



Karen B. Salmon, Ph.D.
State Superintendent of Schools

May 23, 2019

RE-ISSUED ON JUNE 24, 2019

Nicole Joseph, Esq.
The Law Offices of Nicole Joseph
10421 Stevenson Road, #442
Stevenson, Maryland 21153

Dr. Terrell Savage
Executive Director
Special Education & Student Services
Department of Special Services
Howard County Public Schools
The Old Cedar Lane Building
5451 Beaverkill Road
Columbia, MD 21044

RE: XXXXX
Reference: #19-140

Dear Parties:

The Maryland State Department of Education, Division of Early Intervention and Special Education Services (MSDE), 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 March 27, 2019, the MSDE received correspondence from Nicole Joseph, Esq., hereafter, “the complainant,” on behalf of the above referenced student. In the correspondence, the complainant alleged that the Howard County Public Schools (HCPS) did not follow proper procedures in the identification and evaluation of the student to determine if the student requires special education services under Individuals with Disabilities Education Act (IDEA), in accordance with 34 CFR §§300.111, and .301-.311.

BACKGROUND:

The student is eight (8) years old and attends XXXXXXXXXXXXXXXXXXXX. He is not identified as a student with a disability under the IDEA. The student has a 504 Plan¹ due to a diagnosis of anxiety.

FINDINGS OF FACTS:

1. The HCPS reports that it does not look for a severe discrepancy between cognitive assessment scores and academic assessment scores when considering whether a student meets the criteria for identification as a student with a Specific Learning Disability under the IDEA.
2. The HCPS has issued guidance to school psychologists entitled, *HCPS Guidelines*. This guidance states that a deficit may be considered when:
 - a. A score is below average and a significant intra-individual weakness (a score is statistically significant at the .05 level and the cumulative base rate, if available, is 5-10%);
 - b. At least one area of cognitive processing is in the average range; and
 - c. The area(s) of cognitive deficit(s) is/are related to the area(s) of academic concern.

April 2018

3. On April 17, 2018, an IDEA evaluation was conducted due to the parent's concerns about the student's reading fluency and basic reading skills.
4. There is documentation that the student's teachers reported that the student was performing at grade level in reading, but demonstrated that he needs sight words support during reading activities which they were able to address this through the provision of supports.
5. The teachers also reported that, due to the parent's concern that the student may have Dyslexia, the student was participating in a research-based reading intervention to address basic reading skills, and that the student was responding appropriately to the intervention.
6. The IEP team considered whether the student exhibited a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, grade level standards, or intellectual development based on assessment data, and decided that there were some weaknesses in reading fluency skills. However, this weakness did not meet the *HCPS Guidelines* for determining that the student has a psychological processing deficit.

¹ A 504 Plan is a plan for the provision of accommodations under Section 504 of The Rehabilitation Act of 1973.

7. The IEP team decided that the findings were not primarily the result of another disability, cultural facts, environmental or economic disadvantage, or limited English proficiency.
8. The IEP team documented its determination that, based on the data, the student does not meet the criteria for identification as a student with a Specific Learning **Disability** under the IDEA.

December 2018

9. On December 20, 2018, the IEP team again convened in response to concerns about the student's performance in reading decoding and comprehension and writing.
10. The IEP team documented that it considered new data provided by the parent that the student has Dyslexia.
11. The IEP team also documented that it considered information from the student's teacher that, while the student's reading skills had "regressed" over the summer of 2018, he was continuing to read on grade level. The team also considered information from the teacher that he expected the student to be performing beyond that level by that time, and that he believed that the student's reading and writing performance was impacted by his anxiety.
12. The IEP team documented that it did not conduct an IDEA evaluation because it did not suspect that the student has a disability. It documented the basis of this decision was that "the student does not have a processing disorder."

March 2019

13. On March 18, 2019, the IEP team convened to consider whether to conduct an IDEA evaluation based on the parent's continued concerns about the student's reading performance.
14. At that time, the team decided that assessments needed to be conducted in order to determine "whether the student has a processing deficit." However, the parent refused to provide consent to obtain the data and indicated that she would be obtaining private assessments. Therefore, the evaluation was not conducted.

LEGAL REQUIREMENTS:

A public agency proposing to conduct an initial evaluation must obtain parental consent before conducting the evaluation (34 CFR §300.300). As part of an initial evaluation, the IEP team must review existing data and identify what additional data is needed (34 CFR §300.305).

A student with a disability under the IDEA means a student who is evaluated as having one (1) of a list of disability categories, including a Specific Learning **Disability** (SLD), and who, by reason thereof, requires special education and related services. If a student is determined through an evaluation to meet the criteria for identification with one (1) of the disability categories, but only requires a related service and not special education, the student cannot be identified as a student with a disability under the IDEA (34 CFR §300.8).

A SLD is a disorder in one (1) or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. These disorders include conditions such as Dyslexia (34 CFR §300.8).

Even if a student has Dyslexia or other condition included in the definition of SLD, the public agency must conduct an evaluation, in accordance with 34 CFR §§300.304 – .311, to determine whether that the student meets the criteria for identification as a student with a disability under the IDEA. Therefore, the presence of the condition of Dyslexia may, but does not automatically, form the basis for the determination that a student has a SLD under the IDEA (*Dear Colleague Letter*, United States Department of Education, Office of Special Education and Rehabilitative Services, October 23, 2015).

