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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 21042-6198

RE: XXXXX
and similarly-situated students
Reference: #16-155

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. XXXXXXXXX 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.

XXX

Ms. Nancy Fitzgerald

August 23, 2016

Page 2

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 Meeting Notice, dated May 17, 2016;
 - b. Section 504 Eligibility Form, dated May 24, 2016;
 - c. Correspondence from the complainant alleging a violation of the IDEA, received by the MSDE on June 24, 2016;
 - d. The student's 2015-2016 report card; and
 - e. Correspondence from the HCPS to the MSDE, dated August 8, 2016.

BACKGROUND:

The student is seven years old and is not identified as a student with a disability under the IDEA or Section 504 of the Rehabilitation Act of 1973. She attends XXXXXXXXXXXXXXXX (Docs. a - d).

FINDINGS OF FACTS:

1. On May 24, 2016, a Section 504 Eligibility Team met to conduct an evaluation under Section 504 of the Rehabilitation Act of 1973. The meeting was held after the complainant provided the school staff with documentation from the student's private optometrist reflecting that the student was diagnosed with convergence insufficiency, binocular vision dysfunction, headaches, and eye fatigue. The documentation of the meeting reflects that the team considered a report from the student's private optometrist that "there are many areas that can impact daily performance," and that he recommended supports for the student (Docs. a and b).
2. At the May 24, 2016 meeting, the 504 team considered the complainant's request that the student be encouraged to close her eyes to give them rest if she is observed rubbing her eyes, blinking, laying her head down, or rocking back and forth, which are indications that her eyes are hurting (Doc. b).
3. At the May 24, 2016 meeting, the team also considered information from the student's teacher that the student was doing well in reading and was functioning at grade level.

The teacher also reported that the student had complained on one occasion that her “brain was hurting,” but otherwise was observed to be “functioning fine in the classroom.” In addition, the team considered information from the school nurse that no significant medical concerns had been raised for the student (Doc. b).

4. 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, but that the impact was “negligible” and did not constitute an impairment that substantially limits a major life activity, as required under Section 504 of the Rehabilitation Act of 1973. While the team decided that the student does not qualify for a 504 Accommodations Plan, it discussed that the school staff would monitor the student and investigate obtaining a light filter application for the elimination of the blue lights on electronic devices in response to the complainant’s request (Doc. b).
5. The team documented that, at the May 24, 2016 meeting to determine the student’s eligibility under Section 504 of the Rehabilitation Act of 1973, the special education teacher reported that the student “is not visually impaired based on the school system’s definition of visual impairment” (Doc. b).
6. 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*, which states 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 a Maryland State Steering Committee for Programs Serving Students with Visual Impairments, which is scheduled to address the issue on September 28, 2016. The HCPS also proposes to conduct an IDEA evaluation for the named student (Doc. e).

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).

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).

XXX
Ms. Nancy Fitzgerald
August 23, 2016
Page 4

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).

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. c).

XXX
Ms. Nancy Fitzgerald
August 23, 2016
Page 5

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 January 1, 2017 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

XXX

Ms. Nancy Fitzgerald

August 23, 2016

Page 6

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.

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 Free Appropriate Public Education 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:am

c: Renee A. Foose
Kelly Russo
XXXXX
Dori Wilson
Anita Mandis
Sharon Floyd
Nancy Birenbaum