



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

JUN - 3 2016

The Honorable Barbara A. Mikulski
United States Senate
Washington, DC 20510

Dear Senator Mikulski,

This is in response to your April 5, 2016 letter to Secretary of Education John King, Jr. Your letter was referred to the Office of Elementary and Secondary Education for review and I am pleased to respond to your letter on his behalf. Thank you for highlighting important provisions regarding high-ability children and the Jacob K. Javits Gifted and Talented Students Education (Javits) Program in the Every Student Succeeds Act (ESSA). The U. S. Department of Education (Department) is committed to supporting every child in achieving their maximum potential, including high-ability children, many of whom may not yet be high-achievers.

The challenges of educating gifted and talented students identified in the national survey of the states¹ that you've referenced, *e.g.*, lack of teacher training and lack of data, are critical. They must be addressed and the new authorizing language in ESSA provides the Department with an opportunity to do so. For example, in the new law, the opportunity to use Title I funds to identify and serve high-ability students will, in part, serve to dispel the notion that diverse and disadvantaged communities do not produce gifted and talented children. The new provisions in Title II permitting States to include gifted and talented students' needs in the state plan, will allow for innovation in the identification process as well as in the delivery of enriched curricula through more customized instruction. Further, like you, we are eager to know more about the findings of the National Center for Research on Gifted Education's study that examines district practices in three states. Their results and recommendations will inform the creation of effective strategies that enhance teaching and support student learning.

The new law provides time and authority for the Department to work with the public to ensure a smooth and orderly transition to the ESSA. As the Department continues to analyze the ESSA, we will provide additional information on the ESSA website at www.ed.gov/essa. We are conducting listening sessions across the country. To date, we have held over 200 meetings with stakeholders from across the education system and will continue to conduct listening sessions on guidance issues with diverse groups of

¹ *State of the States 2014 - 2015*, National Association for Gifted Children and the Council of State Directors of Programs for the Gifted, 2015.

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

stakeholders, including those from rural areas, tribes, and those representing a variety of professional perspectives, in the coming months. These listening sessions provide an opportunity for the public to provide comment and feedback to the Department on implementation of the ESSA. Please also know that specific information about the Javits Program will be forthcoming as the Department continues to plan the implementation of the ESSA.

If you have additional questions or concerns, please contact the Department's Office of Legislation and Congressional Affairs at 202-401-0020. Please note that I am sending an identical response to Senator Grassley.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ann Whalen', with a long horizontal flourish extending to the right.

Ann Whalen

Senior Advisor to the Secretary

Delegated the Duties of Assistant Secretary for
Elementary and Secondary Education



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

December 20, 2013

Dr. Jim Delisle
Distinguished Professor of Education (Retired)
P.O. Box 3550
North Myrtle Beach, SC 29582

Dear Dr. Delisle:

This letter is in response to your emails to me dated March 8, 2013 and April 4, 2013 asking for clarification of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations as they apply to children who have high cognition and who may have specific learning disabilities (SLD). In your communications, you refer to these children as “twice exceptional students” or “2E students.”

The IDEA does not specifically address “twice exceptional” or “2E” students. It remains the Department’s position that students who have high cognition, have disabilities and require special education and related services are protected under the IDEA and its implementing regulations. See *Letter to Anonymous*, dated January 13, 2010 (55 IDELR 172). That is, under 34 CFR §300.8, a child must meet a two-prong test to be considered an eligible child with a disability: (1) have one of the specified impairments (disabilities); and (2) because of the impairment, need special education and related services.

With regard to your first question, under 34 CFR §300.307, a State must adopt, consistent with 34 CFR §300.309, criteria for determining whether a child has an SLD as defined in 34 CFR §300.8(c)(10). In addition, the criteria adopted by the State: (1) must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has an SLD; (2) must permit the use of a process based on the child’s response to scientific, research-based intervention; and (3) may permit the use of other alternative research-based procedures for determining whether a child has an SLD. Therefore, a State’s criteria under 34 CFR §300.307 may permit, but must not require, the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has an SLD.

Regarding your second question, the regulations do not require or prohibit a State’s use of “cut scores” when determining if there is a severe discrepancy between intellectual ability and achievement for determining whether a child has an SLD; rather, the regulations allow a State flexibility in establishing its criteria for determining whether a child has an SLD, as long as those criteria meet the requirements in 34 CFR §300.307(a). It is important to note that in determining whether a child has a disability -- whether an SLD or any of the other disability categories identified in 34 CFR §300.8 -- the IDEA requires the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and prohibits the use of any single measure or assessment 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)(1) and (2). Therefore, it would be

inconsistent with the IDEA for a child, regardless of whether the child is gifted, to be found ineligible for special education and related services under the SLD category solely because the child scored above a particular cut score established by State policy. Further, under 34 CFR §300.309(a)(1), the group described in §300.306 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... 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 following areas: oral expression; listening comprehension; written expression; basic reading skill; reading fluency skills; reading comprehension; mathematics calculation; or mathematics problem solving.

