



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 that reads "Melody Musgrove". The signature is written in a cursive style with a large, looping initial "M".

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