

Learning Disabilities Association of North Carolina
P.O. Box 3832
Chapel Hill, NC 27515
LDA.of.North.Carolina@gmail.com

October 24, 2016

Marcelo Quiñones
Attorney, Office for Civil Rights U.S. Department of Education
400 Maryland Avenue SW, 4E258
Washington, DC 20202-1475

Re: OCR Complaint # 11-16-1394

Dear Mr. Quiñones,

Thank you for your email of October 4, 2016 in which you ask the following question and request for clarification:

“What is the basis for your assertion that the comparison to culturally linguistically similar peers is discriminatory?”

“Please indicate any facts that could lead one to infer that the policy change to include this comparison has had, is having, or will have a discriminatory impact.”

Background

On February 4, 2016, the North Carolina State Board of Education adopted changes to how children in North Carolina become eligible for Special Education in the category of Specific Learning Disabilities. The Learning Disabilities Association of North Carolina (LDA of NC) has a number of grave concerns about these changes, but most troubling are the changes concerning how North Carolina now determines how a child’s academic achievement level is determined.

To understand LDA of NC’s concern, it is necessary to go back and see how the federal special education laws and regulations make this determination, and why it is important that North Carolina exactly follow federal law and regulations on this and not create its own deviated path.

Federal Law and Regulations

The process to determine if a child is eligible for Special Education in the category of “Specific Learning Disability” is precisely set forth at 34 CFR 300.309, “Determining the existence of a Specific Learning Disability.”

Section “a” of 34 CFR 300.309 establishes the three tests that must be met in order to determine if a child has a Specific Learning Disability. Each of these tests must be strictly adhered to for the

protection of children. We all want to make sure children are not erroneously determined to have a SLD when they do not have a SLD, and conversely we want to make sure children are not erroneously determined to NOT have a SLD when they do indeed have a SLD.

The three tests are as follows:

Test One

A school must determine that the “child does not achieve adequately for the child’s age or [fails] to meet State-approved grade-level standards in one or more of the following [8] areas:”

Oral expression	Listening comprehension	Written expression
Basic reading skill	Reading fluency skills	Reading comprehension
Mathematics calculation	Mathematics problem solving	

It is imperative to point out that the federal law and regulations are unqualified. This is the test. The reasons for the child’s failure are not to be considered, the ONLY test is whether the child failed to achieve at age or grade level. The answer is either “yes” or “no.”

Test Two

A school then must answer in the affirmative either of the following questions:

(1) the “child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified” in Test One “when using a process based on the child’s response to scientific, research-based interventions.”

OR

(2) “The child exhibits a pattern of strength and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development.”

Test Two allows for two models of identification for SLD: (1) A process based on the “child’s response to scientific, research-based intervention,” (2) or the “strengths and weaknesses” model.

The “Strengths and Weaknesses” model under federal regulations is optional for states and NC has opted to not use this model.

Test Three

If a school finds that a child meets Test One and Test Two, then the final step is for the school to make a determination that the findings are not the primarily result of:

A visual, hearing, or motor disability;	Mental retardation
Emotional disturbance	Cultural factors
Environmental or economic disadvantage	Limited English proficiency.

*This is the **safeguard test** – before we determine that a child has a learning disability we want to make sure his poor performance in school is not because he needs glasses and can’t see the board, but because he actually has a learning disability.*

The order of these steps is critical. The determination of whether a child achieves at age or grade level is first. Then a school can ask the question – is the child’s failure to achieve at age or grade level primarily the result of various factors, one of these factors is “cultural factors”.

In determining if a child achieves at age or grade level the Federal Register has extensive comments about how a child’s academic achievement should be judged and the role of “cultural factors” when determining if a child is eligible for Special Education. 71 Fed. Reg. 46339 (8/14/2006).

The federal regulations clearly prescribe the academic yardstick to be used to measure a child’s academic achievement; it is “State- approved grade-level standards” and these state approved standards cannot be “norms”, but must be academic “benchmarks for all children at each grade level”.