In accordance with 34 CFR §§300.304 – .311, the IEP team may determine that a student has a SLD under the IDEA if:

- (1) The student does not achieve adequately for the student's age or to meet State-approved grade-level standards in one (1) or more of the following areas, when provided with learning experiences and instruction appropriate for the student's age or State-approved grade-level standards:
 - i. Oral expression
 - ii. Listening comprehension
 - iii. Written expression
 - iv. Basic reading skills
 - v. Reading fluency skills
 - vi. Reading comprehension
 - vii. Mathematics calculation
 - viii. Mathematics problem solving

- (2)
 - i. The student does not make sufficient progress to meet age or State-approved grade level standards in one (1) of the above areas when using a process based on the student's response to scientific, research-based intervention;

or

ii. The student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development that is determined using appropriate assessments;

and

(3) The team's findings are not primarily the result of the following:

- i. A visual, hearing, or motor disability;
- ii. An intellectual disability;
- iii. An emotional disability;
- iv. Cultural factors;
- v. environmental or economic disadvantage; or
- vi. Limited English proficiency.

Each State is required to adopt criteria for determining whether a student has a SLD, and the public agencies must use that criteria (34 CFR §300.307).

The MSDE's Technical Assistance Bulletin, *Specific Learning Disability and Supplement*, (November 7, 2016) further states that the IEP team may, in conjunction with (1) and (2) above, also look for a severe discrepancy between intellectual ability and achievement.

The MSDE's *A Tiered Instructional Approach to Support Achievement for All Students*, (June 2008) provides guidance on the MSDE's criteria for finding a pattern of strengths and weaknesses sufficient to find that a student is a student with a SLD. It states the following:

At a minimum, patterns of a student's strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development should be evaluated in terms of the level of performance, the degree of variation among strengths and weaknesses, the frequency of such variation across individuals, and the relevance to identification of a SLD. Criteria need to account for the fact that some profile variation is typical of non-disabled peers. That is, significant intra-individual differences in score profiles are normal and can be expected to occur among all students. Furthermore, when two assessment scores are compared, the difference between the two scores is nearly always less reliable than the separate scores on which the difference is based. With these cautions in mind, use of Option 2 for determination of a SLD requires local procedures and criteria that identify patterns of a student's strengths and weaknesses that are significant, meaningful, and relevant to identification of a SLD.

DISCUSSION/CONCLUSIONS:

In this case, the complainant alleges that the HCPS impermissibly narrows the definition of SLD required by the IDEA because it requires assessment scores to be at a certain level in order to demonstrate a processing deficit even for students with the processing disorder of Dyslexia.

April 2018

Based on the Findings of Facts #1 - #8, the MSDE finds that, in April 2018, the IEP team followed proper procedures established by both the IDEA and the MSDE when conducting the IDEA evaluation, in accordance with 34 CFR §§300.304 – .311, MSDE's *A Tiered Instructional Approach to Support Achievement for All Students*, (June 2008) and MSDE's Technical Assistance Bulletin, *Specific Learning Disability and Supplement*, (November 7, 2016).

Based on the Findings of Facts #3 - #8, the MSDE further finds that the data that the student was achieving adequately for his age and to meet State-approved grade-level standards in reading and was responding sufficiently to a research-based reading intervention was consistent with the eligibility determination, in accordance with 34 CFR §§300.304 – .311. Therefore, this office does not find that a violation occurred with respect to this aspect of the allegation.

December 2018

Based on the Findings of Facts #10 and #12, the MSDE finds that the documentation of the student's Dyslexia did not support the team's determination that the student does not have a processing disorder, in accordance with 34 CFR §300.8 and *Dear Colleague Letter*, United States Department of Education, Office of Special Education and Rehabilitative Services, (October 23, 2015). Therefore, this office finds that a violation occurred.

Notwithstanding the violation, based on the Finding of Fact #11, the MSDE finds that the IEP team's decision to not suspect a disability and conduct an evaluation was consistent with the data, in accordance with 34 CFR §§300.304 – .311. The student was achieving adequately for his age and to meet State-approved grade-level standards in reading, which precluded the team from finding that the processing disorder of Dyslexia manifested itself in the imperfect ability to read, which is required by the IDEA regulations to find that the student has a SLD as a result of the Dyslexia. Therefore, no student-specific corrective action is required.

March 2019

Based on the Findings of Facts #13 and #14, the MSDE finds that the HCPS followed proper procedures and did not have the authority to proceed with an evaluation in March 2019 when the parent refused to provide consent, in accordance with 34 CFR §§300.300 and .305. Therefore, this office does not find that a violation occurred with respect to this aspect of the violation.

CORRECTIVE ACTION/TIMELINE:

The HCPS must provide documentation by the start of the 2019-2020 school year of the steps taken to ensure that decisions made about the existence of a processing disorder are made consistent with the data.

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.

As of the date of this correspondence, this Letter of Findings is considered final. This office will not reconsider the conclusions reached in this Letter of Findings unless new, previously unavailable documentation is submitted and received by this office within fifteen (15) days of the date of this correspondence. The new documentation must support a written request for reconsideration, and the written request must include a compelling reason for why the documentation was not made available during the investigation. Pending this office's decision on a request for reconsideration, the public agency must implement any corrective actions within the timelines reported in this Letter of Findings.

Questions regarding the findings and conclusions 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 Free and Appropriate Public Education (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 a due process complaint.

Sincerely,

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

MEF:sf

c:	Michael J. Martirano	Anita Mandis
	Kathy Stump	Dori Wilson
	Kelly Russo	Sharon Floyd
	XXXXXXXX	