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Letter to Lillie/Felton

Office of Special Education Programs

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Related Index Numbers

455.015 Specific Learning Disability, Identification and Evaluation

185.060 Evaluations, Scope of Evaluation Procedures

455.010 Specific Learning Disability, Eligibility Criteria

135.035 Definitions/IDEA, Specific Learning Disability

Judge / Administrative Officer

Thomas Hehir, Director

Case Summary

In determining a child's current level of educational achievement for purposes of specific learning disability (SLD) identification, can satisfactory grades be discounted if the child receives them due to extraordinary parental or tutoring assistance received outside the school day or compensatory help received at school?

In determining a child's current level of educational achievement for purposes of specific learning disability (SLD) identification, it would generally be appropriate to consider information about outside or extra learning support provided to the child when determining whether a child who receives satisfactory grades is nevertheless not achieving at age-level. Such information may indicate that a child's current educational achievement reflects the service augmentation, not what the child's achievement would be without such help.

Full Text

Appearances:

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Text of Inquiry

A number of problems have surfaced in recent months in North Carolina regarding the interpretation of policy from Office of Special Education and Rehabilitative Services (OSERS). To help us have clear, factual information to share with parents and professionals, the Learning Disabilities Association of North Carolina (LDANC) requests clarification of the intent of Individuals with Disabilities Education Act (IDEA) and OSERS policy decisions in the areas identified below. We would like to have information about the legal basis for the following statements and implications for determination of eligibility for students with learning disabilities.

(1) A review and comments on a letter (attached) from Robert R. Davila, Assistant Secretary of Education to Mr. Brian J. Hartman, dated August 28, 1989, especially those underlined sections which state;

(a) In the second situation *the students would not satisfy the Federal requirement that there be a failure to achieve commensurate with (their) age . . . although there was a failure to achieve commensurate with their ability levels.*

(b) In the case where a student's disability does not interfere with the student's ability to benefit from participation in the regular education program without supplementary aids and services, *and the student is progressing from grade to grade at the same rate as his or her age peers, then that student is not entitled under the Act to special education.*

(c) The requirement of discrepancy from age-appropriate performance reflects a fundamental premise expressed in the Education of the Handicapped Act that children with disabilities are entitled to special education if their disability

adversely impacts their ability to benefit from regular education and that there is a need for special education.

(2) Clarification of what should be taken into consideration by the Multidisciplinary Team when applying Section 300.541; "a multidisciplinary team may determine that a child has a specific learning disability if the child does not achieve commensurate with his or her age and ability levels in one or more of the following areas: (i) Oral expression; (ii) Listening comprehension; (iii) Written expression; (iv) Basic reading skill; (v) Reading comprehension; (vi) Mathematics calculation; or (vii) Mathematics reasoning."

One of the significant problems we've been consulted about has to do with STUDENTS WITH LEARNING DISABILITIES WHO ARE BEING DENIED SPECIAL EDUCATION SERVICES BECAUSE THEY ARE RECEIVING As, Bs AND Cs ON THEIR REPORT CARDS AND ARE PASSING FROM GRADE TO GRADE AT THE SAME RATE AS THEIR PEERS. Some parents are even being told that a standard score of 85 or higher on an academic portion of the Woodcock Johnson indicates that the child is achieving at grade level in that subject and therefore, does not need special education services. We are also receiving calls from teachers saying that some Multidisciplinary Teams are being told that they now must consider as a part of eligibility criteria, whether the students' disability *adversely impacts* their ability to benefit from regular education (as stated in the Davilla letter). The term "*adversely impacts*" is given a very restrictive definition by the school systems.

School systems seem to be basing their eligibility policies for students with learning disabilities on the following factors:

1. The standard established by the Supreme Court in Board of Education v. Rowley that a handicapped child is not entitled to a special education (IEP) that is designed to permit him to reach his maximum or optimum potential and "that the LEA is not required to provide the best education,

only an 'appropriate one,' even though the North Carolina State statute says; "The policy of the State is to insure every child a free and full opportunity to reach his full potential."

2. A 1989 letter of finding written by Robert R. Davila, former Assistant Secretary of Education commenting on Section 300.541(a) of the Federal regulations in which Mr. Davila stated "*In the second situation the students would not satisfy the Federal requirement that there be a failure to achieve commensurate with [their] age . . . , although there was a failure to achieve commensurate with their ability levels.*" Mr. Davila's choice of words gives the impression that a *Federal requirement of failure* is written into the Individuals with Disabilities Education Act (IDEA). Unfortunately, Mr. Davila's rendering of the law is causing loss of services for many students with learning disabilities who are in need of special education services in order to receive benefit from education.

