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Via Electronic Mail

Walter Howard, Chief
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Pennsylvania Department of Education
Bureau of Special Education
333 Market Street
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October 15, 2017

RE: Request for Reconsideration of Complaint Investigation Report for Multiple Children and V.M.

Dear Mr. Howard:

The Education Law Center (“ELC”) files this Request for Reconsideration of the Complaint Investigation Report (“CIR”), dated October 6, 2017. The underlying Complaint, submitted on August 14th, was filed on behalf of individual and similarly situated children with disabilities transitioning from early intervention services to school-aged programs at the School District of Philadelphia (“SDP”). We recognize the thoroughness of the investigation conducted by the Bureau of Special Education (“BSE”) in response to our Complaint. The CIR represents an important first step towards ensuring children receiving early intervention services from Elwyn are able to make a smooth transition to kindergarten or first grade and receive needed services immediately. However, as discussed below, we believe that further and more specific corrective action is needed to address all of the issues raised in the Complaint and ensure that all impacted children, as identified by the Bureau, receive the remediation needed to compensate them for the denial of a free appropriate public education (“FAPE”).

Accordingly, we respectfully request that the Bureau review the CIR’s conclusions and revise its corrective action in the following ways:

1. Clarify the Remedy and Verification of Completion of Corrective Action for Children Denied FAPE

The CIR found that SDP was out of compliance with the Individuals with Disabilities Education Act’s (“IDEA”) timeliness requirements, both for conducting re-evaluations and for complying

with IEP team meeting deadlines, for children transitioning from early intervention into kindergarten or first grade. The CIR issued the following corrective action:

The SDP has provided this Adviser with a spreadsheet of all EI students who transitioned from EI to school-aged programming for the 2017-2018 school year whose evaluations were not completed within the required 60-day timeline and whose IEPs were not completed within 30 days of the completion of the RRs. *If the students are denied FAPE because the SDP has either failed to implement the students' EI IEPs or develop an interim IEP agreed to by the parent, as a result of the delayed RR and IEP*, then the students are owed compensatory education from the time that an IEP should have been implemented (30-calendar days from the RR due date + 10-school days for IEP implementation) to the date that an IEP is actually implemented.

Complaint Investigation Report: Multiple Children (Oct. 6, 2017) at 6 (emphasis added). ELC agrees in most part with this directive but asserts that the corrective action and accompanying verification require greater clarity and oversight to ensure that all children who were actually denied FAPE will receive adequate compensation, as required by law, to make up for lost services and specialized instruction. The CIR requires the following verification of completion of corrective action from SDP:

A copy of the plan for compensatory education and a copy of the Compensatory Education NOREP/PWN which has been issued to the parent of each student who was denied FAPE because the SDP had either failed to implement the students' EI IEP or develop an interim IEP agreed to by the parent, as a result of the delayed RR and IEP.

Complaint Investigation Report: Multiple Children (Oct. 6, 2017) at 7.

ELC respectfully submits that the CIR does not sufficiently delineate *how* the denial of FAPE will be determined for each individual child or *who* will make that determination so that relief can be appropriately verified. Presumably, this will fall to the District alone as the CIR requires SDP to issue verification in the form of Compensatory Education NOREPs. The determination of a denial of FAPE, however, will require an individualized, fact-intensive analysis for each child who received a delayed re-evaluation and/or IEP meeting. For example, important determining factors include (i) whether SDP issued a parent-approved interim NOREP; (ii) when such a NOREP was issued; and (iii) whether SDP "implemented" a child's early intervention IEP,

which will depend on *what* services SDP can show were actually provided and *how* they were delivered.¹

Giving SDP this task creates a significant and obvious conflict of interest and imposes a significant cost on the District. It requires SDP to review hundreds of files and creates a financial disincentive to find denials of FAPE. Without assigning this task to a neutral party and providing further direction regarding what triggers a denial of FAPE and the scope of compensatory education, ELC is concerned that the rights of students to individual compensatory education services will not be fully enforced and implemented.

Therefore, ELC respectfully proposes the corrective action be amended as follows:

- (1) identify the population of children to which FAPE was potentially denied as all transitioning children who failed to receive timely re-evaluations and/or timely IEP meetings;
- (2) create a rebuttable presumption that each child in this population was denied FAPE unless SDP can produce service delivery records that show SDP has implemented the services required in the students' early intervention IEP and/or produce an interim IEP agreed to by the parent that show the child received the services to which they were legally entitled;
- (3) establish a deadline for SDP to produce such records;
- (4) appoint a third-party coordinator, paid for by the Department of Education, who will review the records and determine whether they show, by a preponderance of the evidence, that the child was provided FAPE and ensure that parents are provided with proper notice of the corrective action and robust opportunities to take advantage of compensatory education awards; and
- (5) require that relief for each child denied FAPE must, at minimum, consist of minute-for-minute compensatory education for the services the school-age child failed to receive.

ELC notes that the Bureau has previously hired a third-party coordinator to administer corrective action issued by the Bureau in response to a complaint filed by ELC on June 10, 2016 on behalf of students with disabilities at Wilkinsburg Senior High School. We believe the circumstances outlined above necessitate a similar arrangement due to the complexity of the fact-specific inquiry and the fact that hundreds of young children have been impacted by the District's inaction.

