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August 23, 2016

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Ms. Nancy Fitzgerald
Executive Director of Special Education
and Student Services
Howard County Public Schools
10910 Route 108
Ellicott City, Maryland 21042

RE: XXXXX and
similarly-situated students
Reference: #16-154

Dear Parties:

The Maryland State Department of Education (MSDE), Division of Special Education/Early Intervention Services (DSE/EIS), has completed the investigation of the complaint regarding special education services for the above-referenced student. This correspondence is the report of the final results of the investigation.

ALLEGATION:

On June 24, 2016, the MSDE received a complaint from Ms. XXXXXXXXXXXX hereafter, “the complainant,” on behalf of her daughter, the above-referenced student, and similarly-situated students. In that correspondence, the complainant alleged that the Howard County Public Schools (HCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the students.

The MSDE investigated the allegation that the HCPS did not follow proper procedures when determining whether the student meets the criteria for identification as a student with a Visual Impairment under the IDEA, in accordance with 34 CFR §§300.08, .34, .39, and .301-.306.

INVESTIGATIVE PROCEDURES:

1. On June 12, 2016, the MSDE sent a copy of the complaint, via facsimile, to Ms. Nancy Fitzgerald, Executive Director of Special Education and Student Services, HCPS, and Ms. Kelly Russo, Instructional Facilitator, HCPS.

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2. On June 28, 2016, Ms. Anita Mandis, Section Chief, Complaint Investigation Section, MSDE, conducted a telephone interview with the complainant about the allegation.
3. On July 1, 2016, the MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegation subject to this investigation. On the same date, the MSDE notified the HCPS of the allegation and requested that the school system staff conduct review of the matter.
4. On August 8, 2016, the HCPS provided the MSDE with a written response to the allegation and documents to be considered.
5. The MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings, which includes:
 - a. Section 504 Eligibility Form, dated May 24, 2016;
 - b. Section 504 Plan, dated March 15, 2016;
 - c. The student's 2015-2016 report card;
 - d. The student's 2015-2016 interim (1-3 marking periods);
 - e. Vision report, dated May 17, 2016, from the student's private optometrist;
 - f. Correspondence, dated August 8, 2016, from the HCPS Central Office staff; and
 - g. Correspondence from the complainant alleging a violation of the IDEA, received by the MSDE on June 24, 2016.

BACKGROUND:

The student is nine years old and is not identified as a student with a disability under the IDEA. She XXXXXXXXXXXXXXXXXXXXXXX and has a Section 504 Accommodations Plan, as a result of a diagnosis of Oppositional Defiant Disorder (Docs. b and g).

FINDINGS OF FACTS:

1. On May 24, 2016, a Section 504 Eligibility Team considered documentation from the student's private optometrist reflecting that the student was diagnosed with convergence insufficiency, binocular vision dysfunction, and eye fatigue. The documentation also reflects that "there are many areas that can impact daily performance," and that supports are recommended for the student (Docs. a and e).
2. At the May 24, 2016 meeting, the team also considered information from the student's teacher that the student has been squinting when she does not have her glasses and that she frequently requested that the brightness of the computer be lessened during computer-based testing. The teacher reported that the student did not demonstrate "outright frustration" when reading or writing, but that she did demonstrate frustration during cooperative working situations and transitions. Based on the data, the team decided that the student's convergence insufficiency constitutes an impairment that limits the major life activity of seeing and reading. However, the team decided that, unlike the

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Oppositional Defiant Disorder, the convergence insufficiency does not substantially limit a major life activity, as required under Section 504 of the Rehabilitation Act of 1973. Therefore, the student's 504 Plan continues to address the oppositional defiant disorder only (Docs. a, c, and d).

3. At the May 24, 2016 Section 504 Eligibility meeting, the special education teacher reported that the student "is not visually impaired based on the school system's definition of visual impairment" and that HCPS only recognizes blindness and low vision (Docs. a and g).
4. The HCPS acknowledges that its procedures for evaluating students for a Visual Impairment under the IDEA are not consistent with the July 18, 2016 MSDE *Memorandum to Local Directors of Special Education*, stating that students with convergence insufficiency may not be categorically excluded from eligibility under the IDEA. The HCPS proposes to revise its procedures for evaluating students for a Visual Impairment under the IDEA consistent with the MSDE guidance, and will ensure consistency with the recommendations of an HCPS steering committee on the issue, which is set to convene in September 2016. The HCPS also proposes to conduct an IDEA evaluation for the named student consistent with the MSDE guidance (Docs. a and f).

DISCUSSION/CONCLUSIONS:

Under the IDEA, a student with a disability is a student who has been evaluated as **having one of a list of impairments, including a Visual Impairment**, and who, by reason thereof, **requires special education**¹ and related services, which are provided through an **Individualized Education Program** [Emphasis added] (34 CFR §§300.08 and .101).

A student who **requires the support of accommodations**, but does not require special education does not meet the criteria for identification as a student with a disability under the IDEA, but may meet the criteria for identification as a student with a disability under Section 504 of the Rehabilitation Act of 1973. A student who meets this criteria is provided with a **Section 504 Accommodations Plan**. In order to qualify for a Section 504 Accommodations Plan, the student must be found to **have a physical or emotional impairment that substantially limits a major life function** [Emphasis added] (34 CFR §104.3).