This is specifically addressed in the Comments to the Regulations:

“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.” 71 Fed. Reg. at 46652 (8/14/2006)

If child is found to have academic underachievement, the next step is to determine if academic underachievement is primarily the result of “cultural factors” as well as other factors.

“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. Changes: None.” 71 Fed. Reg. at 46654 (8/14/2006)

The federal regulations use the same academic yardstick for all children, namely, state approved grade level standards.

North Carolina’s new regulations will now use a child’s race and ethnicity to determine which academic yardstick will be used to measure a child’s academic performance. If the child is African-America or Hispanic, the child’s academic achievement will no longer be compared to “state standards/benchmarks”, but will be measured by a “African-American” or “Hispanic” yardstick, or as in the words of North Carolina’s new regulations, a child will be compared to “culturally and linguistically similar peers, classroom and/or school.”

When determining the academic achievement of a child, North Carolina will now use different academic standards for different “cultural groups.” A school will decide whether a child does not achieve adequately not by asking “Is the child is able to achieve State-approved grade-level standards?” but instead the school will ask “Is the child able to achieve at the same level as his culturally and linguistically similar peers, classroom and/or school?”

Furthermore, no where in the state regulations does North Carolina define the term “culturally and linguistically similar peers, classroom and/or school.” The terms “classroom” and “school” seem self-explanatory. However, the words “culturally and linguistically similar peers” are broad, ambiguous, and open to multiple interpretations.

The Merriam-Webster dictionary defines “cultural” as “of relating to a particular group of people and their habits, beliefs, traditions, etc.” <http://www.merriam-webster.com/dictionary/culturally> It defines “linguistically” as “of or relating to language or linguistics.” <http://www.merriam-webster.com/dictionary/linguistically> It defines “peers” as “a person who belongs to the same age group or social group as someone else.” <http://www.merriam-webster.com/dictionary/peers>

Based upon the plain language of the words “cultural,” “linguistically,” and “peers,” it is reasonable to conclude that an African-American student and Hispanic student will be grouped with other African-American or Hispanic students. It is easy to see how Hispanic students will be grouped together as they share a common language and can share common or similar habits, beliefs and traditions.

It might be argued that African-America students should not be considered a sharing a “culture” but it is well-established that African-Americans are frequently considered a separate group of people with their own history and traditions. Indeed the school achievement levels of African American students are separately identified thus confirming that schools regard these students as a separate group.

Therefore we can conclude that when North Carolina instructs schools to compare students “to other groups such as culturally and linguistically similar peers, classroom, school, and/or other comparison groups (such as culturally and linguistically similar peers, classroom and/or school [sic]),” North Carolina means schools should compare African-American students to other African-American students and schools should compare Hispanic students to other Hispanic students.

Discussion

Now, to return to your question; you have asked the question,

“What is the basis for your assertion that the comparison to culturally linguistically similar peers is discriminatory?”

First and foremost we must make it clear; North Carolina never should have added any qualifier to Test One.

Second, and the basis for our complaint, North Carolina made their error worse by adding a qualifier that groups students with their “culturally and linguistically similar peers, classroom and/or school” in order to make the decision if a student is eligible for special education. This qualifier is not a harmless error. It is discriminatory.

Discrimination

To answer your question it is important to clarify what exactly is discrimination. Discrimination occurs when different people are treated the same, and the same people are treated differently. In this instance, North Carolina is treating the same students differently. A third-grade student should not be compared to other student, but to state standards.

However, under the new regulations, North Carolina in order to determine eligibility for special education will treat a third-grader differently based upon to which “culturally and linguistically similar peers, classroom and/or school” he belongs. This is discrimination.

Dictionary.com defines “discriminatory” as “characterized by or showing prejudicial treatment, especially as an indication of bias related to age, color, national origin, religion, sex, etc.” By North Carolina’s own words, North Carolina is categorizing children into groups based on their “culturally and linguistically similar peers”. Does this practice of categorizing children by their cultural and linguistic group result in prejudicial treatment? In other words, is the result detrimental to children?

