

**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 [REDACTED]
Division Superintendent Dr. Richard Bentley	Parent's Address [REDACTED]
Senior Director Special and Gifted Education Services Dr. Sandra H. Witcher	Name of Student [REDACTED]
Date Complaint Received February 21, 2012	Complainant (if other than parent) NA
Notice of Complaint Date February 29, 2012	Findings Date April 18, 2012
Complaint Appeal Date May 18, 2012	Corrective Action Plan Due Date May 18, 2012
Complaint Specialist/Case Manager Ms. Scottie Alley	Complaints Department Phone # (804) 225-2013
On-Site Visit Date: N/A	

At the time of this complaint, [REDACTED] was 9 years-old and eligible for special education and related services under the disability category of Other Health Impaired. He attends Granby Elementary School (GES), and the last agreed-upon IEP, dated April 12, 2011, requires NCPS to provide the following aids and services with no specified time: quarterly hearing impairment consultations in a general education setting; and monthly physical therapy services in a general education setting. NCPS is also required to provide the following services: specially designed instruction for a frequency of 450 minutes per week in a general education setting; speech-language services for 90 minutes per week in a special education setting; occupational therapy services for 30 minutes per week in a special education setting; special designed instruction for 90 minutes per week in a special education setting; and special transportation services daily.

PRELIMINARY ISSUES:

A. Applicable Regulations

This office will base its investigation and findings on the reauthorization of the federal Individuals with Disabilities Education Act ("IDEA 2004"), effective December 3, 2004, its implementing federal regulations, effective October 13, 2006, and the Virginia Regulations Governing Special Education Programs for Children ("Virginia Regulations"), effective on July 7, 2009, and reissued on January 25, 2010, at 8 VAC 20-81-10 *et seq.* The 2009 Virginia Regulations are available online at http://www.doe.virginia.gov/special_ed/regulations/state/regs_speced_disability_va.pdf.

LETTER OF FINDINGS

Dr. Richard Bentley

April 18, 2012

Page 2

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 complainant's supporting materials and additional materials and the school division's response documentation, which were supplemented and clarified by various telephone conversations as well as electronic correspondence, this office determined that conducting an on-site visit would not have produced any more determinative facts than were presented in the written correspondence. Therefore, we had sufficient information to bring our investigation to closure without an on-site visit.

D. Chronology

To provide a context for our findings in this matter, we offer the following chronology of events, as outlined by NCPS in its response, and as supported by documentation submitted as a part of the record:

DATE	EVENT
April 12, 2011 ¹	In the annual IEP meeting, the IEP team "recommended an Assistive Technology (AT) evaluation to assist with [REDACTED] writing frustrations." ²
May 17, 2011	[REDACTED] case manager completed the AT referral.
May 23, 2011	Ms. Greene, AT case manager, observed [REDACTED] as a part of the AT evaluation.
May 30, 2011	Ms. Greene completed the AT evaluation, which recommended that NCPS issue [REDACTED] a portable word processor.
September 2, 2011	Ms. Greene checked out a Fusion word processor to case manager for [REDACTED] use.
October 8 – 10, 2011	NCPS students did not attend school.
October 11 – December 8, 2011	Ms. Mangus (long-term substitute) "provided [REDACTED] specially designed instruction ... in the general and special education setting."
December 9 – 21, 2011	Ms. Middleton (long-term substitute) "provided [REDACTED] specially designed instruction ... in the general and special education setting."
December 22, 2011 – January 2, 2012	Winter break for students.
January 3 – to February 21, 2012	Ms. Shirley, [REDACTED] case manager and special education teacher, "provided Dylan specially designed instruction ... in the general and special education setting."

¹ The record shows that five IEP meetings were also held on September 23, 2011; November 4, 2011; December 9, 2011; December 20, 2011; and February 6, 2012, but none of the IEPs developed in these meetings were signed by the parent in consent to its implementation.

² The special considerations page of the last agreed-upon IEP as well as the five successive IEP drafts includes the consideration of "Assistive Technology Devices and Services (Check one)." In each, the box corresponding to the statement, "Need for assistive technology devices and services has been considered," is not checked, and the box corresponding to the statement, "Evaluation recommended" is checked.

