



Policy Brief

Accessible Instructional Materials: Ensuring Access for Students with Learning Disabilities

Accessible Instructional Materials (AIM) are specialized formats of curricular content that can be used by and with print-disabled learners. They include formats such as Braille, audio, large print, and electronic text. The 2004 reauthorization of the Individuals with Disabilities Education Act (“IDEA 2004”) introduced provisions pertaining to the establishment of the National Instructional Materials Accessibility Standard (“NIMAS”) and the National Instructional Materials Access Center (“NIMAC”), which have the potential to improve the production and delivery of accessible instructional materials for students with print disabilities.¹ Although students with learning disabilities could clearly benefit from these provisions, it is likely that many are being excluded from the NIMAS/NIMAC process as a result of limiting and confusing eligibility criteria. Under IDEA, Section 504 of the Rehabilitation Act of 1973 (“Section 504”),² and Title II of the Americans with Disabilities Act (“ADA”),³ school districts have an obligation to ensure the timely provision of appropriate, accessible instructional materials for *all* students with disabilities who

require such materials because of their disability-related needs, regardless of whether the students are NIMAS/NIMAC-eligible. Because it is difficult, in terms of cost and time, for districts to provide accessible instructional materials in ways other than through NIMAS/NIMAC, students with learning disabilities who need accessible instructional materials, but are not

eligible for NIMAS/NIMAC, may not receive the accessible materials to which they are entitled, in violation of IDEA, Section 504, and Title II of the ADA.

Part I of this Policy Brief presents background information, including an overview of the 1996 Chafee Amendment to the U.S. Copyright Act, the NIMAS and the NIMAC provisions, the NIMAS/NIMAC

eligibility requirements, and the tension between the rights of students with learning disabilities to receive accessible instructional materials and the economic interests of publishers. Part II provides an analysis of the implications of the NIMAS/NIMAC eligibility criteria for students with learning disabilities. Part III presents issues for future consideration.

“Although students with learning disabilities could clearly benefit from these provisions, it is likely that many are being excluded from the NIMAS/NIMAC process as a result of limiting and confusing eligibility criteria.”

¹See generally 20 U.S.C. §§ 1412(23), 1413(a)(6), 1474(e); 34 C.F.R. §§ 300.172, 300.210.