The context of this discussion is the process of determining Special Education eligibility in the category of Specific Learning Disability. In order to determine if using different academic standards for different cultural or linguistic groups is detrimental, let’s take an example of a three 8-year old dyslexic students who are all in the same classroom. (Dyslexia is a learning disability that falls under the category of Specific Learning Disability.) Let’s assume all three children are very dyslexic and their dyslexia is the primary reason these children have significant struggles in reading and school.

Like all learning disabilities, dyslexia is neurobiological in origin, which means that if a child is dyslexic, it has nothing to do with a child’s culture, race, religion, or ethnicity. For more information on dyslexia see The Yale Center for Dyslexia & Creativity. <http://dyslexia.yale.edu/>

In this example, let’s make one child white, one child African-American and one child Hispanic. And, let’s make their academic profile, family income and make-up exactly the same. Again, the main reason why these children are failing to learn how to read is because all three children have very severe dyslexia.

It is well-established that in North Carolina there is an academic achievement gap between different racial and ethnic groups. (See, “The Achievement Gap in North Carolina: Annotated Bibliography,” North Carolina’s Department of Instruction’s Division of Data, Research and Federal Policy, July 2016 <http://www.ncpublicschools.org/docs/aer/achievement-nc/listing-annotated.pdf>). (See also data submitted pursuant to OCR Complaint Nos. 11-10-1311 and 11-10-1313). Simply put, white children as a group in the state of North Carolina achieve at a higher rate than African-American and Hispanic children as a group in the state.

Now, let’s place the white child, African-American child, and Hispanic child in the same classroom at the same school. Again, all three children are very dyslexic and their dyslexia, a learning disability, is the reason why they are failing to learn how to read at grade level.

Their teacher suspects that the reason all three are failing to learn how to read at grade level is because they each have the learning disability dyslexia. All three children have failed to achieve a 3 or 4 on the North Carolina End-of-Grade Reading Test. (There four scores on the state tests – 3 & 4 are passing scores, 1 & 2 are failing scores.) Each child has achieved a 2; they have failed to “meet State-approved grade-level standards.” She requests that all three be evaluated to see if they are eligible for special education in the category of Specific Learning Disability.

Now, returning to the three determination tests described above, the school team making the determination of eligibility for these three students goes to Test One and asks the question of whether the “child does not achieve adequately for the child’s age or [fails] to meet State-approved grade-level standards in one or more of the following [8] areas:” In all three students, the answer is, “Yes, the student is not meeting State-approved grade-level standards.” If North Carolina followed federal law then the

school team would move to Test Two. However, North Carolina has added a second test within Test One.

North Carolina instructs schools to then ask how the child is doing in comparison to “culturally and linguistically similar peers, classroom, school, and/or other comparison groups,” and because the average achievement levels for these three groups – white, African-America, and Hispanic – are different, then different academic standards are used for each child.

So, continuing with the three students described above, In North Carolina 72% of white 3rd graders read at or above grade level (they achieve a 3 or 4 on the North Carolina End-of-Grade Reading Test – the Reading EoG), and 28% fail this state grade-level standard.

(<http://www.dpi.state.nc.us/docs/accountability/reports/green/allstdntprfrm1415.pdf>).

When the white child is compared to other white children, this child is performing below the academic achievement level for his cultural group. The school team will conclude: “This white child’s academic achievement level, when compared to other white children, is below for his cultural group. Therefore this white child’s academic achievement is ‘inadequate.’ Thus, this child has passed Test One in the eligibility evaluation for special education. We can now move to Test Two.”

Now let’s look at the process used to determine the academic achievement level for the African-American student. In North Carolina 42% of African-American 3rd graders pass the Reading EoG, and 58% fail this state grade-level standard. When an African-American student’s academic achievement is being judged, the child’s academic achievement will not be compared to state standards. Instead, when deciding if an African-American student has underachievement in reading, a child will be compared to his “cultural group,” in this case, other African-America students.