Another statement in Mr. Davilla's letter that raises an issue for IEP Teams when they are making eligibility decisions for students with learning disabilities is "IN THE CASE WHERE A STUDENT'S DISABILITY DOES NOT INTERFERE WITH THE STUDENT'S ABILITY TO BENEFIT FROM PARTICIPATION IN THE REGULAR EDUCATION PROGRAM WITHOUT SUPPLEMENTARY AIDS AND SERVICES, AND THE STUDENT IS PROGRESSING FROM GRADE TO GRADE AT THE SAME RATE AS HIS OR HER AGE PEERS, THEN THAT STUDENT IS NOT ENTITLED UNDER THE ACT TO SPECIAL EDUCATION" Many students identified as having learning disabilities are not failing to achieve commensurate with their age level and are passing from grade to grade at the same rate their peer. Yet these same students are still in need of special education and related services in order to benefit from education. This is true for students with above average intelligence as well as students with average intelligence. The reason these students are achieving and passing is because parents are spending countless

hours helping their children with homework, reviewing material and studying for tests. Parents also spend a great deal of money year after year on tutors thereby providing services themselves. Another factor in the academic success of these students is that many of their teachers do an outstanding job of individualizing instruction and modifying curriculum and tests. These children are not failing because they are not being allowed to fail. Parents and teachers are giving this type of support because they understand the devastation that comes with failure.

Thus, we contend that these two factors need to be addressed when eligibility decisions are made:

1. How much help is the student receiving outside of the school day?

2. Does the student need remedial help in the areas of reading, writing and arithmetic? Modifications/compensatory by-pass strategies are vitally important to the academic success of most students with learning disabilities, however, in some cases modifications can also mask severe academic weaknesses which might possibly respond to individualized instruction. For example:

A 6th grade student receives As and Bs on her report card. She has a learning disability in written language, dictates most written work to a parent, takes all tests orally and reads all class work to the teacher because the teacher can't understand what the student has written. Direct services in the area of written language is not considered because the student receives As and Bs on her report card and in fact she loses her eligibility for special education services, even though she has over the 15 point discrepancy, because she is achieving commensurate with the age and ability levels of her peers.

An 8th grade student receives As, Bs and some Cs on his report card. He has an identified learning disability in reading yet he has never received a comprehensive diagnostic evaluation in reading and has not received direct reading instruction since 5th grade. He struggles to read his text books in school and his parents help him to read school books in the

evening including all math instructions and math word problems. Upon reevaluation this student also loses eligibility for services because he did not have the 15 point discrepancy required by North Carolina. He was, however, only tested in the areas of broad reading and broad math. His mother is told that because he is achieving above grade level, the school system will not do the alternative method of documenting a discrepancy. The possibility that he might benefit from direct reading instruction is not taken into consideration.

Two court decisions; Ohio (Toledo Public School District 1989) and Pennsylvania (Conrad Weiser Area School District v. Thomas and Wendy L., February 10, 1992), supported parents whose children were achieving academically to the point that the school systems thought the students should not receive special education services. One student was academically gifted/learning disabled and was achieving at or above grade level; the other had a low IQ and was achieving at or above potential. Both courts gave a great deal of credit for the students' achievement levels, to daily help from parents, teachers and private tutors. According to these courts achieving at or above grade/age level or achievement level, does not disqualify a student from eligibility for special education services.

- (3) Clarification of the responsibilities granted to the Administrative Placement Committee (APC) according to Federal Law and definition of what is meant by the word 'PLACEMENT' in regard to their job description. Does the term 'placement decisions' mean eligibility decisions (whether or not the student is going to be placed in a special education program); or in which part of the continuum of placements the student will receive special education; or allocation of resources? Is the APC Committee given the authority to override eligibility decisions made by the Multidisciplinary Committee at the local school level?

In North Carolina the School Based Committee and/or the Multidisciplinary Committee collects all student information including evaluations and then makes the decision as to whether or not the student

indeed has a learning disability and is eligible for, and in need of special education and related services. This Committee, including a Local Education Agency Representative, signs all state and federal paperwork and then together with the parent writes and signs the IEP. The signed Special Education Forms and the IEP then goes to the Administrative Placement Committee (APC) located in each Local Educational Agency's Central Administration Office. According to NC. Special Education Policies and Procedures Manual, the APC Committee is empowered to make final decisions on eligibility.