²29 U.S.C. § 794; 34 C.F.R. § 104.1 *et seq.*

³42 U.S.C. § 12132; 28 C.F.R. § 35.101 *et seq.*

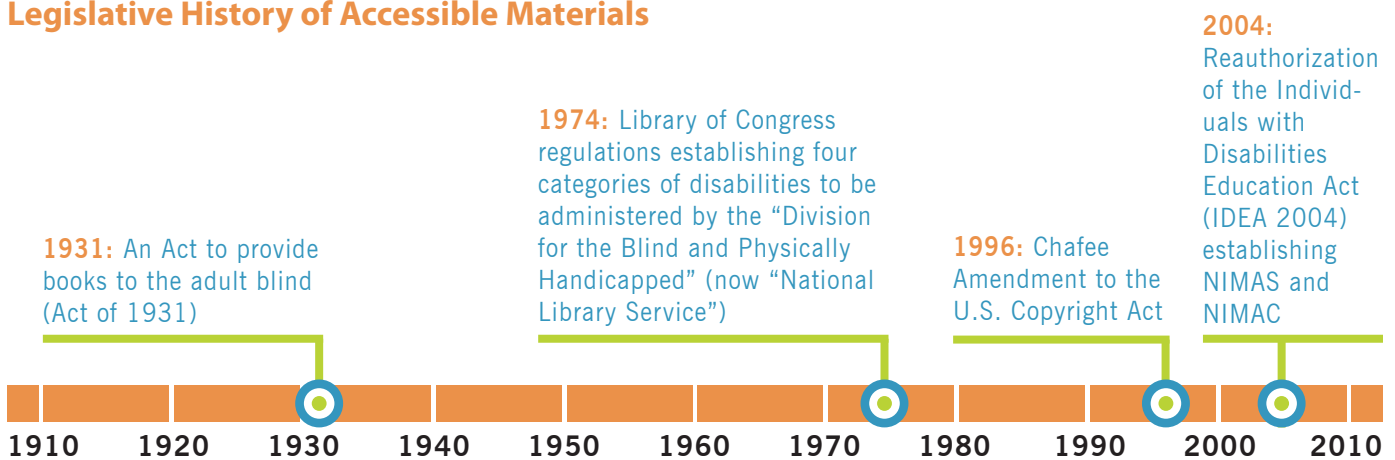
Background

Legal Situation Prior to the NIMAS and the NIMAC: Chafee Amendment

In order to understand the NIMAS and the NIMAC provisions in IDEA 2004, it is necessary to examine the 1996 Chafee Amendment to the U.S. Copyright Act.⁴ The Chafee Amendment provides an exemption from copyright infringement liability to “authorized entities” in the reproduction or distribution of copies of previously published copyrighted works in specialized formats exclusively for use by “blind or other persons with disabilities.”⁵ An “authorized entity” is defined as “a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.”⁶ The term “specialized formats” was originally defined to mean Braille, audio, or digital text exclusively for use by blind or other persons with disabilities,⁷ but was expanded following IDEA 2004 to include large print with respect to print instructional materials.⁸

The term “blind or other persons with disabilities” is defined as individuals who are eligible or may qualify in accordance with “An Act to provide books for the adult blind,” approved March 3, 1931 (“Act of 1931”).⁹ The Act of 1931 authorized the Librarian of Congress to set up a national library program that would provide books for use by the adult blind.¹⁰ The statute was subsequently revised in 1952 to include children¹¹ and in 1966 to include individuals with “physical handicaps.”¹² In 1974, the Library of Congress issued regulations establishing four categories of disabilities for the purpose of eligibility for the national library program, which was to be administered by the “Division for the Blind and Physically Handicapped” of the Library of Congress.¹³ In 1981, this Division was renamed in the regulations, the “National Library Service for the Blind and Physically Handicapped (“NLS”).¹⁴ In order to be eligible under the Chafee Amendment, an individual must fall under one of the four NLS categories, which will be examined further in the discussion of eligibility for NIMAS below.

Legislative History of Accessible Materials



⁴17 U.S.C. § 121.

⁵*Id.* § 121(a).

⁶*Id.* § 121(d)(1).

⁷17 U.S.C. § 121(c)(3)(1996) (amended 2004) (current version at 17 U.S.C. § 121(d)(4)(A)).

⁸*Id.* § 121(d)(4)(B).

⁹17 U.S.C. § 121(d)(2) (citing 2 U.S.C. § 135a (1931)).

¹⁰An Act to provide books for the adult blind, ch. 400, § 1, 46 Stat. 1487 (Mar. 3, 1931) (codified as amended at 2 U.S.C. § 135a), available at <<http://www.loc.gov/nls/act1931.html>>.

¹¹An Act of July 3, 1952, ch. 566, 66 Stat. 326 (July 3, 1952) (codified as amended at 2 U.S.C. § 135a).

Pub. L. 89-522, § 1, 80 Stat. 330 (July 30, 1966) (codified as amended at 2 U.S.C. § 135a) (visited Aug. 16, 2010), available at <<http://www.loc.gov/nls/pl89522.html>>.

¹³39 Fed. Reg. 20203 (June 7, 1974) (codified at 36 C.F.R. §§ 701.10 (a), (b)) (current version at 36 C.F.R. §§ 701.6(a), (b)). In 1970, the Library of Congress had issued regulations identifying three categories of disabilities for the national library program – “legally blind,” “visually handicapped,” and “physically handicapped.” 35 Fed. Reg. 10589 (June 30, 1970) (codified at 44 C.F.R. § 501.10(b)).

¹⁴46 Fed. Reg. 48661 (Oct. 2, 1981) (codified at 36 C.F.R. § 701.10 (a)) (current version at 36 C.F.R. § 701.6(a)).

