and requirements governing approval of homebound instruction.⁷
- NCPS has responded that the parent's August 30, 2013, request was "approved" and that it "attempted several times to schedule an IEP meeting with [REDACTED] to discuss homebound services."⁸
- [REDACTED] last-agreed-upon IEP, signed by the parent on May 6, 2013, provided for her special education services to be delivered in special and general education classrooms. Pursuant to the Virginia Regulations (8 VAC 20-81-170.J.1), during the pendency of the due process proceedings in fall 2013, [REDACTED] was to be required to remain in her "current educational placement unless [emphasis added] the parent(s) of the child and local educational agency agree otherwise"; in this case, because the parent never signed an IEP addendum providing for [REDACTED] receipt of homebound instruction, [REDACTED] placement remained in the "special" and "general education" classrooms, as set forth in the May 6, 2013, IEP.

⁷In her additional information received by this office on January 16, 2014, the parent reasserted that "[t]he coordinator of the homebound medical program told me during a telephone conversation that we did not have to have IEP team approval for medical homebound. In-home instruction began on September 3, 2013 and was provided four days per week, 1½ hours daily. After being told that [REDACTED] had been approved to receive homebound services, I was contacted by the school[-] based case manager who stated that an IEP meeting needed to be held to discuss how [REDACTED] related services should be handled during homebound instruction. The case manager did not notify me that in order to implement the homebound services, we needed to authorize a change of placement in [REDACTED] IEP."

⁸In its January 21, 2014, response to a request for clarification by this office, NCPS provided a copy of its *Homebound Instruction Manual 2012-2013*. NCPS' *Manual* states that "determination of eligibility [for homebound instruction] is based on evidence in the *Application for Homebound Instruction* [emphasis in original], other medical records (when necessary), school attendance records, and academic review" and that the "[f]inal determination of eligibility is the responsibility of the Homebound Program Office and the Homebound Liaison." *Manual*, p. 3.

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- In its January 14, 2014, e-mail response to a request for clarification from this office, NCPS acknowledged that “we did not follow procedure; we were suppose[d] to get parental consent before we provided services....”
- As the chronology indicates, on August 30, 2013, NCPS advised the parent via e-mail of the “need [to schedule] an IEP meeting to discuss Homebound [sic] services.” The record indicates that NCPS attempted to schedule an IEP meeting, but provided homebound instruction before the IEP team considered—or the parent provided consent to a revised IEP providing for—homebound instruction.
- The record includes e-mails between [REDACTED] and NCPS regarding the purpose of the IEP meeting as well as an e-mail statement by NCPS personnel and a meeting summary indicating that “the meeting is to discuss related services to include speech and occupational therapy.” The September 30, 2013, notice for the October 3, 2013, meeting designates IEP development and review as the meeting purpose.
- The meeting summary records discussion of [REDACTED] homebound services in September, and amounts of services to be provided in October, and indicates that the parent and her advocate participated by telephone. In her additional information, the parent countered that the meeting summary included language indicating discussion of homebound services, but that “this was added by the meeting note taker.”⁹
- NCPS included a copy of the proposed October 3, 2013, IEP, which set forth special education services, speech-language services, and occupational therapy in a “home” setting from October 4, 2013, through September 3, 2014. As the chronology indicates, the parent did not sign the IEP addendum, and has indicated she thought the proposed IEP addendum was necessary only for the addition of related services (e.g., speech/language) for [REDACTED]
 - In her additional information, the parent asserted that, at the October 3, 2013, IEP meeting, “we did discuss [REDACTED] access to speech and occupational therapy while she was receiving in-home instruction. The homebound instructor did not attend this meeting and homebound services were not discussed. However, when I received the IEP documents, the case manager had changed the setting code to “HOME” although this was not proposed or discussed during the meeting. Therefore we did not sign the IEP....”
- The prior written notice (PWN) for the proposed October 3, 2013, IEP addendum indicates the proposed action that “[REDACTED] continue to receive 240 minutes of SDI [specially designed instruction] a week on homebound.” The PWN also documented the proposed

⁹The 2006 implementing regulations, at 34 C.F.R. § 300.618, and the Virginia Regulations, at 8 VAC 20-81-170.G.6, set forth procedures whereby parents who believe that “information in the education records collected...is inaccurate or misleading” may request the school division to amend this information. If the parent feels her daughter’s educational records include such inaccurate or misleading information, she may contact the school division regarding the amendment of record option.