ISSUE(S) & REGULATIONS:

ISSUE I. Individualized Education Program (IEP)—Implementation

██████████ (“parent”) alleged that NCPS violated state and federal regulations by failing to provide services to ██████████ in accordance with his IEP. Specifically, the parent alleged the following:

- From October 8, 2011, to February 7, 2012, ██████████ “has not received his specially designed education as stated in his IEP.”
- In this office’s contact with the parent, she further clarified this education as accommodations, such as providing shortened assignments, work on the student’s level, and visual strategies.³
- As a result, ██████████ has regressed in all academic areas.

Applicable Regulations:

- The 2006 implementing regulations of the IDEA 2004, at 34 C.F.R. §300.323(a), and the Virginia Regulations, at 8 VAC 20-81-110 A, require, in part, that each local school division must ensure that an IEP is in effect and implemented for each child with a disability served by the school division.
- The IDEA 2004 implementing regulations, at 34 C.F.R. §300.323, and the Virginia Regulations, at 8 VAC 20-81-110 B.6, state, in part, that the school division must provide special education and related services to a child with a disability in accordance with the child’s IEP.
- The IDEA 2004 implementing regulations, at 34 C.F.R. §300.17, and the Virginia Regulations, at 8 VAC 20-81-10, define FAPE as meaning “special education and related services that ... are provided in conformity with an individualized educational program (IEP).”

Findings:

The Office of Dispute Resolution and Administrative Services dismisses sub-issue B and finds the school division to be in noncompliance regarding sub-issue A and in compliance regarding sub-issue C.

³ As a result of this clarification, we have limited our investigation to the implementation of the accommodations of shortened assignments, work on the student’s level, and visual strategies.

Analysis:

- Special education regulations require that a school division provide services to the child with a disability in accordance with his or her IEP. On a preliminary note, [REDACTED] instructional accommodations are listed on a page of instructional and testing accommodations not outlining their frequency, duration, and setting, other than the introductory explanation, "The following accommodations will be provided to your child during classroom instruction and during the state and Norfolk Public Schools' testing programs. These accommodations will be provided according to the chart below."⁴ In light of this, we must conclude that the following accommodations applied for all assignments. As a result, because there is no limitation to NCPS' application of the accommodations, any documented failure to, for example, shorten the assignment or provide visual strategies would constitute a violation of special education law and regulations.

A. Shortened assignments accommodation

- As discussed above, [REDACTED] April 12, 2011 IEP lists the accommodation, "shorten assignments," only on the Instructional and Testing Accommodations page under the listing of "Instructional Accommodations," but there is no separate listing of accommodations with descriptions of frequency, duration, and setting.⁵
- In response to the allegation that the accommodation for shortened assignments was not implemented as written, NCPS generally denied the allegation. The school division also provided statements from school personnel:
 - In a March 14, 2012 statement, Mrs. Shirley, special education teacher, stated that [REDACTED] has also been receiving shortened assignments and modified homework assignments since February 7th after our February 6th, IEP meeting. At that time I shared with mom academic data collected using division-wide assessments that supported my need to shorten and modify his assignments even more."
 - In an undated statement, Ms. Lopez, a GES paraprofessional, stated that "His daily assignments had been shortened ... I have worked with [REDACTED] in small group for math as well and [REDACTED] would be given a fraction of the problems to work on." (emphasis added).
 - In a statement dated March 14, 2012, Ms. White, general education teacher, stated, "[REDACTED] assignments had been shortened[. F]or example, during word study a teacher would write a word, then he would write a word. In addition, writing assignments would be shortened by the teacher writing part of a sentence and [REDACTED] filling in the rest of the

⁴ There are, however, categories of "start date," "annual review date," "frequency," and "setting code" for [REDACTED] aids, services, and program modifications.

