



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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The Honorable John Carney
Governor

John McNeal
SCPD Director

November 30, 2017

Ms. Susan K Haberstroh, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 21 DE Reg. 372 [Proposed Visual Impairment Eligibility Regulation (11/1/17)]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposed regulation to amend its IDEA eligibility standards for visual impairment. The proposed regulation was published as 21 DE Reg. 372 in the November 1, 2017 issue of the Register of Regulations.

As background, OSEP published the attached Policy Letter to Kotler, 65 IDELR 21 (11/12/14) a few years ago which supported a broad view of "visual impairment" eligibility under the IDEA. For example, it repudiated language limiting eligibility to "severe" conditions:

(T)he definition of "visual impairment including blindness," does not contain a vague modifier; rather; any impairment in vision, regardless of severity, is covered, provided that such impairment, even with correction, adversely affects a child's educational performance.

At 2. In contrast, the Delaware eligibility standard for "visual impairment including blindness" was highly prescriptive and required a disease, condition or impairment of the eye or visual system that seriously affects visual function directly,...". [emphasis supplied] See 21 DE Reg at 374.

On May 22, 2017 OSEP issued the attached guidance which reiterated and expanded upon the Kotler policy letter. OSEP repudiated state adoption of prescriptive criteria (e.g. “reduced visual field to 50 degrees or less” and encouraged states to conform inconsistent eligibility standards to the federal guidance.

On August 25, 2017 the Delaware DOE issued the attached policy letter directing districts and charter schools to use the federal regulatory definition of “visual impairment including blindness” pending formal adoption of a revised State regulation. The DOE is now promulgating the revised regulation.

The SCPD has the following observations.

First, the proposed definition is generally consistent with the federal guidance. However, it would be more informative to include an omitted reference. Compare the following:

Proposed DOE Regulation

6.17.2 This eligibility determination requires a thorough and rigorous evaluation with a data-based media assessment which is based on a range of learning modalities and includes a functional visual assessment.

Federal Guidance

When determining a child’s vision status, the LEA’s evaluation should be thorough and rigorous. Such evaluations should include a data-based media assessment, be based on a range of learning modalities (including auditory, tactile, and visual), and include a functional visual assessment.

The DOE may wish to insert “(including auditory, tactile, and visual)” in the State regulation for clarity.

Second, the DOE should promptly take steps to suspend and correct conflicting provisions in its November 5, 2015 MOU among the DOE, LEAs, charter schools, and DVI. For example, Section V literally states that eligibility to receive services from DVI is limited to students meeting the superseded DOE regulatory definition of “visual impairment including blindness”. The “assessment” section could also be updated to conform to the new DOE regulation and OSEP guidance. The MOU is an important “working document” which, if not promptly revised, will predictably lead to confusion and violation of the IDEA.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulation.

Sincerely,



Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Susan S. Bunting, Ed.D., Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Laura Makransky, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Valerie Dunkle, Esq., Department of Justice
Ms. Elisha Jenkins, DVI
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

21reg372 doe visual impairment eligibility 11-27-17

65 IDELR 21

115 LRP 5832

Letter to Kotler

Office of Special Education Programs

N/A

November 12, 2014

Related Index Numbers

525.003 In General

175.070 Visual Impairment

470.010 Authority to Set Standards

Judge / Administrative Officer

Melody Musgrove, Director

Ruling

States' definitions of "visual impairment" need not precisely track the IDEA's language; however, they must not exclude children who would otherwise be IDEA-eligible under that classification, OSEP informed a parent's attorney.

Meaning

Visual impairments under the IDEA include both blindness and partial vision. The key isn't the type of eye condition the child has, or whether the condition limits the ability to see distances or to see near, but whether it adversely affects the child's educational performance. Thus, districts determining whether a child is or may be eligible under the IDEA based on a visual impairment need to consider factors such as whether the condition impacts the child's ability to use assistive technology, complete school work, including reading and math, and otherwise be involved in and progress in the general education curriculum.

Case Summary

In conducting child find and eligibility determinations, districts must be careful not to overlook children with near vision problems, even when they might otherwise pass an eye exam. OSEP told a parent's attorney that any condition that results in either blindness or partial sight and that could affect a child's educational performance may qualify

the student to receive special education and related services. The attorney indicated that the District of Columbia (and some states) use eligibility criteria for visual impairments that exclude children whose conditions, such as convergence insufficiency (where the eyes do not properly turn inward to focus), affect their ability to read and write. OSEP pointed out that a visual impairment under the IDEA implementing regulation at 34 CFR 300.8(c)(13) means any vision impairment, including blindness, that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness. "States may not use criteria or other definitions for 'visual impairment including blindness' that result in the exclusion of children who otherwise meet the definition in 34 CFR § 300.8(c)(13)," OSEP Director Melody Musgrove wrote. OSEP further noted that a proper vision evaluation should consider how the impairment affects the child's ability to learn to read, write, do math, use computers, and participate and make progress in the general curriculum. OSEP informed the attorney that it would work with the District of Columbia Office of State Superintendent of Education to ensure that the District of Columbia Public Schools' eligibility guidelines are consistent with state standards and the IDEA.