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speech/language and occupational therapy services, and stated that the “IEP team discussed the needs for related services while the student was on homebound. Per the parent, the home bound [sic] application was submitted for an extension of 4 weeks.”

- We note the parent’s repeated assertions that she was not aware that her consent to an IEP revision was necessary for the provision of homebound services for [REDACTED]. As stated above, the August and September 2013 e-mail exchanges between the parent and NCPS indicated seemingly separate or limited purposes for an IEP meeting: to discuss either homebound instruction or “related services.” The meeting notice set forth a more general meeting purpose—that of IEP development and revision. The PWN associated with the October 3, 2013, meeting documents the proposed continuation of homebound services and the addition of certain related services. While we note the need for clarity in communications and documentation to ensure mutual understanding between the parties, we need not determine what the parent may or may not have understood as the meeting purpose to reach our finding here.
- Simply stated, the record indicates that (i) NCPS personnel “approved” the parent’s completed application for homebound instruction, but that [REDACTED] IEP team did not consider the request before these services were initially implemented on September 3, 2013; (ii) regardless of the depth of any discussion of homebound and related services occurring on October 3, 2013, the parents failed to provide consent the proposed IEP addendum providing for these services; and (iii) NCPS continued to provide homebound instruction for [REDACTED] up through December 4, 2013, the date this office received the parent’s complaint submission, without an IEP providing for this placement.
- Accordingly, we find NCPS to be in noncompliance on this subissue.

Subissue 1B: *Home-based Instruction*

- The parent has also alleged that, in response to her November 1, 2013, request for homebound instruction (following October 23, 2013, due process ruling), NCPS advised her that “[h]omebased [sic] services will be provided until enrollment into the SECEP Autism Spectrum Program has been completed,” and that this action constituted “a change in placement which should have been discussed via IEP meeting. Neither my husband nor I were included in an IEP meeting to discuss and change placement.” The parent has further alleged that NCPS has not provided PWN regarding this action, nor has NCPS responded to her requests for information.
 - In her additional information, the parent provided a copy of a November 4, 2013, e-mail from NCPS indicating that “NPS [sic] will provide homeBASED [sic] services during this transition period. The homebound application will not be approved per Janice James-Mitchell.” The parent also stated that, in response to her November 18, 2013, request for an explanation of the denial of her November 1, 2013, homebound instruction

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request, NCPS provided her with a copy of “the NCPS appeal process related to denial of homebound services.”

- In its January 17, 2014, response to a request from clarification from this office, NCPS stated that, following receipt of the November 1, 2013 request for homebound instruction, it “denied the request because [it] was trying to implement the Hearing Officer's order.”
- As the chronology indicates, the hearing officer's October 23, 2013, decision specifically directed [REDACTED] placement at SECEP, as set forth in the proposed June 2013 IEP, and “permitted [NCPS] to conduct and/or permit a SECEP observation of the student...a prerequisite for placing the student in the SECEP Autism Spectrum Program in a classroom appropriate for the student.” Accordingly, following the issuance of this decision, [REDACTED] designated placement was at SECEP, rather in the general and special education classrooms set forth the May 6, 2013, IEP.
- The record includes a copy of NCPS' November 2, 2013, letter to the parent advising that (i) [REDACTED] placement was at SECEP, as determined by the hearing officer; (ii) SECEP personnel would contact the parent regarding scheduling the required observation; and (iii) NCPS would provide home-based services for [REDACTED] until the SECEP enrollment could be implemented. Significantly, the record indicates that the parent accepted these services.
- On November 26, 2013, NCPS advised the parent that, because there had been no appeal of the due process decision,¹⁰ it would implement the October 23, 2013, decision and terminate home-based services on December 6, 2013. The record also documents NCPS' repeated and unsuccessful attempts to coordinate with the parent to schedule the SECEP observation, and the parents' November 27, 2013, refusal to permit the required observation.¹¹
- As we have noted above, NCPS continued to provide instructional services to [REDACTED] in her home throughout the pendency of the due process proceedings, and, as the record further documents, after the issuance of the hearing officer's decision. NCPS stated that it had “continued to provide [REDACTED] homebased [sic] services as a good faith effort even though we knew we did not have [REDACTED] written consent to implement. We did not want to stop services until [REDACTED] met enrollment requirements into SECEP. NPS [sic] did change the services to homebased [sic] after the Hearing Officer rendered his decision, and we did not hold an IEP meeting. Please note that [REDACTED] placement and services were identical

¹⁰The Virginia Regulations, at 8 VAC 20-81-170.T, provide that a hearing officer decision “final and binding unless the decision is appealed by a party in a state circuit court within 180 days of the issuance of the decision, or in a federal district court within 90 days of the issuance of the decision.... If the special education hearing officer's decision is appealed in court, implementation of the special education hearing officer's order is held in abeyance except in those cases where the special education hearing officer has agreed with the child's parent(s) that a change in placement is appropriate in accordance with subsection J of this section. In those cases, the special education hearing officer's order shall be implemented while the case is being appealed.”

