

Learning Disabilities Association of North Carolina
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June 1, 2016

Office for Civil Rights
District of Columbia Office
U. S. Department of Education
Lyndon Baines Johnson Department of Education Bldg
400 Maryland Avenue, S.W.
Washington, DC 20202-1475

Catherine E. Lhamon
Assistant Secretary
Office for Civil Rights
U.S. Department of Education
Lyndon Baines Johnson Department of Education Bldg
400 Maryland Avenue, S.W.
Washington, DC 20202-1100

Re: Recent Changes to the North Carolina special education regulations

Dear Sir or Madam,

On behalf of the Learning Disabilities Association of North Carolina (LDA of NC), I am writing to file a complaint arising from recent changes to the North Carolina special education regulations.

On February 4, 2016 the North Carolina State Board of Education approved amendments to the North Carolina Policies Governing Services for Children with Disabilities (the “NC Policies”), the state’s special education regulations. <http://ec.ncpublicschools.gov/gcs04-draft-policies.pdf>

LDA of NC believes as a result of these changes proposed and implemented by the North Carolina Department of Public Instruction (<http://ec.ncpublicschools.gov/>), and adopted by the State Board of Education (<http://stateboard.ncpublicschools.gov/>), nonwhite students with disabilities in low performing schools will be discriminated against and their civil rights violated.

We believe when determining if a student with a specific learning disability is eligible for special education North Carolina **illegally compares the student** “to other groups such as culturally and linguistically similar peers, classroom, school, and/or comparison groups [sic] other comparison groups (such as culturally and linguistically similar peers, classroom and/or school)” and “to state and/or national norms and district norms.”

These regulations will have a disproportionate impact on nonwhite students with disabilities because in North Carolina nonwhite students disproportionately are enrolled in the state’s 50 lowest performing schools (85% of students enrolled in 50 lowest performing schools are nonwhite, compared to about 45% of the total K-12 enrollment for the state).
https://old.northcarolina.edu/nctomorrow/Johnson_-_Demographics_Brief-Final1.pdf

Requested Action

LDA of NC requests that that Office for Civil Rights seek to enjoin NC DPI from implementing the changes to the NC Policies until such time as the NC Policies can be amended so they conform to federal law and do not violate the civil rights of nonwhite students with disabilities in low performing schools.

Background and Explanation

As a result of the adoption of the changes to the NC Policies, one of the four criteria now required by North Carolina for a student to be determined eligible for special education in the disability category of specific learning disability is the student must demonstrate “inadequate academic achievement.”¹

One way North Carolina measures this is by comparing the student to his classmates.

“These measures must include, but are not limited to, two or more of the following: universal screening, interim/benchmark assessments, data from progress monitoring and/or standardized measures of achievement related to the area of concern. When available, sources of data must include state and district wide assessments. **Student performance must include comparison to state and/or national norms and district norms when available. This may include comparison to other groups such as culturally and linguistically similar peers, classroom, school, and/or comparison groups [sic] other comparison groups (such as culturally and linguistically similar peers, classroom and/or school).** These data must be relevant to the area(s) of concern (e.g., reading, math, writing, listening, and oral language).” NC Policies 1503-2.5(d)(11)(ii)(B), at page 77.

The federal regulations are clear, a student’s performance cannot be compared “to other groups such as culturally and linguistically similar peers, classroom, school, and/or comparison groups [sic] other comparison groups (such as culturally and linguistically similar peers, classroom and/or school).”

This language in the NC Policies misconstrues how “cultural factors” are to be applied when making a determination of whether a student has an SLD. The purpose of inclusion of “cultural factors” in the federal regulations is to prevent a student from being identified as a student with disability when his academic underachievement is due to “cultural factors.” **It does not mean that a student’s academic**

¹ This section of the NC Policies is NC DPI’s attempt to conform to §300.309 of the federal regulations where a threshold test for special education eligibility in the category of SLD is:

“(1) The child does not achieve adequately for the child’s age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade-level standards:

- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading fluency skills.
- (vi) Reading comprehension.
- (vii) Mathematics calculation.
- (viii) Mathematics problem solving. 34 CFR Section 330.309(a)(1).

achievement level is determined by comparing his academic achievement to his “culturally and linguistically similar peers.”

When determining the existence of a specific learning disability, the federal regulations provide:

- (3) The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of—
- (i) A visual, hearing, or motor disability;
 - (ii) Mental retardation;
 - (iii) Emotional disturbance;
 - (iv) **Cultural factors**;
 - (v) Environmental or economic disadvantage; or
 - (vi) Limited English proficiency. 34 CFR Section 300.309(a)(3).

The discussion in the comments to the regulations make it clear that “cultural factors” are to be considered only to determine if they are the cause of the child’s low performance. Not to determine if the child’s performance is low.

Comment: One commenter asked what kind of assessment identifies culture as a primary cause of academic performance deficits and recommended removing the requirement in § 300.309(a)(3)(iv) unless there are objective methods to determine whether a child’s low performance is a result of cultural factors.