Full Text

Dear Ms. Kotler:

This is in response to your letter to the Office of Special Education Programs (OSEP) regarding the criteria used by some States to identify children with "visual impairments or blindness," as that term is defined under Part B of the Individuals with Disabilities Education Act (IDEA). In your letter, you provide, as an example, the criteria used by the District of Columbia Public Schools (DCPS) to determine eligibility for special education and related services under Part B of the IDEA based on visual impairment or blindness.¹ You indicate that the criteria are inconsistent with Federal regulations because they exclude children whose vision problems affect their ability to read and write. Furthermore, you

indicate that an example of a vision condition that severely impairs learning is "convergence insufficiency" and that some States' definitions of "visual impairment" exclude children with such a condition.

Under Part B of the IDEA a child with a disability means a child evaluated in accordance with 34 CFR §§ 300.304-300.311 as having a disability, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8(a)(1). Further, under 34 CFR § 300.8(c)(13), "visual impairment including blindness" means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness. OSEP understands that convergence insufficiency results when a person's eyes do not properly turn inward to focus and provide binocular vision and a single image, which could affect a child's ability to read, and therefore, the child's educational performance.

While States may establish standards for eligibility for special education and related services, and are not required to use the precise definition of disability terms in the IDEA, these State-established standards must not narrow the definition in the IDEA. It is important to note that States define or adopt common definitions of certain ambiguous modifiers to guide evaluators in making individualized determinations of eligibility. For example, where the definition of "intellectual disability"² refers to "significantly subaverage general intellectual functioning," 34 CFR § 300.8(c)(6), and, similarly, where the definition of "orthopedic impairment" refers to "severe orthopedic impairment that adversely affects a child's educational performance," States are given discretion to determine the precise level of impairment that qualifies as significant, and severe, respectively, in order for evaluators to implement those definitions. In contrast, the definition of "visual impairment including blindness," does not contain a vague modifier; rather, any impairment in vision, regardless of severity, is covered, provided that such

child's educational performance.

Accordingly, States may not use criteria or other definitions for "visual impairment including blindness" that result in the exclusion of children who otherwise meet the definition in 34 CFR § 300.8(c)(13). State eligibility guidelines and definitions for visual impairment and blindness may not exclude a child with convergence insufficiency or other visual impairment from meeting the definition in the IDEA for visual impairment and blindness if that condition adversely affects that child's educational performance.

The evaluation of vision status and the need for special education and related services should be thorough and rigorous, include a data-based media assessment, be based on a range of learning modalities, including auditory, tactile, and visual, and include a functional visual assessment. An assessment of a child's vision status generally would include the nature and extent of the child's visual impairment, and its affect, for example, on the child's ability to learn to read, write, do mathematical calculations, and use computers and other assistive technology, as well as the child's ability to be involved in and make progress in the general curriculum offered to nondisabled students. Such an evaluation generally would be closely linked to the assessment of the child's present and future reading and writing objectives, needs, and appropriate reading and writing media. The information obtained through the evaluation generally should be used by the IEP Team in determining whether it would be appropriate to provide a blind or visually impaired child with special education instruction or related services as required by the IDEA. In addition, because the evaluation must assess a child's future needs, a child's current vision status should not necessarily determine whether it would be inappropriate for that child to receive special education and related services while in school. Please see OSEP's Dear Colleague Letter on Braille, June 19, 2013, <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/brailledcl-6-1>

cyberFEDS[®] Case Report

With respect to the definition used by DCPS, as the State educational agency for the District of Columbia, OSSE is responsible for establishing and implementing procedures for ensuring that all eligible children with disabilities are identified, located and evaluated, and that a free appropriate public education is made available to all such children. OSSE is also responsible for ensuring that Part B funds are not used to serve children who do not meet the Part B definition of "child with a disability." It is the role of OSSE, rather than this office, to establish State standards for determining eligibility (so long as they are consistent with Part B requirements), and to determine whether DCPS' eligibility guidelines are consistent with State standards, and the requirements of Part B of the IDEA. OSEP will work with OSSE to address this issue.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

Thank you for bringing this matter to our attention. If you have questions, please do not hesitate to contact Jennifer Denny at 202-245-6331 or by email at Jennifer.Denny@ed.gov.