⁵ The resulting confusion over implementation of the accommodation may have been captured by the parent's February 6, 2012 agenda for an IEP meeting: "2. Shorten assignment — how does this get accomplished? [Is it] to include homework?"

sentence. During math, he would work with a small group, completing less [sic] problems than other students were assigned.”⁶ (emphasis added)

- The questions raised by the past perfect verb tense in the two above statements aside, the record includes – in the information submitted by the parent and not refuted by NCPS – assignments that teachers did not shorten, as the following examples indicate:
 - **Daily assignment.** [REDACTED] completed twenty out of twenty vocabulary questions on a December 19, 2011 assignment entitled “Mr. Putter and Tabby Fly the Plane,” with a score of fourteen out of twenty correctly answered;
 - **Quiz.** [REDACTED] completed ten of ten math questions on a February 10, 2012 assignment entitled “Daily Math Review Quiz” with a score of three out of ten correctly answered;
 - **Test.** [REDACTED] completed thirteen of thirteen questions on an undated Chapter 8 test with a score of 10 of thirteen correctly answered;
 - An additional, but not exhaustive, list of assignments in the record indicating that the accommodation was not followed are: undated Chapter 7 test; February 17, 2012 vocabulary practice sheet on “The Day Jimmy’s Boa Ate the Wash”; undated vocabulary practice sheet on “Get Up and Go”; and undated science test (“review and re-test”). For some of these assignments, teachers have noted certain accommodations, such as “read aloud,” “used textbook,” and “one-on-one testing,” but not “shortened assignment.”
- Given the above, this office finds NCPS in noncompliance on this sub-issue.

B. Work on student’s level

- [REDACTED] IEP does not include an accommodation or service regarding “work on student’s level.” Therefore, this office dismisses this sub-issue.

C. Visual strategies

- The April 12, 2011 IEP provides the accommodation, “visual strategies” but without specific frequency, location, or duration, as discussed above.
- In response to the allegation in the parent’s complaint that the accommodation was not implemented as written, NCPS denied any failure to implement the IEP. NCPS also provided samples of visual strategies used for [REDACTED] including visuals for requests, counting, feelings, tasks, calming down, behaviors, and schedules. The school division also provided statements from school personnel:
 - Mrs. Shirley stated that [REDACTED] had visual strategies already in place when I started working with him on January 3rd and has continued to use various visual strategies from

⁶ However, in the parent’s December 21, 2011 email to NCPS staff, she writes, “Mrs. White doesn’t accommodate her work lessons for [REDACTED] according to his [IEP] ... shorten assignments ...”

January 3rd until [March 14, 2012, the date of the statement].”

- In Ms. Lopez’s undated statement, she added, “While working with [REDACTED] I have utilized all of [REDACTED] visual aids, such as the daily task check list, visual schedule, cue cards, timers, and classroom procedure visuals.” Ms. White corroborated Ms. Lopez’s statement.
- There is no documentation that NCPS failed to use visual strategies as required by the IEP. Thus, given the information in the record, this office finds NCPS in compliance on this sub-issue.

ISSUE II. Evaluation/Reevaluation Procedures

The parent alleged that NCPS violated state and federal special education regulations regarding timelines during the process of determining [REDACTED] educational needs. Specifically, she alleged that an assessment for assistive technology was completed on May 30, 2011, but she “had to ask three times to finally get a copy of this assessment on 12/21/2011. He is still currently not receiving the technology recommended.”

Applicable Regulations:

- The 2006 implementing regulations of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004), at 34 C.F.R. §300.122, and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, effective July 7, 2009, reissued on January 25, 2010, (the Virginia Regulations), at 8 VAC 20-81-70, require that the local school division establish procedures for the evaluation and reevaluation of children with disabilities. Among other things, school divisions provide a copy of evaluation reports available to parents at no cost prior to or at the meeting where the eligibility group reviews the evaluation report or immediately following the meeting, but no later than 10 days after the meeting. This report must also be made available to the parent no later than two business days before the meeting to determine eligibility.
- The Virginia Regulations, at 8 VAC 20-81-70 H.2, state that a school division must ensure that all reevaluations are completed within 65 business days of the receipt of the referral by the special education administrator or designee.
- The IDEA 2004 implementing regulations, at 34 C.F.R. §300.503, and the Virginia Regulations, at 8 VAC 20-81-170.C, require a school division to provide written notice to the parents of a child with a disability within a reasonable time before the school division proposes or refuses to initiate or change the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education for the child. These regulations further set forth the required content of the written notice.