¹¹As the chronology indicates, no appeal was filed until December 26, 2013.

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whether they were designated ‘homebased’ [sic] or ‘homebound’ instruction.”

- While we commend NCPS for its expressed commitment to ensure that [REDACTED] continued to receive special education services during the four (4)-week period following the issuance of the hearing officer’s ruling (during which the required SECEP observation had yet to occur), [REDACTED] was entitled to neither homebound nor home-based services following the issuance of the hearing officer’s decision.
- As of October 23, 2013, [REDACTED] designated placement was SECEP; absent a revision to [REDACTED] IEP—effectuated by her parents’ written consent—NCPS was not authorized to provide special education services in a different placement. While we note that the parents refused to permit the required SECEP observation to proceed, NCPS’ provision of in-home special education services—regardless of description or label—following the issuance of the hearing officer’s decision was outside the scope of the hearing officer’s ruling.
 - While the parent correctly indicated that a change in placement requires parental consent (8 VAC 20-81-170.E.1.d), we also note that the parent acquiesced to the continuation of [REDACTED] in-home services (previously described by the parent and NCPS as “homebound”), even after NCPS characterized [REDACTED] in-home services on November 2, 2013, as “home-based.”
- To reach our finding with regard to this subissue, we need not focus on NCPS’ rejection of the November 1, 2013, request for homebound instruction.¹² The record clearly indicates that NCPS advised the parent on November 2 and 4, 2013, that [REDACTED] would receive “homebased” services.
- The parent has also alleged that NCPS failed to issue PWN regarding the change in placement to “home-based” and “why the homebound application was denied.” Nowhere do special education regulations—or NCPS’ homebound instruction manual—dictate the issuance of PWN (or establish a timeline for notification) when the designated homebound personnel decline to find a student eligible for homebound instruction. Only if [REDACTED] IEP team met to review the appropriateness of an approved homebound placement—and the IEP team had either accepted or refused the parent’s request—would NCPS have been required to issue PWN. We note, however, that NCPS’ unilateral determination of shift to “home-based” services in its November 2, 2013, letter to the parents, constituted a change in placement from the May 6, 2013, IEP, for which PWN was required.¹³
- In any investigation, our findings must be based upon the information culled from the record and the applicable regulations. Here, the record indicates that [REDACTED] placement as of October 23, 2013, was with SECEP; the ruling effectively supplanted the “general” and

¹²The parent has acknowledged that NCPS provided the parent with information regarding an appeal of the decision not to approve the homebound application.

¹³See 8 VAC 20-81-170.E.

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“special education classroom” services set forth in May 6, 2013, IEP. Although the required SECEP observation had yet to be completed (initially due to “juggling appointments” and, subsequently, the parents’ expressed refusal to comply with this component of the hearing officer’s ruling), NCPS was simply not authorized to provide [REDACTED] with any “interim” special education services without parental consent to an IEP providing for a different placement.¹⁴

- The record demonstrates that NCPS provided [REDACTED] with in-home special education services—whether characterized as “homebound” or “home-based.” While the record indicates that the parent wanted [REDACTED] to continue to receive these in-home services after the issuance of the hearing officer’s ruling, because (i) these services were inconsistent with the hearing officer’s decision; and (ii) NCPS provided these services without obtaining parental consent to a revised IEP for [REDACTED] we find NCPS to be in noncompliance with regard to this subissue.

CORRECTIVE ACTION PLAN:

This office found NCPS to be in noncompliance on Subissues 1A and 1B. Because the record indicates that (i) the parent requested and accepted the in-home services NCPS provided for [REDACTED] during the timeframe addressed by the complaint allegations; (ii) NCPS’ violations of the regulations were technical in nature; and (iii) NCPS stood ready, willing, and available to provide services in the SECEP setting, we find no adverse effect caused by NCPS related to [REDACTED] FAPE. Accordingly, we decline to direct the IEP team to convene to consider the need for any compensatory services as part of our corrective action.

