

LDAMC's Comments on Proposed Regulations for IDEIA 2004

September 6, 2005

Troy R. Justesen, Acting Deputy Assistant Secretary
Office of Special Education and Rehabilitative Services
U.S. Department of Education,
400 Maryland Avenue, SW.,
Room 5138, Potomac Center Plaza
Washington, DC 20202

Dear Mr. Justesen:

The Learning Disabilities Association of Montgomery County (LDAMC) respectfully submits our comments for your consideration on the proposed regulations, published in the Federal Register on June 21, 2005 (Volume 70, Number 118), implementing the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA 2004). LDAMC, an affiliate of the Learning Disabilities Association of America (LDA), is a non-profit volunteer organization representing individuals with learning disabilities, their families, and the professionals who serve them. LDAMC has over 340 members from Montgomery County and the Greater Washington Metropolitan Area. The goals of our organization are to: (1) create greater awareness of learning disabilities and ADHD among parents, professionals and the general public; (2) improve education, employment and social opportunities for persons with learning disabilities; (3) educate parents and young adults for their role as advocate/self-advocate; and (4) connect parents and young adults with learning disabilities to community resources.

While all of the proposed regulations in Part B will have an impact on the education of students with learning disabilities, we are limiting our written comments to the provisions in proposed §§300.307 through 300.311 that would revise current regulations regarding the additional procedures for evaluating children suspected of having specific learning disabilities (SLD). These proposed regulations, particularly those provisions in §§300.307 and 300.309, will have a significant impact on the eligibility of students with learning disabilities for services under IDEA. Our comments include broad policy concerns, technical issues, and concerns with respect to the clarity of the regulations. These comments are LDAMC's, and do not necessarily reflect the opinions of the LDA.

We believe that the proposed regulations do not reflect the body of neuropsychological and psycho-educational research that supports the key role the assessment of inter- and intra-individual differences in cognitive abilities and performance play in both identifying SLD and appropriate research-based interventions. Although SLD typically manifests as a lack of academic achievement, the disorder should not be conceptualized as merely an inability to acquire basic academic skills, such as reading and writing. SLD is a neurologically based group of heterogeneous disorders. The 13 organizations of the LD Roundtable acknowledged intra-individual differences as a fundamental concept of SLD and recognized that a child's pattern of strengths and weaknesses and/or cognitive abilities may impact the child's achievement.

In addition, LDAMC is concerned that without further clarification, several of the proposed provisions will lead to numerous problems in interpretation and implementation by State and local education agencies that will negatively impact on the eligibility of students with learning disabilities. There are also technical problems in some of the proposed provisions that, as written, appear to be inconsistent with other provisions. It is imperative that the Department of Education (ED) clarify the meaning or intent of these provisions by either revising the regulation, providing further clarification in the analysis of comments, or by publishing further guidance (e.g., questions and answers) along with the regulations.

Proposed §300.307 – Specific learning disabilities

LDAMC understands the problems associated with the use of the discrepancy model as it has been implemented and does not support the sole or primary use of a statistical IQ discrepancy formula or criterion for determining eligibility for students with specific learning disabilities. However, we are concerned that proposed regulations at §300.307 (a)(1) that allow a State to “prohibit the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability” may lead States to develop evaluation policies and practices that are not sufficiently comprehensive to identify the student’s pattern of cognitive abilities and impairments, including intra-individual differences that are crucial in identifying appropriate interventions, accommodations, and placement.

In addition, the regulations need to be revised to both clarify and emphasize that while the proposed regulations in §300.307 through §300.311 provide additional procedures for evaluating children suspected of having specific learning disabilities, State and local education agencies must still carry out the evaluation of these students consistent with the provisions in §300.304. In particular, it is important to emphasize that educational agencies must --

- (1) use of a variety of assessments tools and strategies to gather relevant functional, developmental, and academic information about the child (§300.304 (b)(1));
- (2) not use any single procedure 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 (§300.304 (b)(2));
- (3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (§300.304 (b)(3));
- (4) 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 (§300.304 (c)(4));
- (5) ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs (§300.304 (c)(6)); and
- (6) use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided (§300.304 (c)(7)).

Unfortunately, many LEAs did not fully comply with the requirements in current §300.532 and limited the procedures for evaluating students suspected of having a learning disability to the additional requirements prescribed in current §300.541.

In fact, in practice, many LEAs, limited their assessment tools to an IQ test and an achievement test and used an IQ – achievement discrepancy formula as the sole criterion in making their

determination of eligibility. This practice made it nearly impossible to identify older students because the lack of appropriate instruction over several years impacts both the IQ score and achievement thereby gradually reducing the magnitude of the discrepancy.

