



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

AUG 22 2017

Joanna J. Barnes
President
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Post Office Box 3832
Chapel Hill, North Carolina 27515

Dear Ms. Barnes:

This letter responds to your May 5, 2016 correspondence to the U.S. Department of Education (Department), Office of Special Education Programs (OSEP), and the addendum to that letter provided to our office on April 10, 2017. In your correspondence, you raised concerns on behalf of the Learning Disabilities Association of North Carolina (LDA/NC) regarding amendments approved by the North Carolina State Board of Education to the *North Carolina Policies Governing Services for Children with Disabilities* (hereafter, "Policies"). Specifically, your May 5, 2016 letter states that LDA/NC believes that certain changes to the State's Policies are inconsistent with Part B of the Individuals with Disabilities Education Act (IDEA).

As part of OSEP's review of this matter, we examined the Policies and the information contained in your letters and enclosures. We also conducted a telephone interview with North Carolina Department of Public Instruction (NCDPI) staff, followed up by written questions posed to the State, and a review of the State's written responses.¹

The concerns outlined in your correspondence and OSEP's responses are provided below. We regret the delay in responding to your inquiry.

I. LDA/NC's Statement of Issue #1: "When determining if a student has a Specific Learning Disability [SLD], 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.'"

Question: Is the State's procedure that requires school teams [i.e., eligibility groups] to perform a comparison of a child's performance to that of culturally and linguistically similar peers and State and/or national norms and district norms inconsistent with the IDEA when making eligibility determinations?

Analysis: No. Under 34 CFR §300.309(a)(1), the eligibility group may determine that a child has an SLD if 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 enumerated areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level

¹ All references to "the State" refer to NCDPI.

standards. Although, in the *Analysis of Comments and Changes* accompanying the 2006 final IDEA Part B regulations, the Department stated that “[t]he performance of classmates and peers is not an appropriate standard if most children in a class or school are not meeting State standards,” the Department did not expressly prohibit such comparisons. See *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule*, 71 Fed. Reg. 46540, 46652 (Aug. 14, 2006). Also, as explained further below, the State noted that it requires its eligibility groups to consider the results of this comparison as only one source of information in their analysis of a child’s eligibility for IDEA services. We further note that, since the IDEA’s reauthorization in 2004, there has been considerable research, technical assistance, and guidance disseminated in the field about using a Response to Intervention (RTI) process in the identification of learning disabilities. NCDPI noted in its written response to OSEP that the State has applied practices that are included in the RTI-Based SLD Identification Toolkit developed by the RTI Action Network.²

² The RTI Action Network web page provides the following description: “The RTI Action Network is dedicated to the effective implementation of Response to Intervention (RTI) in school districts nationwide. Our goal is to guide educators and families in the large-scale implementation of RTI so that each child has access to quality instruction and that struggling students – including those with learning and attention issues – are identified early and receive the necessary supports to be successful.” The RTI-Based SLD Identification Toolkit notes that when reviewing data to determine a child is failing to meet age- or grade-level State standards in one of the eight areas identified in 34 CFR §300.309(a)(1), the team must consider the data within the context of two important elements: (1) State norms; and (2) cultural and linguistic sensitivity:

Norm-referenced assessments provide an indicator of the average performance of a student in the same grade in comparison with other students across the country. Local norms are based on grade-level State standards, and a State’s norms may vary in relation to the overall progress of students nationwide...

If differences in culture or language are not considered when interpreting assessment data, the result may be an inappropriate disability designation. For students whose primary language is not English, an evaluation of their current English skills is recommended in order to show relative mastery of English...

If a student belongs to an ethnic or cultural group, or is limited-English proficient (LEP), the team should review achievement data for that population to provide a context for the student’s underperformance. If the performance of the student’s subgroup is significantly lower than that of the total group, an exclusionary factor *may* apply or the student *may* have the impairment of SLD. It is inappropriate to automatically exclude a student from identification for the sole reason that students of a similar demographic group at the school have significantly lower achievement than that of the top group or because the student has LEP...

Evidence of classwide, gradewide, or schoolwide low achievement in the academic area of concern could lead the team to a determination that instruction (e.g., quantity, quality, relevance, alignment with standards) may have a strong relationship to the student’s lack of achievement. Only when the team can determine that the referred student’s academic problems persist while most students in the same demographic (e.g., English language learners, race/ethnicity), class, school, or district are performing satisfactorily can lack of appropriate instruction be ruled out. For example, when approximately 80% of students in the referred student’s class or grade, or other subgroup, are meeting the age- or grade-level State standards, then the referred student’s lack of achievement can be recognized as unique and not a result of the lack of instruction.