To resolve the remaining issues addressed in our findings, the Office of Dispute Resolution and Administrative Services requests that NCPS:

1. Issue an instructional memorandum to all NCPS administrators, homebound instruction personnel, and special education personnel regarding procedures governing the approval and delivery of homebound instructional services for students with IEPs, including requirements addressing (i) IEP development, review, and revision; and (ii) parental consent to an IEP providing for homebound instruction.

In developing this instructional memorandum, NCPS is to review and incorporate, as appropriate, guidance based upon VDOE’s *Homebound Instruction Services Guidelines* (February 2012), available on our website at http://www.doe.virginia.gov/instruction/homebound/homebound_instructional_services.pdf.

¹⁴In her additional information, the parent stated that [REDACTED] in-home services were stopped on December 6, 2013[,] despite asking in good faith that NCSP [sic] hold the hearing officer’s decision in abeyance pending the filing of our appeal in federal court.” We note that the Virginia Regulations, at 8 VAC 20-81-210.T.3, provide that, upon appeal, the hearing officer’s order is held in abeyance unless the hearing officer had agreed with the parent(s) that a change in placement is appropriate. The record indicates that the parents did not file their appeal until December 27, 2013. Accordingly, with respect to the time period addressed in this investigation, there was no regulatory authority supporting an abeyance of the hearing officer’s ruling.

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2. Provide this office with (i) a copy of the instructional memorandum; and (ii) evidence of its transmission to the above-identified personnel.

Please maintain documentation of the actions taken as required in this Corrective Action Plan (CAP), including the documentation referenced in the CAP, as this information may be requested during our CAP implementation follow-up process on a later date.

APPEAL INFORMATION:

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

Either party to this complaint has the right to appeal these findings within 30 calendar days of our office's issuance of the Letter of Findings. Any appeal must be received by our office no later than **February 28, 2014**.

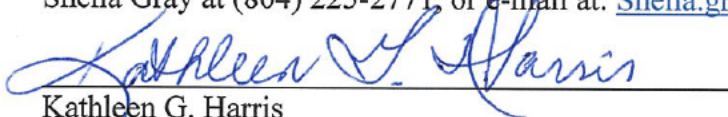
Please be advised that the appeal request does not relieve the school division of its obligation to submit the above-referenced Corrective Action Plan, which is due on February 28, 2014.

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

Patricia V. Haymes
Director - Office of Dispute Resolution and Administrative Services
Virginia Department of Education
P. O. Box 2120
Richmond, Virginia 23218

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

A copy of the appeal, along with any submitted documentation, must be sent simultaneously to the non-appealing party. Questions regarding these procedures should be addressed to Ms. Sheila Gray at (804) 225-2771, or e-mail at: Sheila.gray@doe.virginia.gov.



Kathleen G. Harris
Complaints Specialist

Attachment - Appeal Procedures

c: Dr. Richard Bentley
Ms. Phyllis Mondak
Ms. Wanda Council

VIRGINIA DEPARTMENT OF EDUCATION

SPECIAL EDUCATION COMPLAINT APPEAL PROCEDURES

[Revised November 2009]

The Virginia Department of Education (VDOE) has established an appeal process for special education complaint findings. Parties to a complaint, under 8 VAC 20-81-200 E, have the right to appeal a final decision¹ rendered by the VDOE to an independent reviewer in accordance with these procedures.

1. The VDOE's Office of Dispute Resolution and Administrative Services (ODRAS) is responsible for the operation and management of the appeal process.
2. The complainant and/or the local school division may appeal the findings, portion of the findings, and/or any Corrective Action Plan (CAP) rendered by the VDOE in a special education complaint.
3. The request for appeal must be made in writing to the VDOE and submitted to ODRAS by regular mail, hand-delivery, fax, or electronic mail (e-mail). A copy of the appeal request must be delivered contemporaneously by the requesting party to the other party.
 - a. The written request for appeal must include any supporting documentation, articulate specific assignments of error, and articulate the basis for the errors alleged.
 - b. The request for appeal shall be made on the basis of: (i) newly discovered information, or (ii) an error in fact or law on which the findings were based.
 - c. The written appeal request, and all supporting documentation, must be received by the VDOE within 30 calendar days of the date VDOE issues its Letter of Findings. The date of the appeal deadline shall be set forth in the Letter of Findings.
4. VDOE shall select at least two Complaint Appeal Reviewers who are current special education hearing officers to serve for a term of one year. If necessary, VDOE may adjust the number of reviewers to be more than two.
 - a. Terms may be renewed by agreement between the VDOE and the reviewer.
 - b. The reviewer shall be retained on the special education hearing officer list maintained by the Supreme Court of Virginia but shall be ineligible to be assigned special education cases for the period of service as an appeal reviewer. The reviewer shall receive training in special education that VDOE provides for the special education hearing officers.