¹Your letter included a copy of the Office of the State Superintendent of Education's (OSSE) Letter of Decision for State Complaint No. 013-004 dated October 16, 2013, in which OSSE identified the five eligibility criteria used by DCPS under the category of visual impairment including blindness:

1. Central acuity with corrective lenses 20/70 in the better eye with correction, or
2. Reduced visual field to 50 degrees or less in the better eye, or
3. A diagnosis of cortical visual impairment, or
4. A diagnosis of a degenerative condition that is likely to result in a significant loss of vision in the future, or

irremediable through medical or therapeutic intervention that has adverse effect on educational performance.

²Rosa's Law (P.L. 111-256) replaced references to "mental retardation" or "mentally retarded" with "intellectual disability" in all Federal health, education, and labor policy.

Cases Cited

61 IDELR 172



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

May 22, 2017

Contact Person
Name: Lisa Pagano
Telephone: (202) 245-7413

OSEP 17-05

MEMORANDUM

TO: State Directors of Special Education, Preschool/619 State Coordinators

FROM: Ruth E. Ryder
Acting Director
Office of Special Education Programs

SUBJECT: Eligibility Determinations for Children Suspected of Having a Visual Impairment Including Blindness under the Individuals with Disabilities Education Act

On November 12, 2014, the Office of Special Education Programs (OSEP) issued a response to an inquiry for policy clarification addressing whether a State educational agency (SEA) and/or local educational agency (LEA) is permitted to establish procedures that further define the disability category, “visual impairment including blindness,” under the Individuals with Disabilities Education Act (IDEA).¹ Since that time, OSEP has received a request for written guidance to assist SEAs in supporting their LEAs in reaching appropriate eligibility determinations for children with this disability. The purpose of this memorandum is to ensure broad dissemination of the key points made in our November 12, 2014 letter, provide the additional guidance requested on this important issue, and share information about outside resources that may be helpful as you examine your State’s procedures related to the identification and evaluation of children suspected of having a visual impairment including blindness.

Applicable IDEA Definitions

Under Part B of the IDEA, a child with a disability means a child evaluated in accordance with 34 CFR §§300.304-300.311 as having a disability, and who, by reason thereof, needs special education and related services. 34 CFR §300.8(a)(1). Further, under 34 CFR §300.8(c)(13),

¹ See OSEP Letter to Kotler available at: <https://www2.ed.gov/policy/speced/guid/idea/memosdelttrs/acc-13-020197r-md-kotlereligibilitycriteria.pdf>.

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“visual impairment including blindness” means an impairment in vision that, *even with correction*, adversely affects a child’s educational performance. (Emphasis added) The term includes both partial sight and blindness.

State and Local Eligibility Criteria

While States are permitted to establish standards for eligibility for special education and related services, and are not required to use the precise definition of a disability term in the IDEA, these State-established standards must not narrow the definitions in the IDEA. We recognize that States often adopt common definitions of certain modifiers to guide evaluators in making individualized eligibility determinations. For example, as OSEP noted in our November 12, 2014 letter, “intellectual disability” refers to “*significantly* subaverage general intellectual functioning,” (34 CFR §300.8(c)(6)), and similarly, the definition of “orthopedic impairment” refers to “a *severe* orthopedic impairment that adversely affects a child’s educational performance” (34 CFR §300.8(c)(8)). In these cases, because the IDEA does not specifically address the meaning of these modifiers, the IDEA gives States discretion to determine the precise level of impairment that qualifies as “*significantly*,” and “*severe*,” respectively, in order for evaluators and eligibility teams to implement these definitions.

In contrast, in the definition of “visual impairment including blindness,” the regulations do not contain a modifier; therefore, *any* impairment in vision, regardless of significance or severity, must be included in a State’s definition, provided that such impairment, even with correction, adversely affects a child’s educational performance. States may not use criteria or other definitions for “visual impairment including blindness” that result in the exclusion of children who otherwise meet the definition in 34 CFR §300.8(c)(13). For example, State eligibility guidelines and definitions for “visual impairment including blindness” may not exclude a child with convergence insufficiency or other visual impairment from meeting the IDEA’s definition of “visual impairment including blindness” if that condition, even with correction, adversely affects that child’s educational performance (e.g., the child’s ability to read and write).