¹ In other instances, such as when the denial of FAPE resulted from late transportation services, BSE has assigned similar tasks to SDP. With regard to transportation, the corrective action was clear and objective – SDP was required to determine if a child arrived on-time or not. In contrast, the circumstances presented here require a fact-intensive individual analysis to determine whether a child was denied a FAPE due to the failure to implement an interim or early intervention IEP.

2. Take into Consideration the Failure to Administer Evaluations for V.M.'s and Similarly Situated Students' with a BCA

The CIR, and a sister CIR for named complainant V.M., found that SDP was in compliance with 34 C.F.R. § 300.304, which requires that English Learner (EL) students be evaluated in their native language when feasible. ELC posits that reconsideration of these findings is warranted because the Bureau failed to consider all information relevant to this claim.

The CIR found, in relevant part, that SDP has the following procedure for students who need a bilingual evaluation:

The following procedures are followed to determine if an evaluation needs to be conducted in the student's native language . . . "If a student is not proficient [in English], the appropriate bilingual psychologist will be assigned. If not feasible, psychologists will use SDP Bilingual Counselor Assistants (BCA) and/or nonverbal measures that are appropriate for the student's known level of language." The Executive Director explained that other modes of communication, which may be used during an evaluation for an ELL student include the use of BCAs and/or nonverbal measures.

Complaint Investigation Report: Multiple Children (Oct. 6, 2017) at 5. Based chiefly on this evidence, the CIR, and V.M.'s CIR concluded that SDP was in compliance because:

SDP *maintains and implements* an evaluation process regarding ELL students, which allows the evaluation team to make an appropriate determination regarding *special education eligibility* for ELL students. These procedures are sufficient in preventing the inappropriate over-identification or disproportionate representation by ethnicity.

Complaint Investigation Report: Multiple Children (Oct. 6, 2017) at 6 (emphasis added).

First, ELC believes that BSE did not fully consider the information presented in V.M.'s related complaint. V.M. had a reevaluation that was conducted entirely in English, despite his clear need for a bilingual evaluation in Mandarin – one of the most common languages in the District. V.M.'s re-evaluation report shows that he had limited proficiency in English and that he was assessed using both verbal and non-verbal measures. All verbal measures were conducted in English without the use of a BCA. Thus, in V.M.'s portion of the Complaint, BSE was presented with a clear example of how SDP failed to *implement* its own procedures.

Second, 34 C.F.R. § 300.304 does not merely require SDP to make an appropriate determination for special education eligibility for EL students, but requires SDP to administer evaluations in

the “child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer.”

Thus, SDP’s procedure must not only yield an accurate determination of continuing eligibility but *also* ensure that EL children receive re-evaluations that accurately determine their academic, developmental, and functional performance for purposes of programming. However, the CIR finds that SDP is in compliance merely because it uses nonverbal measures to determine eligibility and ignores the verbal assessment conducted solely in English. To cease an investigation at the point of an eligibility determination is not legally sufficient as the evaluation must accurately consider the child’s potential “academically, developmentally and functionally.” This critical information is then used by the IEP Team to inform the child’s school-age programming. A reevaluation report cannot pass muster where it is fraught with inaccuracies in other verbal measures that assess what the child knows and their potential for learning. This is precisely what occurred in V.M.’s case. The procedure maintained by SDP is thus facially deficient because it allows the use of BCAs *or* nonverbal measures alone, regardless of the child’s need for verbal measures. Thus, under the procedure a child – like V.M. – could be found eligible but still receive a re-evaluation report that is inaccurate with regard to other domains and causes the IEP Team to develop inappropriate programming based on inaccurate information. This is precisely what section 300.304 of the IDEA regulations seeks to avoid.

Accordingly, in order to comply with applicable federal requirements, ELC respectfully proposes that the CIR be amended as follows:

- (1) find SDP non-compliant with 34 C.F.R. § 300.304 on the ground that SDP has failed to conduct evaluations in the native language of V.M. and other children similarly situated in the form most likely to yield accurate information regarding what the child knows and can do academically, developmentally, and functionally;
- (2) issue corrective action that SDP must revise its procedure to reference the requirements in 34 C.F.R. 300.304(c)(1)(ii) and submit the new procedure to BSE for approval;
- (3) reflect that BSE will conduct a file review of the 156 transitioning EL students who did not receive a bilingual evaluation to determine whether a bilanguage re-evaluation was needed and feasible or whether a BCA was used in a manner most likely to yield accurate information; and
- (4) based on these findings, order SDP to hold IEP meetings for all children identified through the file review as having legally deficient re-evaluations to be offered bilingual re-evaluations which shall be conducted as determined by the IEP team with consent of the parent or other legally authorized decisionmaker.

In view of the foregoing, we respectfully request the following action be taken by the Bureau with regard to the applicable CIR findings and proposed corrective action and that the CIR be amended and re-issued as appropriate. Thank you for your consideration.

Respectfully submitted,



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