See: <http://rtinetwork.org/getstarted/sld-identification-toolkit/ld-identification-toolkit-criterion-1> (The opinions in the RTI-Based SLD Identification Toolkit reflect the opinions of the authors of the Toolkit and do not necessarily reflect the opinions of the Department and should not be construed as an endorsement.)

The assessments and other evaluation materials a public agency uses to assess a child for a disability under the IDEA must be selected and administered so as not to be discriminatory on a racial or cultural basis. 34 CFR §300.304(c)(1)(i). Further, these must be provided and administered 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 do so). 34 CFR §300.304(c)(1)(ii). The public agency must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 CFR §300.304(c)(4). These requirements help to ensure that the group making the eligibility decision has full and accurate data upon which to base its decision.

There is nothing in the IDEA or its implementing regulations that would prohibit the public agency from comparing the child's performance to district, State, and/or national norms. However, the public agency must ensure that no single measure or assessment is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 34 CFR §300.304(b)(2).

OSEP requested clarification from NCDPI on how the State expects eligibility groups to use the comparison information. In its response to OSEP's inquiry, NCDPI reported that "the group of individuals responsible for making eligibility determinations will use the comparison information to: (1) establish that the child's performance is inadequate when compared to age- and grade-level standards; and (2) ensure that a child's difficulties are unique to that child and not an indication that the instruction, curriculum, or learning environment provided to children who are members of the particular subgroup is inadequate." NCDPI stated that upon examination of the comparison data, "if it is determined that particular groups of students are failing to meet age and grade level standards, it would be difficult, if not unethical and discriminatory, to determine the entire subgroup was incapable of succeeding or disabled. Rather, the school would be required to examine the curriculum, instruction and learning environment and determine what improvements needed to be made to ensure that ALL students in all subgroups are meeting age and grade level standards." The State further noted that in North Carolina, each child's individualized education program team is responsible for ruling out lack of appropriate instruction as the determinant factor resulting in the child's inadequate achievement, as required under 34 CFR §300.306(b)(1).

The State noted that "school teams [eligibility groups] are asked to consider a student's performance compared to similar peers whenever possible, in order to ensure that their learning profile is truly different (and indicative of a within child characteristic such as a disability) and not merely a function of instruction/curriculum that is not effective for all learners." The State noted that it requires its eligibility groups to consider the results of this comparison as only one source of information, and the outcome of the comparison is not the sole basis to conclude whether a child is or is not a child with a disability under the IDEA.

Conclusion: Based on our review of documents, interviews with NCDPI personnel, and the State's written response to OSEP explaining how the information comparing a child's performance to that of a similar comparison group is to be used, OSEP concludes that the State's Policies are not inconsistent with the IDEA. We understand LDA/NC's concern that, if the

Policies are not implemented properly, a child could be inappropriately excluded from identification or inappropriately identified as eligible for special education and related services. Thus, it is critical that NCDPI fulfill its general supervisory responsibilities by: (1) providing guidance and technical assistance to its local educational agencies (LEAs) to support proper implementation of the State's Policies; and (2) monitoring its LEAs to ensure the Policies are implemented properly.

II. LDA/NC's Statement of Issue #2: "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.'" LDA/NC also expressed concern that the Policies require the school team [eligibility group] to consider, when available, the child's performance on State- and district-wide assessments as indicators of whether a child demonstrates inadequate academic achievement.

Question: Must a State's procedures include a requirement that the child is unable to meet State-approved grade-level standards?

Analysis: Yes. The Department noted in the *Analysis of Comments and Changes* accompanying the 2006 final IDEA Part B regulations 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)." See 71 Fed. Reg. at 46652.

The Policies at NC 1503-2.5(d)(11)(ii)(B) require that in order to be determined eligible as a child with an SLD, the child must, among other criteria, demonstrate inadequate academic achievement "based on evidence from multiple sources of data indicating that the child does not achieve adequately for the age- or grade-level standards in which the child is enrolled in one more of the following areas when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards: (1) [b]asic reading skills; (2) [r]eading fluency skills; (3) [r]eading comprehension; (4) [w]ritten expression; (5) [m]athematics calculation; (6) [m]athematics problem solving; (7) [l]istening comprehension; or (8) [o]ral expression."

This provision is consistent with the IDEA requirement in 34 CFR §300.309(a)(1).