In the *Analysis of Comments and Changes* in the 2006 final regulations implementing Part B of the IDEA, the Department, in responding to public comments, recognized that there will be some students who are gifted but also need special education and related services. See 71 Fed. Reg. 46540, 46647 (Aug. 14, 2006) ("Discrepancy models are not essential for identifying children with SLD who are gifted. However, the regulations clearly allow discrepancies in achievement domains, typical of children with SLD who are gifted, to be used to identify children with SLD."). In responding to a public comment specifically addressing students who are gifted and who have difficulty with reading fluency, the Department stated as follows: "No assessment, in isolation, is sufficient to indicate that a child has an SLD. Including reading fluency in the list of areas to be considered when determining whether a child has an SLD makes it more likely that a child who is gifted and has an SLD would be identified." 71 Fed. Reg. at 46652.

Lastly, you suggest that OSEP adopt specific language to clarify the use of discrepancy models and response-to-intervention models when determining if a child is a child with an SLD. We believe that further clarification is unnecessary at this time.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

I hope this information is helpful. If you have questions, please do not hesitate to contact Jennifer Wolfsheimer at 202-245-6090 or by email at Jennifer.Wolfsheimer@ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Melody Musgrove". The signature is fluid and cursive, with a long horizontal line extending to the right.

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs



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

April 17, 2015

Contact Person
Name: Rebecca Walawender
Telephone: 202-245-7399
OSEP 15-08

MEMORANDUM

TO: State Directors of Special Education

FROM: Melody Musgrove, Ed.D. /s/
Director
Office of Special Education Programs

SUBJECT: *Letter to Delisle*: Children with disabilities with high cognition

I am writing to draw your attention to the Office of Special Education Programs' (OSEP) December 20, 2013 letter to Dr. Jim Delisle (*Letter to Delisle*) regarding determining eligibility for special education and related services under the Individuals with Disabilities Education Act (IDEA) for children with disabilities with high cognition; students who Dr. Delisle terms "twice exceptional students" or "2E students." *Letter to Delisle* pointedly addresses children with high cognition who may be eligible for special education and related services as a student with a specific learning disability, but also cites to the broader requirements in 34 CFR §300.304(b)(1) and (2) that state, in part –

... in determining whether a child has a disability ... the IDEA requires the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and prohibits the use of any single measure or assessment 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."

In spite of the guidance provided in *Letter to Delisle*, we continue to receive letters from those who work with children with disabilities with high cognition, particularly those with emotional disturbance or mental illness, expressing concern that some local educational agencies (LEA) are hesitant to conduct initial evaluations to determine eligibility for special education and related services for children with high cognition.

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In transmitting OSEP Memo 15-08, I am requesting that you widely distribute *Letter to Delisle* to the LEAs in your State, and remind each LEA of its obligation to evaluate all children, regardless of cognitive skills, suspected of having one of the 13 disabilities outlined in 34 CFR §300.8

Should you have any questions, please contact Rebecca Walawender at (202) 245-7399. We appreciate your on-going commitment to providing quality services to children and youth with disabilities.

Attachment



Know Your Rights: Students with ADHD

If you are the parent or guardian of a student in public elementary or secondary school, including a charter school, and that student has attention-deficit/hyperactivity disorder (ADHD), the information below summarizes your rights and your school district's legal obligations under a Federal civil rights law that prohibits disability discrimination called Section 504 of the Rehabilitation Act of 1973 (Section 504).

Federal Law Protects Students from Disability Discrimination

- Section 504 protects any student with a disability from discrimination based on disability.
- Regardless of how well he or she performs in school, a student who has trouble concentrating, reading, thinking, organizing or prioritizing projects, among other important tasks, because of ADHD may have a disability and be protected under Section 504.
- A student with ADHD who has a disability under Section 504 may also be entitled to special education or related aids or services from his or her school district.