LETTER OF FINDINGS

Dr. Richard Bentley
[REDACTED]

April 18, 2012

Page 7

Findings:

The Office of Dispute Resolution and Administrative Services finds the school division to be in noncompliance regarding this issue.

Analysis:

- Special education regulations require that a school division must ensure that all reevaluations, for purposes other than the child's triennial evaluation, are completed within 65 business days of the receipt of the referral. Once completed, school divisions are required to hold an eligibility meeting within the 65 business days to determine eligibility, or in this case, to consider the report and the child's educational needs. Additionally, school divisions must provide a copy of the evaluation reports to parents at no cost prior to or at the meeting where the group reviews the evaluation report or immediately following the meeting, but no later than 10 days after the meeting.
- In its response, NCPS acknowledged that although the evaluation was completed within the sixty-five day timeline, the evaluation reports were not provided to the parent until December 21, 2011, and AT services were not provided to [REDACTED] between October 11, 2011, to February 13, 2012.⁷ NCPS did provide documentation that the AT team provided a Fusion word processor to [REDACTED] case manager on September 2, 2011.
- The record includes the AT referral form, dated May 17, 2011.⁸ Given this date as the trigger for the evaluation timeline,⁹ the sixty-fifth day would fall on July 14, 2011. The record thus supports NCPS's assertion that the evaluation was completed within the timeline, but there is no documentation that NCPS (1) held an IEP meeting for the stated purpose of considering the AT report and of reviewing and revising [REDACTED] IEP accordingly; (2) provided copies of evaluation reports within the regulatory timeline; and (3) provided AT services in accordance

⁷ In the summary for [REDACTED] IEP meeting on September 23, 2011, the parent "asked about the use of the Fusion for typing." The summary then states, "He has been typing his writing and taking spelling tests on it." In the summary for the November 4, 2011 IEP meeting, "[REDACTED] wanted to know if [REDACTED] could use the desktop computer instead of the Neo." These statements are evidence that some AT services were being provided, but, according to the record, not within the context of IEP-driven services.

⁸ In apparent response to the request in the Notice of Complaint for "parental consent documentation," NCPS noted that it "does not require a permission to evaluate form since AT is not a related service but a support. AT only requires an AT referral . . ." However, AT does not have to be a related service in order for it to fall under the regulations regarding evaluation. Given the regulatory definitions of "special education" (adapting instruction to address a child's unique needs and to ensure access to the general curriculum) and "evaluation" (procedure used to determine the nature and extent of the special education and related services a child needs), AT must be considered in determining what a child requires in accessing the general curriculum. These procedures, then, would have to apply to AT evaluations, regardless of whether the IEP team considered AT a support or a service. See 8 VAC 20-81-10; 8 VAC 20-81-110 F.2; and 8 VAC 20-81-100 F. As the parent did not allege a violation relating to obtaining her consent, however, this office has not investigated this issue. The parent may file a new complaint if she wishes to have this issue investigated and addressed. Alternatively, the parties may consider mediation to resolve any outstanding issues.

⁹ There is no documentation in the record specifying the date of the receipt of the referral by the special education administrator.

LETTER OF FINDINGS

Dr. Richard Bentley

[REDACTED]

April 18, 2012

Page 8

with an IEP consented to by the parent. Put another way, NCPS made a unilateral decision in September of 2011 — apart from the regulatory IEP process — to provide AT services to [REDACTED]

- In a February 6, 2012 IEP meeting, convened for the stated purpose “to develop or review your child’s IEP,” the team, according to the meeting summary, reviewed the “AT consult” and stated, “He would benefit from something that helps him with tracking print. The Alpha Amart [sic] is recommended for [REDACTED].” The IEP, however, was not revised to reflect this recommendation, nor did the parent sign in consent to its implementation. That aside, February 6, 2012 — approximately 136 business days after the 65-day timeline — appears to be the first time the IEP team reviewed the AT evaluation. Further, according to the record, NCPS first provided a copy of the evaluation report to the parent on December 21, 2011, approximately 109 business days after the 65-day timeline. Given NCPS’ regulatory responsibility (1) to meet within the 65-business-day timeline for the purpose of determining eligibility — or, by extension, reviewing the report — and (2) to provide the evaluation report no later than ten days after the meeting, we find that NCPS unreasonably delayed its post-evaluation meeting and its provision of the evaluation report to the parent.
- This office, therefore, finds NCPS in noncompliance on this issue.