¹ This is defined as specially designed instruction to meet the student's unique needs, which involves adapting the content, methodology, or delivery of instruction in order to ensure the student's access to the general curriculum (34 CFR §§300.08 and .39).

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Under the IDEA, a **Visual Impairment** means **impairment in vision that, even with correction, adversely affects a child's educational performance**. The IDEA specifically states that both partial sight and blindness constitute visual impairments. However, the United States Department of Education, Office of Special Education and Rehabilitative Services (OSERS) has indicated that **States may not exclude students with convergence insufficiency or other visual impairments from meeting the definition of Visual Impairment under the IDEA if the condition adversely affects their educational performance** [Emphasis added] (34 CFR §300.8 and *Letter to Kotler*, November 12, 2014).

When conducting an IDEA evaluation, the public agency must review the existing data, including evaluations, information provided by the student's parents, classroom-based assessments, and observations conducted by teachers. On the basis of that review, the public agency must determine whether additional data is needed and if so, it must ensure that assessments and other evaluation measures needed to produce the data are conducted and the results are considered by the IEP team in determining whether the student meets the criteria for identification as a student with a disability under the IDEA (34 CFR §§300.301 - .306).

Therefore, if a student with convergence insufficiency is referred for an IDEA evaluation, the public agency must review existing data, including evaluations, information provided by the student's parents, classroom-based assessments, and observations conducted by teachers, and determine whether additional data is needed. If additional data is required, the public agency must ensure that it is obtained. Based on the data, the IEP team must **determine whether the convergence insufficiency impacts the student's education**. If the team determines that the convergence insufficiency impacts the student's education, it must **consider it a visual impairment**, and **determine whether the student requires special education instruction as a result of the visual impairment**. If the student is found to require special education instruction, the student meets the criteria for identification as a student with a Visual Impairment under the IDEA.

In this case, the complainant asserts that the student requires special education as a result of convergence insufficiency. While the HCPS has considered whether convergence insufficiency constitutes a physical or emotional impairment that substantially limits a major life activity under Section 504 of the Rehabilitation Act of 1973, the complainant alleges that the school system will not consider whether convergence insufficiency constitutes a visual impairment under the IDEA (Doc. g).

Based on the above Findings of Facts, the MSDE concurs with the HCPS that the IDEA evaluation procedures are not consistent with the MSDE guidance and finds that a violation occurred. The MSDE appreciates the responsiveness of the school system and concurs with the corrective action that is proposed.

CORRECTIVE ACTIONS/TIMELINES:

Student-Specific

The MSDE requires the HCPS to provide documentation by October 1, 2016 that an IEP team has reviewed the data and determined whether the student is suspected of being a student with a disability under the IDEA based on the data, and if so, that an IDEA evaluation is being conducted.

If the student is identified as a student with a disability under the IDEA, the HCPS must provide documentation by November 1, 2016 that an IEP has been developed and that compensatory services or other remedy have been determined for the delay in the IDEA evaluation since May 2016.

System-Based

The MSDE requires the HCPS to provide documentation by December 1, 2016 that its procedures for evaluating students for a Visual Impairment under the IDEA have been revised consistent with the MSDE guidance.

Similarly-Situated Students

The MSDE requires the HCPS to provide documentation by December 1, 2016 that notice has been provided to the parents of all HCPS students of the revised procedures for evaluating students for a Visual Impairment under the IDEA and of the right to request an evaluation if they suspect that their children meet the criteria for identification as students with a Visual Impairment under the IDEA.

Documentation of all corrective action taken is to be submitted to this office to: Attention: Chief, Family Support and Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE.

TECHNICAL ASSISTANCE:

Technical assistance is available to the parties by contacting Dr. Nancy Birenbaum, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE at (410) 767-7770.

Please be advised that the HCPS and the complainant have the right to submit additional written documentation to this office within fifteen (15) days of the date of this letter if they disagree with the findings of fact or conclusions reached in this Letter of Findings. The additional written documentation must not have been provided or otherwise available to this office during the complaint investigation and must be related to the issues identified and addressed in the Letter of Findings. If additional information is provided, it will be reviewed and the MSDE will determine if a reconsideration of the conclusions is necessary.

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Upon consideration of this additional documentation, this office may leave its findings and conclusions intact, set forth additional findings and conclusions, or enter new findings and conclusions. Pending the decision on a request for reconsideration, the school system must implement any corrective actions within the timelines reported in this Letter of Findings.

Questions regarding the findings, conclusions and corrective actions contained in this letter should be addressed to this office in writing. The complainant and the school system maintain the right to request mediation or to file a due process complaint, if they disagree with the identification, evaluation, placement, or provision of a FAPE for the student, including issues subject to this State complaint investigation, consistent with the IDEA. The MSDE recommends that this Letter of Findings be included with any request for mediation or due process.

Sincerely,

Marcella E. Franczkowski, M.S.
Assistant State Superintendent
Division of Special Education/Early Intervention Services

MEF:ac

c: Renee A. Foose
Kelly Russo
XXXXXXXX
Dori Wilson
Anita Mandis
Albert Chichester
Nancy Birenbaum