To address these problems, we suggest that §300.307 (a) be revised to read as follows:

§300.307 Specific learning disabilities

(a) General. A State must adopt, consistent with §300.309, criteria for determining whether a child has a specific learning disability as defined in §300.8 and ensure that the State's evaluation procedures are consistent with the requirements in §300.304. In addition, the criteria adopted by the State--

(1) May not require that a local educational agency take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in determining whether a child has a specific learning disability as defined in §300.8;

(2) May prohibit the use of an intellectual ability and achievement discrepancy formula as the sole or primary criterion in determining whether a child has a specific learning disability as defined in §300.8;

(3) Must permit the use of a process that determines if the child responds to scientific, research-based intervention as part of its procedures in conducting the evaluation described in §300.304 and in determining whether the child has a specific learning disability in §300.309; and

(4) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability as defined in §300.8.

Proposed §300.309 -- Determining the Existence of SLD

The proposed regulations would establish four major elements that will be used to determine whether a child has a SLD. These elements are:

(1) The child does not achieve commensurate with the child's age in one or more of the eight specified areas listed in §300.309 (a)(1) when provided with learning experiences appropriate to the child's age;

(2) The child fails to make sufficient progress in meeting State-approved results when using a response to scientific, research-based intervention process, OR the child exhibits a pattern of strengths and weaknesses that the team determines is relevant to the identification of a SLD;

(3) The groups findings are not primarily the result of other visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage; and

(4) In making its determination, the group must consider evidence that the child was provided, either prior to, or as a part of, the referral process, appropriate high-quality, research based instruction in regular education settings consistent with the Elementary and Secondary Education Act, including that – the instruction was delivered by qualified personnel and data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during the instruction, was provided to the child's parent

Proposed §300.309 (a)(1)

The proposed regulations that establish the procedures for evaluating children suspected of having specific learning disabilities are not consistent with the definition of specific learning disability in §602 (30) of IDEA and proposed regulations at §300.8. These provisions state that “the term SLD 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.” However, the areas listed in §300.309 (a)(1) do not fully implement the definition of SLD.

The areas specified in §300.309 (a)(1) include: (1) oral expression, (2) listening comprehension, (3) written expression, (4) basic reading skill, (5) reading fluency skills, (6) reading comprehension, (7) mathematics calculation, and (8) mathematics problem solving. The ability to listen, speak, read, write, and perform mathematics are consistent with 6 of the 7 areas in the definition of the SLD. However, proposed §300.309 does not include one of the most significant problem areas experienced by many students with learning disabilities. The statutory definition refers to this problem area as the “ability to think.” In the scientific literature, this critical area is typically referred to as cognitive processing.

Cognitive processing impairment often affects students’ ability to fully understand the content of what is being taught in the classroom and typically affects learning across many academic areas. It is this area of impairment, in conjunction with listening comprehension, that is the major reason students with learning disabilities have such a difficult time learning in the regular education classroom. Impairments in cognitive processing also affect “rate of learning”. The significance of rate of learning is discussed in the RTI literature. However, it is only conceptualized in terms of basic academic skills in reading, writing, and math, and does not include the affect on the student’s ability to learn the content material presented in core subject areas ,such science, social studies, and literature.

Students with SLD can often improve their reading, writing, and math skills through effective research-based interventions. However, they will continue to have difficulty “learning” and participating meaningfully in the regular education classroom if they have processing impairments. By the time they have processed one piece of information, the rest of the class has sped through several more concepts and facts. As a result, they often miss crucial information and are perplexed when the information appears on a test. Unfortunately, many regular education teachers have not been trained to understand the impact of specific weaknesses in cognitive processing. LDAMC members’ experiences have demonstrated that the untrained teacher will most likely respond defensively and blame the student when questioned about the student’s failure to acquire knowledge presented and discussed in class, rather than consider a cognitive processing impairment.

The educational system’s limited understanding of the impact of cognitive processing on educational performance, self-concept, and mental health is the major failure of inclusion with respect to SLD students. Academic difficulties due to weaknesses in cognitive processing have an even greater impact in middle school and high school when learning requires enhanced recall of past knowledge, organization, and higher order analytical and comprehension skills to “put it all together.” The typical practice of providing output accommodations are not beneficial if the student has not learned or does not fully understand the content.

Proposed regulations at §300.309(a)(1) would also make a small, but significant change as compared to the former provision in current law §300.541(a)(1) by dropping the phrase “and ability levels.” In determining the existence of a learning disability, proposed regulations at §300.309 (a)(1) would require the group to first make a determination that the child does not achieve commensurate with his or her age in one or more of the eight specified areas. We are concerned about the potential impact the new language may have on students who are achieving commensurate with their age with a lot of assistance from the family and tutors, but are still performing well below their ability.

