

January 13, 2010

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Dear XXXXXXXXX:

This is in response to your letters dated October 8, 2009 and October 10, 2009 to U.S. Department of Education (Department) Secretary Arne Duncan. Both letters were forwarded to the Office of Special Education and Rehabilitative Services (OSERS) for response. Your letters ask for clarification of the Individuals with Disabilities Education Act (IDEA) as it applies to children with disabilities requiring special education and related services who have high cognition (what you term, “twice exceptional students,” “students who are gifted” and “students who have high cognition and have disabilities”) as well as how other laws apply to this population, including the Elementary and Secondary Education Act (ESEA), section 504 of the Rehabilitation Act of 1973 (Section 504), and the Americans with Disabilities Act (ADA).

As you are aware, the ESEA was amended in 2002. Laurel Nishi of my staff in the OSERS informed you during a phone call on November 12, 2009, the Department is currently conducting a "Listening and Learning" tour to seek public input about changes to the ESEA. By the end of the year, the Secretary or a senior staff member had led “Listening and Learning” events in all 50 states. During the phone call, you stated that you would take advantage of this public hearing opportunity to share the concerns you raise in your letters as they relate to the ESEA. It is also my understanding that the Department’s Office for Civil Rights (OCR) sent an electronic mail (e-mail) response to you on December 8, 2008, regarding concerns you raised with that office about protections and services under Section 504 and the ADA for students who have disabilities and high cognition. Therefore, this letter will not address either of those concerns. This letter addresses your concerns as they relate to the IDEA.

In your letter dated October 8, 2009, you specifically referenced students with high cognition and disabilities such as Attention Deficit Hyperactivity Disorder (ADHD), Asperger’s Syndrome, and specific learning disabilities related to reading, writing, and mathematics who struggle to timely complete grade-level work and have difficulties with organizational skills, homework completion, affective areas, social skills, classroom behavior, reading and math fluency, writing and math operations.

The IDEA is silent regarding “twice exceptional” or “gifted” 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. 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. For example, a child

with high cognition and ADHD could be considered to have an ‘other health impairment,’ and could need special education and related services to address the lack of organizational skills, homework completion and classroom behavior, if appropriate. Likewise, a child with Asperger’s Syndrome could be considered under the disability category of autism and the individualized evaluation would address the special education and related services needs in the affective areas, social skills and classroom behavior, as appropriate.

With regard to students with specific learning disabilities (SLD), the Analysis of Comments and Changes in the regulations implementing Part B of the IDEA (71 Fed. Reg. 46540, at 46647 and 46652, August 14, 2006) contemplates that there will be some students with high cognition who need special education and related services:

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...;

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.

Moreover, it has been the Department’s long-standing position that, in general, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child to determine whether the child’s current academic achievement reflects the service augmentation, and not what the child’s achievement would be without such help.

Based on this analysis, we believe that the IDEA and its regulations do provide protections for students with high cognition and disabilities who require special education and related services to address their individual needs.

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 further questions, please do not hesitate to contact Dr. Deborah Morrow, of my staff, at 202-245-7456.

Sincerely,

/s/

Alexa Posny
Acting Director
Office of Special Education Programs