It has come to our attention that some States direct their LEAs to implement a two-step process when addressing whether a child suspected of having a visual impairment may be eligible for special education and related services under the IDEA. During the first step, the eligibility team is required to reach a decision as to whether the child has one or more of the conditions that the State has identified and believes could affect a child’s vision functioning. Examples of such conditions might include: the child has a reduced visual field to 50 degrees or less in the better eye; the child has been diagnosed with cortical visual impairment; or the child has a diagnosis of a degenerative condition that is likely to result in a significant loss of vision in the future. During the second step, the eligibility team determines the extent that it should proceed further and examine whether the condition adversely affects the child’s educational performance. However, if the eligibility team were to conclude the child’s vision difficulties do not fall within one of the

State's listed criteria or conditions, the eligibility team would not consider whether the child's visual functioning adversely affects his or her educational performance. Such a practice is inconsistent with the IDEA. While it is permissible for a State to provide *examples* of the types of conditions that would meet the State's criteria for "visual impairment including blindness," the SEA or LEA may not preclude eligibility teams from considering whether *other* vision conditions, even with correction, adversely affect the child's educational performance such that the child requires special education and related services under the IDEA.

For more information about various types of visual impairments and the ways in which those impairments can affect a child's ability to learn, visit <http://www.parentcenterhub.org/repository/visualimpairment/>.

Evaluation to Determine Whether the Child's Visual Impairment Adversely Affects Educational Performance

Prior to the eligibility determination, each public agency must conduct a full and individual evaluation, in accordance with 34 CFR §§300.304-300.306, before the initial provision of special education and related services to a child with a disability. 34 CFR §300.301(a). The purpose of the evaluation is to determine whether the child qualifies as a child with a disability and the nature and extent of the educational needs of the child. Under 34 CFR §300.304(b)(1), in conducting the evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child that may assist in determining whether the child is a child with a disability and the educational needs of the child. That information could include information from a physician, if determined appropriate, to assess the effect of the child's visual impairment on the child's eligibility and educational needs. However, under 34 CFR §300.304(b)(2), no single measure or assessment may be used as the sole criterion for determining whether the child is a child with a disability and for determining an appropriate educational program for the child.

Under 34 CFR §300.306(c)(1)(i), in interpreting evaluation data for the purpose of determining whether the child is a child with a disability under Part B of the IDEA and the educational needs of the child, the group of qualified professionals and the parent must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior. Under 34 CFR §300.306(c)(1)(ii), the public agency must ensure that information obtained from all of these sources is documented and carefully considered. There is nothing in the IDEA or the Part B regulations that would prevent a public agency from obtaining a medical diagnosis prior to determining whether the child has a

particular disability, and the educational needs of the child.² Also, there is nothing in the IDEA or the Part B regulations that would prohibit a State from requiring that a medical diagnosis be obtained for purposes of determining whether a child has a particular disability, provided the medical diagnosis is obtained at public expense and at no cost to the parents, and is not used as the sole criterion for determining an appropriate educational program for the child. Further, if a State requires a medical diagnosis consistent with the above criteria, such a requirement exceeds the requirements of Part B of the IDEA. Under 34 CFR §300.199(a)(2), the State would be required to identify in writing to the LEAs located in the State, and to the Secretary, that such rule, regulation, or policy is a State-imposed requirement that is not required by Part B of the IDEA and Federal regulations.

When determining a child's vision status, the LEA's evaluation should be thorough and rigorous. Such evaluations should include a data-based media assessment, be based on a range of learning modalities (including auditory, tactile, and visual), and include a functional visual assessment. In previously-issued guidance, OSEP has noted that an assessment of a child's vision status generally would include the nature and extent of the child's visual impairment and its effect on the child's ability to learn to read, write, do mathematical calculations, and use computers and other assistive technology, as well as the child's ability to be involved in and make progress in the general curriculum offered to nondisabled students. Such an evaluation generally would be closely linked to the assessment of the child's present and future reading and writing objectives, needs, and appropriate reading and writing media. The information obtained through the evaluation generally should be used by the eligibility team in determining whether it would be appropriate to provide a blind or visually impaired child with special education or related services as required by the IDEA. In addition, because the evaluation must assess a child's future needs, a child's current vision status should not necessarily determine whether it would be inappropriate for that child to receive special education and related services while in school. Please see OSEP's Dear Colleague Letter on Braille, June 19, 2013, available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/brailledcl-6-19-13.pdf>.

You may wish to consult the following outside resources that address assessments for children who have, or are suspected of having a "visual impairment including blindness."³

- American Foundation for the Blind. Assessments for students who are blind or visually impaired. Retrieved from <http://www.familyconnect.org/info/education/assessments/13>
- American Printing House for the Blind, Inc. Accessible tests resource center. Retrieved from <http://www.aph.org/accessible-tests/>

² In the case of a suspected "visual impairment including blindness," a diagnosis may be made by a medical professional such as the child's pediatrician, ophthalmologist, or optometrist.