In some cases their parents have been informed that their children are not eligible after the IEP Team met with the parents, the parents were told that the child received the necessary 15 point discrepancy, every person on the IEP Team including the LEA Representative signed all of the necessary paper work which stated that the child had a learning disability that was not correctable without special education services and every person on the IEP Team, including the parents agreed upon the contents of the IEP and signed it. The special education forms and IEP were then sent to the Administrative Placement Committee (APC) where special education services for that student were denied because the APC Team overrode the eligibility decision made by the IEP Team. Unfortunately, these are not isolated incidences.

(4)(a) A policy statement as to the compliance of the NC guidelines with the evaluation procedures mandated by the last part of Section 300.541.

(b) A list of tests that may be used to test achievement in the areas of reading comprehension, basic reading, mathematics calculation or mathematics reasoning.

The North Carolina Special Education Policies and Procedures Manual only instructs the LEA to test the student in Reading and Arithmetic and does not follow the federal mandate 300.541 which specifically requires separate testing in the areas of basic reading and reading comprehension and in mathematics calculation and mathematics comprehension. Currently, N. C. Special Education

Guidelines only require students with suspected learning disabilities to be evaluated in five areas, instead of the seven areas designated by Section 300.541. Many diagnosticians and psychologists are unaware of this facet (mandate) of federal law because it is currently not mentioned in NC. Guidelines; therefore students are only evaluated in broad reading and broad mathematics. Advocates who have requested that federal law be followed, have been told by NCDPI, that the Woodcock Johnson (the most commonly used educational test) cluster scores of basic reading and reading comprehension, which are composites of the broad reading; as well as the cluster scores of mathematics calculation and mathematics reasoning may not be used because the cluster scores are not considered statistically reliable.

We are looking forward to receiving your policy decisions relating to our concerns. Your interest in these issues is very much appreciated.

Text of Response

This letter is in further response to your request for clarification of the requirements of Part B of the Individuals with Disabilities Education Act (Part B) that govern procedures for determining whether children suspected of having specific learning disabilities are eligible for services under the Part B program. Based on your inquiry and a subsequent telephone conversation between Ms. Lillie and a member of my staff, the specific issues which you wanted clarified in writing were identified. The relevant issues and our responses appear below. Please excuse the delay in responding to your request.

In items (1) and (2) of your letter, you raised questions about a letter to Mr. Brian J. Hartman dated August 28, 1989, concerning situations in which some students with exceptionally high I.Q.s may be eligible for special education services, under the specific learning disability category, while others may not. A more recent clarification from this Office relevant to the issues that your inquiry raises is set forth in a letter to Stephen Mark Ulissi, Ph.D, dated January 14, 1992 (copy enclosed). The more recent clarification to

Mr. Ulissi represents the Department's current position on the relevant issues and supersedes the clarifications set forth in the August 28, 1989 letter to Mr. Hartman.

The letter to Mr. Ulissi clarifies that "each child who is evaluated for a suspected learning disability *must be measured against his or her own expected performance, and not against some arbitrary general standard.*" The Part B regulations include requirements, at 34 CFR §§ 300.540-300.543, which must be used for evaluating children suspected of having specific learning disabilities, in addition to the evaluation requirements at 34 CFR §§ 300.530-300.534. The multidisciplinary evaluation team, whose responsibilities for evaluating a child with a specific learning disability are specified at 34 CFR §§ 300.541-300.543, is responsible for making a determination as to whether there is a severe discrepancy between an individual child's ability and his or her performance level.

The interpretation in the letter to Dr. Ulissi is that underachievement is measured against the student's own ability, and not against a normative performance standard. Thus, each child's educational needs are determined on a case-by-case basis, using the evaluation procedures at 34 CFR §§ 300.530-300.534, and the additional criteria at 34 CFR §§ 300.540-300.543 when evaluating children with learning disabilities.

You are also concerned that, because of a statement in the August 28, 1989 letter to Mr. Hartman, "teachers [are] saying that some Multidisciplinary Teams are being told that they now must consider as a part of eligibility criteria, whether the student's disability *adversely impacts* their ability to benefit from regular education." Part B contains no such requirement. In order to be eligible for services under Part B, a child must be evaluated as having one or more of thirteen specified physical, mental, emotional, or sensory impairments, which cause the child to need special education and related services. 20 U.S.C. § 1401(a)(1). The common denominator in this definition is that the child's impairment

"adversely affects educational performance." 34 CFR § 300.7(b)(1)-(b)(13). Part B does not otherwise define this concept. The term "*adversely affects*" is used in the Part B regulations at 34 CFR § 300.7 in the phrase "adversely affects a child's educational performance." An operational definition of "educational performance" is included in a letter to William M. Lybarger, Ed.D. dated September 14, 1990 (copy enclosed). That letter states that a child's educational performance must be determined on an individual basis, and should include non-academic and academic skills. Since the measurement of "educational performance" is different for each child, the Department has not developed a single definition for this term. Similarly, the term "adversely affects" must be determined on an individual basis.