With respect to the eligibility group's use of data from State- and district-wide assessments in the eligibility determination process, NCDPI explained that looking at a child's performance on norm-referenced standardized assessments provides an indicator of the child's performance in the same grade as compared with other children in the normative sample. However, those data do not provide information relative to the child's performance compared to grade-level standards. The State noted that its norms are based on grade-level State standards and are an important tool to assess a child's achievement in comparison to age- and grade-level standards for the State of North Carolina. The State pointed out that use of State- and district-wide assessment data provides useful information about the child's performance over time, but that use of these data

are not conclusive. NCDPI noted that eligibility groups should look at these data “*as part of the evidence* that the evaluation team considers,” and that the State continues to emphasize that multiple sources of data must be used in the determination of a child’s eligibility under the IDEA (emphasis added).

The *Analysis of Comments and Changes* accompanying the 2006 final IDEA Part B regulations notes that “failing a State assessment alone is not sufficient to determine whether a child has an SLD. However, failing a State assessment may be one factor in an evaluation considered by the eligibility group. As required in §300.304(b)(1), consistent with section 614(b)(2)(A) of the [IDEA], the evaluation must use a variety of assessment tools and strategies to gather relevant information about the child. Further, §300.304(b)(2), consistent with section 614(b)(2)(B) of the [IDEA], is clear that determining eligibility for special education and related services cannot be based on any single measure or assessment as the sole criterion for determining whether a child is a child with a disability.” See 71 Fed. Reg. at 46652.

Conclusion: Based on the review of documents, interviews with NCDPI personnel, and the State’s written explanation of how State- and district-wide assessment information will be used in the eligibility determination process, OSEP concludes that the State’s procedures are not inconsistent with the IDEA.

III. LDA/NC’s Statement of Issue #3: “The definition of Specific Learning Disability in the NC Policies, as amended, no longer conforms to Federal law and regulations.” LDA/NC stated its concern that the revised definition in NC 1500-2.4(b)(11)(i) is inconsistent with the definition provided in 34 CFR §300.8(c)(10) because the revised definition in the Policies:

- uses the term “disability” rather than “disorder;”
- excludes the term “psychological” when referencing “processes;”
- includes language that the child has been provided “sustained, high quality instruction and scientific research-based intervention;” and
- states that “[a]lternate terms may include, but are not limited to, dyslexia and dyscalculia.”

Question: Must States adopt and implement the precise definition of SLD in 34 CFR §300.8(c)(10)?

Analysis: No. As LDA/NC notes, in the *Analysis of Comments and Changes* accompanying the 2006 final IDEA Part B regulations, the Department declined to change “disorder” to “disability” in the definition of SLD in 34 CFR §300.8(c)(10), because the statutory provision defining SLD refers to “disorder” rather than “disability.” 71 Fed. Reg. at 46551. The Department noted that States have some flexibility in how children with SLDs are identified, but also emphasized that a State’s eligibility criteria must meet the requirements set forth in 34 CFR §§300.307-300.311. See 71 Fed. Reg. at 46653 (“State eligibility criteria [for SLD] must meet the requirements in §§300.307 through 300.311 and LEAs must use these State-adopted criteria. We believe that, although these provisions allow States some flexibility in how children with SLD are identified, the requirements in these provisions will ensure that SLD criteria do not vary substantially across States.”). Further, regardless of the terminology in the State’s definition, the State must ensure

that a child who would otherwise be eligible as a child with an SLD based on the definition in 34 CFR §300.8(c)(10) is not found ineligible because the child failed to meet the State's definition.

NCDPI reported to OSEP that “the [State's] definition is not intended to describe the criteria and evaluation requirements to establish the existence of a disability that requires special education and related services; the criteria and evaluation requirements described in policy operationalize the definition.”

Conclusion: OSEP concludes that although the State's definition of SLD differs from the language in 34 CFR §300.8(c)(10), there is nothing in the IDEA that requires the State to use the precise terminology in the Federal definition.

We understand that the changes to North Carolina's Policies discussed in this letter were initiated by the State after consultation with a variety of stakeholders. We would like to emphasize the critical role NCDPI staff have in ensuring appropriate implementation of the revised procedures, consistent with the IDEA. Through its oversight and guidance, NCDPI can support eligibility groups in making appropriate eligibility determinations for children suspected of having an SLD and to ensure the rights of these children and their parents are protected throughout the identification and evaluation processes.

If you have questions regarding the information in this letter, you may contact Lynne Fairfax, OSEP's State Lead for North Carolina, at 202-245-7337.

Sincerely,



Ruth E. Ryder
Acting Director
Office of Special Education Programs

cc: William Hussey, NCDPI