We recommend that paragraph (a)(1) be revised to read —

“(1) The child does not achieve commensurate with the child’s age or with the child’s ability levels in one or more of the following areas, when provided with learning experiences appropriate for the child’s age: ...”

Proposed §300.309(a)(2)(i)

ED needs to clarify meaning of the term “State-approved results” in proposed §300.309(a)(2)(i). It is not clear whether the term “State-approved results” means criteria established by the State in determining whether a student has made sufficient progress on a specific scientific, research-based intervention, or whether the term means the State’s standard for proficiency in an academic area such as reading or math based on State assessments as required under No Child Left Behind..

Proposed §300.309(a)(2)(ii)

As written, proposed §300.309(a)(2)(ii) is very confusing and should be rewritten to provide clarity. In addition, we suggest that the term “cognitive ability” be substituted for the term “intellectual development.” Although information obtained from analyzing performance on IQ subtests can be useful in providing information on a student’s cognitive abilities, we are concerned that term “intellectual development” may be narrowly interpreted by educational agencies to mean performance on an IQ test. In fact, given ED’s statements in the preamble with respect to IQ testing, we are puzzled by the use of the term “intellectual development” in this provision. The term “cognitive ability” is preferable because it more appropriately reflects the fundamental concepts underlying SLD and can be assessed with a variety of appropriate assessment tools.

We suggest simplifying the language to read —

“(ii) the child exhibits a pattern of strengths and weaknesses in performance and/or cognitive abilities that is determined by the team to be relevant to the identification of a specific learning disability, using appropriate assessments consistent with §§300.304 and 300.305;

Proposed §300.309 (b)

Before determining that a child has a specific learning disability, proposed §300.309(b) would require that the evaluation team consider data that demonstrate that prior to, or as part of the

referral process: (1) the child received appropriate high-quality, research-based instruction in regular education settings; and (2) data-based documentation of repeated assessments of achievement were provided.

ED needs to clarify intent of the language in proposed §300.309(b), requiring that as a part of the evaluation the group must consider data that demonstrates that the child was provided appropriate high quality, research-based instruction in the regular education setting prior to, or as a part of, the referral process. Does this language require the LEA to provide the child appropriate high quality, research-based instruction in the regular education setting prior to, or as a part of, the referral process before the group can make a determination that the student has a specific learning disability and is eligible for special education and related services under IDEA? Can the group make a determination that a student has a specific learning disability in the absence of such data, in whole, or in part?

If not, the regulation is requiring local educational agencies to implement a response to scientific, research-based intervention process as part of its evaluation procedure. Imposing such a requirement is inconsistent with §614(b)(6) of IDEA and proposed regulations at:

- (1) §300.307 that permits a process that examines whether the child responds to scientific, research-based intervention as part of the evaluation procedures, and permits the use of other alternative procedures for determining whether a child has an SLD; and
- (2) §300.309(a)(2)(i) which provides the option of using a response to scientific, research-based intervention process as one of the criteria in determining whether a child has an SLD.

In addition, the option of providing such instruction as part of the referral process does not seem to make sense in light of the requirements in §300.301(c)(1). The provision of appropriate high quality, research-based instruction, including the requirements for data-based documentation of repeated assessments at reasonable intervals, cannot be carried out within 60 days of receiving parental consent for the evaluation. Thus, States would be forced to either establish a much lengthier timeframe for conducting SLD evaluations, or institute a pre-referral requirement for students suspected of having a specific learning disability.

LDAMC supports early intervention and the use of appropriate high-quality, research-based instruction for all children who are experiencing problems in academic performance. However, we know that many school districts do not currently have the resources and capacity to carry out this provision and that regular education teachers do not have the training and support to carry out such interventions with fidelity. Thus, we are concerned that the immediate implementation of this requirement will have a negative impact on the identification of SLD and the receipt of special education services.

We recommend that proposed §309 (b) be revised to read as follows:

“(b) If a child suspected of having a specific learning disability was provided research-based instruction in the regular education setting, the group must consider, as part of the evaluation described in §§300.304 through 300.306 ---

(1) the quality of the instruction and its consistency with §1111(b)(8)(D) and (E) of the ESEA, including that the instruction was delivered by qualified personnel; and

(2) the extent to which data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, was provided to the child's parents.”

Thank you for the opportunity to share the views of LDAMC on the proposed IDEA regulations. As you are aware, your actions will have a significant impact on the education and lives of students with learning disabilities. Thus, it is imperative that you very carefully consider our comments and the comments of other organizations representing individuals with learning disabilities, their parents, and their educators in finalizing the regulations implementing Part B of the Individuals with Disabilities Education Improvement Act of 2004.