The January 14, 1992 letter to Dr. Ulissi also states:

. . . Neither Part B nor the Part B regulations provide for any exclusions based on intelligence level in determining eligibility for Part B services.

The regulations, at 34 CFR § 300.541(b), do provide that:

[t]he team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of---

(1) A visual, hearing, or motor [disability]; (2) Mental retardation; (3) Emotional disturbance; or (4) Environmental, cultural, or economic disadvantage.

No mention is made in the regulations of any exclusions solely on the basis of intelligence. *All children, except those specifically excluded in the regulations, regardless of I.Q., are eligible to be considered as having a specific learning disability, if they meet the eligibility requirements contained in the Part B regulations.*

In your letter, you stated that you are concerned that some students are being disqualified for services under Part B because they are passing from grade to grade, without taking into consideration any severe discrepancy between the child's ability and the child's

performance. Ms. Lillie indicated in her conversation with a member of my staff that, in some instances, a child's final grade in mathematics or reading, or a score on an achievement test, alone, is used to determine whether a child is eligible for services under Part B.

In order for a child to be eligible for services under Part B under the specific learning disability category, there must be a severe discrepancy between the child's achievement and intellectual ability *in one or more of the following areas*: oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematics calculation, or mathematics reasoning. 34 CFR § 300.541(a)(2)(i)-(vii). None of the areas listed at § 300.541(a)(2)(i)-(vii) can be categorically excluded from the areas that the multidisciplinary team examines to determine whether a child has a specific learning disability. A child may be considered to have a specific learning disability if the multidisciplinary evaluation team finds that the child "does not achieve commensurate with his or her age and ability levels" in one or more of the areas, and the child has a severe discrepancy between achievement and intellectual ability in these areas that is not the result of other known handicapping conditions or environmental, cultural, or economic disadvantage. *See* 34 CFR § 300.541(a)(1)-(2) and (b). Of course, as is the case for all other children who are identified as having a disability, a child is not eligible for services under Part B unless, because of their disability, they need special education and related services. *See* 34 CFR § 300.7(a).

You also asked if the evaluation team should consider any tutoring that the child receives outside of the school day, or any modifications or compensatory strategies that are used with the child, and that the child needs in order to succeed academically, when determining whether the child is eligible for services under Part B. Although this specific issue is not addressed in the Part B regulations, a team may find that a child has a specific learning disability if the team determines that "[t]he child does not achieve

commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels" 34 CFR § 300.541(a)(1). Generally, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child in developing the written report required at 34 CFR § 300.543, as such information may indicate that the child's current educational achievement reflects the service augmentation, not what the child's achievement would be without such help. Such information may also have bearing on the evaluation team's conclusion, required by 34 CFR § 300.543(b)(6), on whether the child has "a severe discrepancy between achievement and ability that is not correctable without special education and related services."

In item (3) of your letter, you asked about which groups appropriately make eligibility and placement decisions. Before a child can receive services under Part B, the responsible public agency must evaluate the child in accordance with the requirements of 34 CFR §§ 300.531-300.532, and in the case of children suspected of having a learning disability, the requirements of 34 CFR §§ 300.540-300.543. Under Section 300.532, the evaluation must be made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability. *See* 34 CFR § 300.532(e). For children suspected of having learning disabilities the additional team member specified at § 300.540 must also be included in the multidisciplinary team. The evaluation must assess the child "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." *See* 34 CFR 300.532(f). After the evaluation is completed, the determination is made about whether or not the child is eligible for services under Part B.

Under Part B, placement decisions must be made

"by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." *See* 34 CFR § 300.533(a)(3). The term "placement" as used in this provision encompasses eligibility (e.g., placement into special education), placement in a continuum option, and location in which services will be delivered. While the regulation requires that each of these decisions be made in accordance with 34 CFR § 300.533, it does not require that all of those decisions be made at the same time, or even by the same group of persons.