¹ The decision is issued as a "Letter of Findings" to both the complainant (and/or to the parent/guardian of any student whose rights are the object of the Complaint) and the local school division.

- c. During any term of service as a reviewer, the reviewer is precluded from representing clients in special education matters.²
 - d. The reviewer shall not accept an appeal review if the reviewer has a personal or professional interest which would conflict with his/her objectivity in the review.
 - e. By accepting the appointment, the reviewer agrees to complete the review and issue written findings in 30 calendar days from the date of appointment.
 - f. Compensation for services under these procedures shall be at the then current hourly rate for special education hearing officers.
5. Within 3 business days of VDOE's receipt of the request for appeal, ODRAS shall:
- a. appoint the reviewer;
 - b. provide the reviewer with a copy of the appeal request(s), VDOE's findings, the complaint file, as well as other relevant information the reviewer requests, and
 - c. send the parties a Notice of Appeal(s), including the following information:
 - i. VDOE's receipt of the appeal request(s);
 - ii. the name of the reviewer;
 - iii. the option of the non-appealing party to file a written response to the appeal; and
 - iv. The expected date for issuance of review findings.
6. The non-appealing party has the option of filing a written response to the appeal. The response shall be filed with the reviewer within 5 business days of the date of the Notice of Appeal (the final submission date shall be stated in VDOE's Notice of Appeal). The response must be submitted by regular mail, hand-delivery, fax, or electronic mail (e-mail).
7. An appealing party does not have the right to submit additional information or argument in rebuttal to a response to the appeal filed by the other party. The reviewer shall not consider any information submitted for this purpose.
8. The parties shall not communicate with the reviewer, other than the non-appealing party opting to submit to the reviewer a written response to the appeal. The reviewer shall have the discretion to disregard untimely submissions.

² This provision is consistent with 8 VAC 20-81-210 H.4.c which prohibits a person from serving as a special education hearing officer if the person represents schools or parents in any matter involving special education or disability rights, or is an employee of any parent rights agency or organization, or disability rights agency or organization.

9. The reviewer shall:

- a. complete the review and issue written findings within 30 calendar days from the date of the appointment. The reviewer may request from the Director of ODRAS an extension of the deadline for good cause.
- b. identify the basis for the decision by making the findings based on: (i) newly discovered information, or (ii) an error in fact or law on which the complaint findings were based.
 - Only matters specifically articulated in the appeal and any response to the appeal will be reviewed; generalized disagreement with the Letter of Findings or non-specific requests for a generalized review of the Letter of Findings are non-justiciable (not appropriate or proper for consideration or resolution by the complaint appeal reviewer).
- c. affirm or amend the findings, or remand to ODRAS for further review and reissuance of findings, as well as any corrective action plan to insure that the plan flows logically from the ultimate findings (of the complaint or of the appeal). The reviewer shall adhere to the state regulatory process at 8 VAC 20-81-200 D.5 regarding remedies for denial of appropriate services.
- d. provide a copy of his/her written findings to the VDOE and the parties.
- e. comply with VDOE's protocols in maintaining VDOE's complaint file records in a confidential manner, including submissions from the parties as part of the complaint appeal process.

10. The reviewer's findings shall be considered final.³

11. During the complaint appeal process, if VDOE's complaint findings require a corrective action plan (CAP) of the local school division, ODRAS staff shall continue to work with the school division in implementing the CAP. ODRAS staff will initiate whatever action is needed to readjust the CAP if revisions are needed as a result of the reviewer's findings.

Issuance date: November 10, 2009
Posted to: <http://www.doe.virginia.gov/VDOE/duproc>
ODRAS contact number: 804-225-2013

³ Issues in the Letter of Findings and/or the reviewer's decision related to the student's free appropriate public education are reviewable through a due process hearing in accordance with 8 VAC 20-81-210, *et seq.*