³ These organizations are examples of organizations that may be helpful on these matters. We cannot vouch for the quality or completeness of their assistance. They are provided merely as examples, and there may be other organizations that you may wish to consult.

- Perkins eLearning Center. Assessment of students who are blind or visually impaired. Retrieved from <http://www.perkinselearning.org/scout/assessment-students-who-are-blind-or-visually-impaired>

Based on the guidance set forth in this memorandum and OSEP's *Letter to Kotler*, a State may need to review its criteria and revise those criteria, as appropriate, and make sure that its LEAs are informed of the changes. As an example of how a State could revise its criteria, a State could comply with the IDEA requirements by adding a general criterion stating that the definition of "visual impairment including blindness" includes, in addition to other specific State-established criteria, any other impairment in vision that, even with correction, adversely affects a child's educational performance.

OSEP will be following up with States through our various monitoring activities. If you have questions or would like to access technical assistance, please contact your OSEP State Lead. We appreciate your continued efforts to ensure that children suspected of having visual impairments including blindness are provided with an appropriate evaluation and if found eligible under IDEA, the services necessary to meet their special education needs.

cc: Parent Training and Information Centers
OSEP-Funded Technical Assistance Centers



DEPARTMENT OF EDUCATION

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Susan S. Bunting, Ed.D.
Secretary of Education
Voice: (302) 735-4000
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August 25, 2017

MEMORANDUM

TO: Superintendents and Charter Heads
LEA Special Education Directors
Director of Division of Visually Impaired

From: Mary Ann Mieczkowski
Director of Exceptional Children Resources

Re: Immediate Changes for Eligibility Determinations for Children Suspected of Having a Visual Impairment Including Blindness under the Individuals with Disabilities Education Act (IDEA)

Upon reviewing our State regulations for compliance with federal IDEA regulations, we have realized that a change is necessary. Beginning today, please use the IDEA definition under **34 CFR §300.8(c) (13)** when determining eligibility for visual impairment including blindness:

“Visual impairment including blindness” means an impairment in vision that, even with correction, adversely affects a child’s educational performance.

The Office of Special Education Programs (OSEP) issued two communications regarding eligibility criteria for students suspected of having a visual impairment including blindness. In its November 12, 2014 letter, OSEP explains while states may establish standards for eligibility for special education and related services, they are not required to use the precise definition of disability terms in IDEA. However, the state-established standard must not narrow the definition in IDEA. Under 34 CFR §300.8(c) (13), “visual impairment including blindness” means an impairment in vision that, even with correction, adversely affects a child’s educational performance. In other words, *any* impairment in vision, regardless of severity, is covered, provided that such impairment, even with correction, adversely affects a child’s educational performance.

Furthermore, OSEP states in this letter, the evaluation of vision status and the need for special education and related services should be **thorough and rigorous**, include a data-based media



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assessment, be based on a range of learning modalities, including auditory, tactile, and visual, and include a functional visual assessment. An assessment of a child's vision status generally would include the nature and extent of the child's visual impairment, and its affect, for example, on the child's ability to learn to read, write, do mathematical calculations, and use computers and other assistive technology, as well as the child's ability to be involved in and make progress in the general curriculum offered to nondisabled students. Such an evaluation generally would be closely linked to the assessment of the child's present and future reading and writing objectives, needs, and appropriate reading and writing media. The information obtained through the evaluation generally should be used by the IEP Team in determining whether it would be appropriate to provide a blind or visually impaired child with special education instruction or related services as required by the IDEA. In addition, because the evaluation must assess a child's future needs, a child's current vision status should not necessarily determine whether it would be inappropriate for that child to receive special education and related services while in school.

On May 22, 2017, OSEP issued a Memorandum in response to a request for written guidance to assist the state educational agencies in supporting their local educational agencies in reaching appropriate eligibility determinations for children with a visual impairment including blindness disability. The memorandum was issued to ensure broad dissemination of the key points made in the November 12, 2014 letter, to provide the additional guidance requested, and to identify resources that might be helpful to the States as they examine their procedures relating to the identification and evaluation of children suspected of having a visual impairment including blindness.

Both OSEP communications, dated November 12, 2014 and May 22, 2017, state that States may not use criteria or other definitions for "visual impairment including blindness" that result in the exclusion of children who otherwise meet the definition in 34 CFR §300.8(c)(13).

We will be submitting the change to Title 14 Education Delaware Administrative Code this fall and will notify you of the change.

Attachments:

1. OSEP letter of November 12, 2014
2. OSEP Memo of May 22, 2017