Your School District Must Determine if A Student Has a Disability and Needs Services

- Under Section 504, your school district must evaluate a student, at no cost to you, if the district believes or has reason to believe a student has a disability and needs special education and/or related services because of that disability.
- You can also request that the school district evaluate a student. For example, you might request an evaluation if you suspect a student has ADHD, or a student has received a diagnosis of ADHD outside of school.
 - A district must either: (1) conduct the evaluation, or (2) explain why it is refusing to evaluate the student and notify you of your right to dispute that decision through the due process procedures under Section 504.
 - During an evaluation process, you can, but are not required to, provide information to the school to consider before an evaluation.
- Signs that a student may need an evaluation could be: considerable restlessness or inattention; trouble organizing tasks and activities; communication or social skill deficits; or significant difficulty related to beginning a task, recalling information, or completing assignments.
- Your school district must determine if an evaluation is necessary even if a student exhibits behavioral (and not academic) challenges.
- If the school district suspects a student has a disability, the district cannot deny or delay this disability evaluation in order to first provide the student with intervention strategies.
- If your school district requires, as part of the evaluation, a medical assessment to determine whether a student has ADHD, the school district must ensure that the student receives this assessment at no cost to you.



- When conducting the disability evaluation, your school district cannot consider the positive effects of mitigating measures in determining if a student has a disability. For example, if your daughter uses medication to address ADHD, the school district cannot consider the positive effects of that medication as a basis to determine she does not have a disability.

A Student May Be Entitled to Individualized Services to Meet His or Her Needs

- All elementary and secondary school students who are individuals with disabilities as defined by Section 504 are entitled to a free appropriate public education (FAPE). Under Section 504, FAPE is the provision of regular or special education and related aids and services designed to meet a student's educational needs as adequately as the needs of students without disabilities are met.
- School districts often set forth these needed services in a document, typically referred to as a "Section 504 Plan."
 - The school district cannot limit FAPE to those aids or services that are free or low-cost, and cannot exclude needed aids and services just because of their expense.
- Not every student with ADHD needs the same set of services, or any services at all. School districts cannot simply provide the same aids and services to all students with ADHD. Each student's needs may be different, and Section 504 requires school districts to provide for those individual educational needs.
- The special education or related aids and services that are included in a student's Section 504 Plan, or similar document, should be clear and detailed so that you and the school both understand what the plan requires, and can make sure it is implemented consistently.

Your School District Must Provide You with Due Process Under Section 504

- The school district must allow you to appeal district actions regarding the identification, evaluation, or educational placement of a student with a disability. This obligation is more commonly known as "due process."
- The school district must tell you about this due process system, notify you of any evaluation or placement actions, allow you to examine the student's records, provide you an impartial hearing, allow you to have a lawyer at that hearing, and provide you a review procedure.

Resources

To learn more about a school district's Section 504 obligation to provide FAPE to students with ADHD, please see OCR's July 2016 Dear Colleague Letter and Resource Guide, at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf>, and visit OCR's website, at www.ed.gov/ocr.

If you want to learn more about your rights, or if you believe that your school is violating Federal law, you may contact the U.S. Department of Education, Office for Civil Rights, at (800) 421-3481, (800) 877-8339 (TDD), or ocr@ed.gov. You may also file a complaint online at www.ed.gov/ocr/complaintintro.html.



AB-1369 Special education: dyslexia. (2015-2016)

SECTION 1. *Section 56334 is added to the Education Code, to read:*

56334. *The state board shall include "phonological processing" in the description of basic psychological processes in Section 3030 of Title 5 of the California Code of Regulations.*

SEC. 2. *Section 56335 is added to the Education Code, to read:*

56335. (a) *The Superintendent shall develop program guidelines for dyslexia to be used to assist regular education teachers, special education teachers, and parents to identify and assess pupils with dyslexia, and to plan, provide, evaluate, and improve educational services to pupils with dyslexia. For purposes of this section, "educational services" means an evidence-based, multisensory, direct, explicit, structured, and sequential approach to instructing pupils who have dyslexia.*

(b) *The program guidelines shall include, but shall not be limited to, characteristics typical of pupils with dyslexia and strategies for their remediation, as well as information to assist educators in distinguishing between characteristics of dyslexia and characteristics of normal growth and development.*

(c) *In developing program guidelines pursuant to subdivision (a), the Superintendent shall consult with teachers, school administrators, other educational professionals, medical professionals, parents, and other professionals involved in the identification and education of pupils with dyslexia.*

(d) *The Superintendent shall complete the program guidelines in time for use no later than the beginning of the 2017–18 academic year.*

(e) *The Superintendent shall disseminate the program guidelines through the department's Internet Web site and provide technical assistance regarding their use and implementation to parents, teachers, school administrators, and faculty members in teacher training programs of institutions of higher education.*