If the child is eligible for services under Part B, the school district must conduct a meeting to develop an individualized education program (IEP) for the child, within thirty days of the date of the eligibility determination. *See* 34 CFR § 300.343(c). Although the Part B regulations clearly contemplate that IEP meetings are held after eligibility decisions are made, they do not necessarily preclude the development of IEPs in anticipation of eligibility determinations.

One of the determinations made by the participants at the IEP meeting is the specially-designed instruction or special education services, as well as any necessary related services, to be included in the IEP. Since the IEP forms the basis for decisions about where the child will receive services (34 CFR 300.552(a)(2)), the decision about where the IEP will be implemented generally would be made after the IEP meeting has taken place.

As indicated below, we are referring your inquiry about how eligibility determinations are being made in North Carolina to the North Carolina Department of Public Instruction (NCDPI).

In item (4) of your letter, you alleged that North Carolina is not complying with the requirements at 34 CFR § 300.541 because its policies do not require separate testing of basic reading and reading comprehension, and mathematics calculating and mathematics comprehension. You stated that in North Carolina, "students are only evaluated in broad reading and broad mathematics" and that North Carolina's guidelines "only require students with

suspected disabilities to be evaluated in five areas, instead of the seven designated at [34 CFR § 300.541]." As stated earlier in this letter, none of the areas listed at 34 CFR § 300.541(a)(2)(i)-(vii) can be categorically excluded from the areas that a multidisciplinary team examines to determine whether a child has a specific learning disability. A child may be considered to have a learning disability if the multidisciplinary team finds that the child "does not achieve commensurate with his or her age and ability levels" in one or more of the areas listed at 34 CFR § 300.542(a)(2)(i)-(vii), and each of the seven areas listed at 34 CFR § 300.541(a)(2)(i)-(vii) must be taken into consideration when evaluating a child with, or a child suspected of having, a specific learning disability.

In item (4), you also asked about tests that can be used to evaluate the areas listed at 34 CFR § 300.541(a)(i)-(vii). The Part B regulations set out requirements for evaluating children with disabilities at 34 CFR §§ 300.530-300.534, with additional criteria for evaluating children with specific learning disabilities at 34 CFR §§ 300.540-300.543. Neither the Act nor the Part B regulations prescribe specific tests which must be used to meet the Federal requirements. The regulation at 34 CFR § 300.532 requires State and local educational agencies to ensure that tests and other evaluation materials: "(1) Are provided and administered in the child's native language or other mode of communication, unless clearly not feasible to do so; (2) Have been validated for the specific purpose for which they are used; and (3) Are administered by trained personnel in conformance with the instructions provided by their producer." No single test or procedure may be used as the sole criterion for determining the appropriate educational program for a child.

As discussed earlier with Ms. Lillie, North Carolina's implementation of issues raised in items (3) and (4) in your letter will be handled as a complaint involving Part B. You will note from the enclosed letter that we have forwarded your complaint to NCDPI, and have requested that agency to take action

to resolve the complaint, in accordance with the "State Complaint Procedures" in Part B at 34 CFR §§ 300.660-300.662 of the Part B regulations.

These regulations require that, within 60 calendar days of receiving the complaint, NCDPI must provide you with a written decision that addresses each allegation in the complaint, and contains (1) findings of fact and conclusions, and (2) the reasons for the final decision. We have asked NCDPI to provide us with a copy of its written decision.

To obtain more information about the resolution of your complaint, or to discuss any complaints that you may have in the future, you can contact:

Mr. E. Lowell Harris
Director
Exceptional Children Support Team
North Carolina Department of Public
Instruction
Education Building
301 North Wilmington Street
Raleigh, North Carolina 27601-2825
Telephone: (919) 715-1565

I hope that you find this information helpful. If I can be of further assistance, please let me know.

Statutes Cited

20 USC 1401(a)(1)

Regulations Cited

34 CFR 300.541(a)

34 CFR 300.540-300.543

34 CFR 300.7(b)(1)-(b)(13)

34 CFR 300.541(b)

34 CFR 300.7

34 CFR 300.541(a)(2)(i)-(vii)

34 CFR 300.541(a)(1)-(2)

34 CFR 300.7(a)

34 CFR 300.541(a)(1)

34 CFR 300.543

34 CFR 300.543(b)(6)

34 CFR 300.531-300.532

34 CFR 300.532

34 CFR 300.532(e)

34 CFR 300.532(f)

34 CFR 300.533(a)(3)

34 CFR 300.343(c)

34 CFR 300.541

34 CFR 300.552(a)(2)

34 CFR 300.600-300.662

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