In the scenario above, when the African-American child in our scenario above is compared to other African-American students in the state, since most (more than 50%) African-American children in North Carolina are not reading on grade level in 3rd grade, and since this student is not reading on grade-level, then he is achieving as his “cultural peers.” The school team will conclude, “This African-American child, when compared to other African-American children, is **right on par** for his cultural group. Since the child’s academic achievement is **on par** for his cultural group, then this child’s academic achievement is not ‘inadequate.’ We do not move to Test Two.” Without a record of “inadequate academic achievement,” this African-American student will never be eligible for special education. He can never pass Test One in the eligibility evaluation for special education.

A similar analysis can be used for the Hispanic student. In North Carolina 43.6% of Hispanic 3rd graders pass the Reading EoG, and 56.4% fail this state grade-level standard.

So, the result of our scenario with three dyslexic children who each achieve a 2 on the Reading EoG is that the white student’s school team will move on to Test Two and Test Three and the white student may be found eligible for special education. But, the African-American and Hispanic students who also achieved a 2 on the Reading EoG will never be found to be eligible for special education because a different standard was used in their evaluations. Moreover, when this scenario is repeated throughout the state we believe it likely that because this lower academic standard is used for African-American and Hispanic students that very few African-American and Hispanic students will ever be found to be eligibility for special education in the category of Specific Learning Disability.

Does this practice of categorizing children by their cultural group result in prejudicial treatment? Is it discriminatory? In other words, is the result detrimental to children? LDA of NC believes the answer is, “yes.” When a student has the learning disability dyslexia, and he is excluded from special education because of this extra test North Carolina has imposed, then he is harmed. He is denied access to

education. The white student with dyslexia will receive special education and he will learn how to read, the African-American and Hispanic students with dyslexia will never receive special education and might never learn how to read.

Northside Elementary

In your October 4, 2016 email, you also request,

“Please indicate any facts that could lead one to infer that the policy change to include this comparison has had, is having, or will have a discriminatory impact.”

We believe this request is mostly addressed in our discussion above, however we would like to further illustrate the discriminatory impact of this policy change by examining how this change will impact students at one school. For this illustration we have chosen Northside Elementary in the Chapel Hill Carrboro City Schools to present the facts of an actual school. (See attachment) At Northside the 3rd Grade EoG Reading achievements are:

White students –	94.1% achieve a 3 or 4;	5.9% achieve a 1 or 2
African-American students -	42.9% achieve a 3 or 4;	57.1% achieve a 1 or 2
Hispanic students -	23.1% achieve a 3 or 4;	76.9% achieve a 1 or 2

As in the above scenario, if a Northside Elementary white student, African-American student, and Hispanic student each achieve a 2 on the Reading EoG, only the white student will pass Test One and might be found eligible for special education. The African-American and Hispanic students will never pass Test One and so will never be eligible for special education.

We hope the preceding discussion has provided enough information for the Office of Civil Rights to conclude, as we have, that the North Carolina policy change will have a discriminatory impact. And, we once again request that the U.S. Department of Education, Office of Civil Rights, enjoin the North Carolina Department of Public Instruction 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.

Again, if you have any questions or require further information, please feel free to contact me at joannajbarnes@hotmail.com or at 919-260-4672.

Sincerely yours,



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

Attachment

EOG Reading Grade 3 for Northside Elementary in the Chapel Hill-Carrboro Schools

2015-16 State, District, and School Level Drilldown Performance Data (xlsx, 13.4mb)

<http://www.ncpublicschools.org/accountability/reporting/>

EOG percentages are based on the number of a school's reading, mathematics and science tests scored at:

Level 3 or above (grade level proficiency)

Level 4 and above (college- and-career ready proficiency)

EOG Reading Grade 3

District Name	School Name	Standard (CCR - Level 4 & 5, GLP - Level 3 & Above)	% All Students	% American Indian	% Asian	% Black	% Hispanic	% Two or More Races	% White
Chapel Hill-Carrboro Schools	Northside Elementary	College and Career Ready	53.7	*	70.0	14.3	23.1	*	85.3
Chapel Hill-Carrboro Schools	Northside Elementary	Grade Level Proficient EOG of 3 or above	65.9	*	80.0	42.9	23.1	*	94.1