

Learning Disabilities Association of North Carolina
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May 5, 2016

Ruth Ryder
Acting Director
Office of the Director
Office of Special Education Programs
U.S. Department of Education
Washington, DC

Re: Recent Changes to the North Carolina special education regulations

Dear Ms. Ryder,

On behalf of the Learning Disabilities Association of North Carolina (LDA of NC), I am writing to express our extreme concern with 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 the NC Policies no longer conform to federal law and regulations. We thus request that the Grant Award under Part B of the IDEA be withheld until North Carolina amends its NC Policies to conform to federal law and regulations.

The noncompliant parts are discussed below.

I. When determining if a student has a Specific Learning Disability 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.”

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**

¹ This is the section on eligibility criteria in the North Carolina regulations that attempts to conform to §300.309 of the federal regulations, which is discussed more fully below

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 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.

II. When determining if a student has a Specific Learning Disability North Carolina fails to require that the student fail to meet "State-approved grade-level standards."

The federal regulations make it clear that the child must fail to achieve "State-approved grade-level standards."

(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).

North Carolina not only fails to include this requirement, but creates confusion by instructing the group that is determining if the child has a SLD to consider “state and district wide assessments.” NC Policies 1503-2.5(d)(11)(ii)(B). It is possible North Carolina intended “state ... assessments” to be evaluations of State-approved grade level standards,” but North Carolina also includes “district assessments” which leaves ambiguity and leads to the conclusion that these are assessments other than of “State-approved grade level standards.”

III. The definition of Special Learning Disability in the NC Policies, as amended, no longer conforms to federal law and regulations.

The amended North Carolina definition states:

“(11) Specific learning disability.

(i) General. Means a disability in one or more of the basic processes involved in understanding or in using language, spoken or written, that may manifest itself in the impaired ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The disability substantially limits academic achievement so that the child does not learn at an adequate rate when provided with sustained, high quality instruction and scientific researched-based intervention. Alternate terms may include, but are not limited to, dyslexia and dyscalculia.

(ii) Disabilities not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of serious emotional disturbance, or of environmental, cultural, or economic disadvantage.” NC Policies 1500-2.4(b)(11) at page 4.

The federal law defines Specific Learning Disability as:

(30) Specific learning disability.—

(A) In general.--The term `specific learning disability' means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

(B) Disorders included.--Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(C) Disorders not included.--Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of

emotional disturbance, or of environmental, cultural, or economic disadvantage. 20 USCA § 1401 (30).

The federal regulations of Specific Learning Disability follow the law:

“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).

North Carolina’s change from “disorder” to “disability” in the definition is inconsistent with IDEA

This change was specifically addressed and rejected by the Department of Education in its comments to the regulations.

One commenter recommended using the word “disability,” instead of “disorder,” and referring to specific learning disabilities as a “disability in one or more of the basic psychological processes.”

Discussion: The definition of specific learning disability is consistent with the procedures for evaluating and determining the eligibility of children suspected of having a specific learning disability in §§ 300.307 through 300.311. We do not believe it is necessary to repeat these procedures in the definition of specific learning disability.

Section 602(30) of the Act refers to a “disorder” in one or more of the basic psychological processes and not to a “disability” in one or more of the basic psychological processes. We believe it would be inconsistent with the Act to change “disorder” to “disability,” as recommended by one commenter. 71 FR 46539 (8/14/2006) at page 46551.

The deletion of the modifier “psychological” is an impermissible departure from IDEA

North Carolina’s amended definition of Specific Learning Disability deletes the modifier “psychological” from the subject “processes.” By doing this North Carolina rewrites the definition of SLD in IDEA and attempts to redefine what is a Specific Learning Disability. IDEA, a law that was carefully constructed and debated, recognizes the complexities of SLD’s and that they are based in psychological processes. To delete “psychological” is to fundamentally change the definition in the law.

North Carolina conflates the definition of SLD with eligibility under IDEA and impermissibly adds to the definition a Response-to-Intervention Test

The amended North Carolina definition states:

“The disability substantially limits academic achievement so that the child does not learn at an adequate rate when provided with sustained, high quality instruction and scientific researched-based intervention.”

North Carolina conflates the definition of “Specific Learning Disability” (SLD) with “eligibility for special education services”. This impermissible change directly flows from North Carolina’s use of

the word “disability” instead of “disorder,” and reflects an erroneous application of the law in the Americans with Disabilities Act to special education (that is the addition of the “substantially limits” test).

Additionally, North Carolina impermissibly adds a new requirement to the definition of SLD: a child must fail response-to-invention.

The definition of SLD must simply be a definition of SLD. If a child is found to have a SLD, which in the federal law is defined as a “disorder,” it does not necessarily mean that the child automatically qualifies for an IEP. And it cannot add a response to intervention test to the definition. North Carolina includes eligibility language in the definition of SLD which is not consistent with the definition of SLD in IDEA.

This addition of response to intervention to the definition of SLD was specifically addressed and rejected by the Department of Education in the comments to the regulations:

Comment: One commenter recommended changing the definition of specific learning disability to refer to a child’s response to scientific, research based intervention as part of the procedures for evaluating children with disabilities, consistent with § 300.307(a). A few commenters recommended aligning the definition of specific learning disability with the requirements for determining eligibility in § 300.309.

The Department responded:

Discussion: The definition of specific learning disability is consistent with the procedures for evaluating and determining the eligibility of children suspected of having a specific learning disability in §§ 300.307 through 300.311. We do not believe it is necessary to repeat these procedures in the definition of specific learning disability. 71 FR 46539 (8/14/2016) at page 46551.

North Carolina erroneously states there are “alternate terms” for a “Specific Learning Disability”

The North Carolina revised definition states:

“Alternate terms [for a specific learning disability] may include, but are not limited to, dyslexia and dyscalculia.”

This is simply wrong. “Dyslexia and dyscalculia” are not other ways to describe a SLD; rather as the federal law and regulations correctly provide, the term “specific learning disability” “includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” These are all conditions that come under the larger umbrella of a SLD. Each condition is not synonymous with SLD; the terms are not interchangeable.

Closing

The Learning Disabilities Association of North Carolina requests that you withhold the Grant Award under Part B of the IDEA to North Carolina until North Carolina amends its NC Policies to conform to federal law and regulations. As the NC Policies are now written children who attend low-performing schools will not be identified as a child with a specific learning disability. Furthermore, the

amended North Carolina definition of specific learning disability is misleading and will result in the law being erroneously applied by schools.

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