Discussion: The identification of the effect of cultural factors on a child’s performance is a judgment made by the eligibility group based on multiple sources of information, including the home environment, language proficiency, and other contextual factors gathered in the evaluation. 71 FR 46539 (8/14/2006) at page 46655.

Discussion: Section 300.309(a)(3) is clear that children should not be identified with SLD if the underachievement is primarily the result of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; or environmental or economic disadvantage. The eligibility group makes the determination after the evaluation of the child is completed. Therefore, we believe that there is minimal risk that a child who is underachieving due to these factors will be identified as having an SLD. 71 FR 46539 (8/14/2006) at page 46654.

The comments to the regulations further state:

Discussion: The first element in identifying a child with SLD should be a child’s mastery of grade-level content appropriate for the child’s age or in relation to State-approved grade-level standards, not abilities. This emphasis is consistent with the focus in the ESEA on the attainment of State-approved grade-level standards for all children. State-approved standards are not expressed as “norms” but represent benchmarks for all children at each grade level. **The performance of classmates and peers is not an appropriate standard if most children in a class or school are not meeting State approved standards.** Furthermore, using grade-based normative data to make this determination is generally not appropriate for children who have not been permitted to progress to the next academic grade or are otherwise older than their peers. Such a practice may give the illusion of average rates of learning when the child’s rate of learning has been below average, resulting in retention. **A focus on expectations relative to abilities or classmates simply dilutes expectations for children with disabilities.**

We will modify § 300.309(a)(1) to clarify that, **as a first element in determining whether a child has an SLD, the group must determine that the child does not demonstrate achievement that is adequate for the child's age or the attainment of State-approved grade-level standards**, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards in one or more of the areas listed in § 300.309(a)(1). The reference to "State-approved grade-level standards" is intended to emphasize the alignment of the Act and the ESEA, as well as to cover children who have been retained in a grade, since age level expectations may not be appropriate for these children. The reference to "instruction" will be added to emphasize that children may not be identified as having SLD if there is no documentation of appropriate instruction, consistent with the Act and the ESEA. Consistent with this change, we will add a reference to "State approved grade-level standards" in §§ 300.309(a)(2)(i) and (ii). We will also combine proposed § 300.311(a)(5) and (6) into § 300.311(a)(5) to ensure consistency with the requirements in § 300.309(a). 71 FR 46539 (8/14/2006) at page 46652.

Moreover, on this requirement, the federal regulations are clear; a student's performance cannot be compared "to state and/or national norms and district norms." As the comments to the regulations make clear:

This emphasis is consistent with the focus in the ESEA on the attainment of State-approved grade-level standards for all children. State-approved standards are not expressed as "norms" but represent benchmarks for all children at each grade level 71 FR 46539 (8/14/2006) at page 46652.

NC DPI will point to other language in the NC Policies which they believe which will lead a school to a different conclusion on how to implement the new NC Policies. This is a false argument. If the regulations are inconsistent on their face, then we cannot assume the schools will apply the "correct" rule. The NC Policies need to be clear and consistent. As the NC Policies are written now, it is reasonable to conclude a school will determine if a student demonstrates "inadequate academic achievement" based upon a comparison to his classmates. This is not the test required by federal law. That test is simple: students who fail to attain age or state-approved grade-level standard have met the first requirement in order to be determined to be a child with a specific learning disability.

Example

In Y.E. Smith Elementary school in Durham, North Carolina, about half the school's students are black, and only 5.7% of these students pass both the State Reading and Math tests. <http://www.ncschoolreportcard.org/src/servlet/srcICreatePDF?pSchCode=400&pLEACode=320&pYear=2012-2013> So, under the current NC Policies, when determining if a black student at Y.E. Smith Elementary has demonstrated "inadequate academic achievement," he will be compared to the nearly 95% of black students at Y.E. Smith who do not pass the State Reading and Math tests.

The federal regulations and comments are clear - students who fail to attain a state-approved grade-level standard have met the first requirement in order to be determined to be a child with a specific learning disability. There is no qualifier that if the student's attains the achievement level of his classmates or cultural peers, then he has demonstrated "adequate achievement," and thus cannot have a specific learning disability. The result of this new North Carolina standard will be that different academic achievement standards are applied depending on which cultural group a student belongs. There will be one academic achievement standard for an Hispanic student, another for a white student, and yet another

for an African-American student. In the end, no child in a low performing school will ever be determined to have a specific learning disability.

A “Specific learning disability means a disorder in one 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, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” [34 CFR Section 300.8(c)(10)(i)]

Specific learning disabilities do not discriminate between rich and poor students, or black and white students. Their prevalence is across all populations and a student should not be denied identification because he attends a low performing school.

If you have any questions regarding our request, please feel free to contact me at (919) 929-3621 or joannajbarnes@hotmail.com

Sincerely yours,



JoAnna J. Barnes
President, Learning Disabilities Association of North Carolina

cc: Olegario D. Cantos, VII
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