CORRECTIVE ACTION PLAN:

This office finds NCPS to be in noncompliance with federal and state regulations regarding the implementation of [REDACTED] IEP and evaluation procedures. For this reason, this office requests that NCPS:

1. Promptly convene a properly comprised meeting, no later than May 18, 2012, of [REDACTED] IEP team to discuss what compensatory services, if any, should be provided to him as a result of these noncompliances. At this meeting, the IEP team must also consider revising the IEP accommodation page to indicate the frequency, setting, and duration of [REDACTED] instructional accommodations.
2. Submit by May 21, 2012, the meeting minutes and an IEP Addendum, if any, as developed at the above-referenced meeting, which has been signed and consented to by the parent and which outlines the IEP team’s plan to ensure that he receives the compensatory services to which he is entitled and any revisions to his IEP. If, however, an agreement is not reached through the IEP process, the parties may consider the options of either due process or mediation to resolve this matter.
3. For issue II, this office notes that NCPS has voluntarily undertaken measures to self-correct its failure, as outlined above, to provide the AT evaluation report within the regulatory timeline. Therefore, this office requests that NCPS maintain documentation of self-

LETTER OF FINDINGS

Dr. Richard Bentley

April 18, 2012

Page 9

corrections provided in its complaint response, as this information may be requested during our CAP implementation follow-up process on a later date.¹⁰

OTHER ISSUES

This office is required to determine whether NCPS has followed procedures prescribed by special education law and regulations, as set out above. The parent has alleged issues that cannot be investigated by this office, as follows:

- In the parent's additional information, she alleged that "... Mrs. White ... made [redacted] spit out his gum while he was doing his work. This also was listed under his accommodations."
- Additionally, she alleged that "no data was taken for his [functional behavioral assessment] while [Ms. Shirley] was out" and "no homework was sent home until I contacted Mrs. Verhappen."

Since these issues were raised subsequent to the issuance of the Notice of Complaint, this office will not address them in this Letter of Findings because the school division was not given an opportunity to respond to these allegations. The parent may file a new complaint if she wishes to have this issue investigated and addressed. Alternatively, the parties may consider mediation to resolve any outstanding issues.

The parent, in her additional information, expresses frustration generally with the autism inclusion program and the lack of support shown for children with autism. She also requests another AT assessment, questions the use of a different form of AT than was recommended, and suggests that [redacted] teachers offer [redacted] the use of his keyboard, instead of allowing him to request it. These issues raised by the parent are not allegations of violations of special education law; rather, they are matters that should be addressed on a local level. The parties may avail themselves of the variety of VDOE resources at http://www.doe.virginia.gov/special_ed/disabilities/autism/index.shtml. They may also contact Ms. Samantha Hollins at (804) 371-7421.

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 the close of business, 5:00 pm, on **May 18, 2012**. Please be advised that any appeal request does not obviate NCPS' submission of the above referenced Corrective Action Plan, which is due May 18, 2012.

¹⁰ NCPS also implemented corrective actions for its failure to provide AT to [redacted] during October 11, 2011, to February 12, 2012. Because the record does not include an IEP requiring AT services or support to [redacted] our office has not addressed this implementation issue.

LETTER OF FINDINGS

Dr. Richard Bentley

April 18, 2012

Page 10

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

Dr. Judith Douglas
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 an e-mail correspondence to the following e-mail address:
ODRAS@doe.virginia.gov.

The appeal may be submitted to this office via facsimile (FAX) transmission at (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 Dr. Douglas at (804) 225-2771, or e-mail at: Judy.douglas@doe.virginia.

Scottie Alley

Scottie Alley
Complaints Specialist

Attachment - Appeal Procedures

- c: Dr. Sandra H. Witcher
- Dr. Debbie Pfeiffer
- Ms. Phyllis Mondak