By eliminating the need for authorized entities to receive permission from copyright holders prior to converting copyrighted works into specialized formats, the Chafee Amendment sought to reduce delays in the time taken for blind and other persons with disabilities to receive accessible materials.¹⁵ When Senator Chafee introduced the Amendment on the floor of Congress in 1996, he acknowledged the support of the Association of American Publishers (“AAP”), the National Federation for the Blind (“NFB”), the American Foundation for the Blind (“AFB”), the American Printing House for the Blind (“APH”), and Recording for the Blind & Dyslexic (“RFB&D”).¹⁶

While the Chafee Amendment helped to improve the provision of accessible materials to individuals with disabilities, the Amendment did not succeed in eliminating the administrative and technical delays associated with the process of converting works into specialized formats.¹⁷ Some States subsequently passed their own legislation or regulations pertaining to the provision of accessible instructional materials to students with print disabilities.¹⁸ Because there was no uniform standard, different States and districts would often request that publishers produce the same textbook in different file formats,¹⁹ a situation that resulted in unnecessary duplication and cost. To address these continuing challenges, disability advocacy groups and publishers collaborated on the drafting of proposed legislation at the federal level.²⁰ The Instructional Materials Accessibility Act (“IMAA”), introduced in 2002 but not enacted, called for the creation of a national repository of electronic files to be developed from a common standard that could be accessed by States and local school districts.²¹ The language of the IMAA was eventually adapted and incorporated into IDEA 2004.

Provisions in IDEA 2004 Establishing the NIMAS and the NIMAC

Building on the 1996 Chafee Amendment and the proposed IMAA, the 2004 reauthorization of IDEA incorporated provisions establishing the NIMAS/NIMAC process. As created under IDEA 2004, NIMAS is a national standard established by the Secretary of Education to be used in the preparation of electronic files for the efficient conversion of print instructional materials into specialized formats, as defined under Chafee — i.e., Braille, audio, digital text, or large print.²² The term “print instructional materials” is defined as “printed textbooks and related printed core materials that are written and published primarily for use in elementary school and secondary school instruction and are required by a State educational agency or local educational agency for use by students in the classroom.”²³ IDEA 2004 requires States to adopt NIMAS for the purpose of providing instructional materials to “blind persons or other persons with print disabilities.”²⁴

In addition, State educational agencies (“SEAs”) and local educational agencies (“LEAs”) may choose whether they want to coordinate with the NIMAC,²⁵ a national repository for NIMAS-derived files.²⁶ If an SEA or LEA chooses to coordinate with the NIMAC, the SEA/LEA must, when purchasing print instructional materials, enter into a written contract with the publisher to do one of the following: (1) require the publisher to prepare and, on or before delivery of the print instructional materials, provide to the NIMAC electronic files of the materials using NIMAS; or (2) purchase directly from the publisher instructional materials that are already produced, or may be rendered, in specialized formats.²⁷ The NIMAC is responsible for (1) receiving and

¹⁵ 142 CONG. REC. S9066 (daily ed. July 29, 1996)(statement of Sen. Chafee). Senator Chafee acknowledged the time-consuming process associated with the creation of accessible textbooks: “It is a challenge to reproduce today’s highly visible textbooks in Braille format. Maps, charts, graphs, and illustrations that take up one page in a standard textbook may require multiple pages of Braille or tactile graphics to convey the same information. All in all, it can take a full year to produce a Braille textbook. Added time consumed by trying to get permission from publishers makes it certain that the blind student is not in sync with his classmates.” *Id.*

¹⁶ *Id.*

¹⁷ Comments from Allan Adler, Vice President for Legal & Government Affairs, Association of American Publishers to the U.S. Copyright Office, in Response to Notice of Inquiry on Facilitating Access to Copyrighted Works for the Blind or Persons with Other Disabilities 4 (Apr. 21, 2009), available at <<http://www.copyright.gov/docs/sccr/comments/2009/>> [hereinafter AAP, Apr. 2009].

¹⁸ See *id.*, at 2-3.

¹⁹ See *id.* at 4. See also 70 Fed. Reg. 37302, 37303 (June 29, 2005).

²⁰ AAP, Apr. 2009, *supra* note 17, at 4.

²¹ See S. 2246, H.R. 4582, 107th Cong. (2002); H.R. 490, 108th Cong. (2003).

²² 20 U.S.C. § 1474(e)(3)(D) (referencing 17 U.S.C. § 121(d)(3)) (currently at § 121(d)(4)).

²³ *Id.* § 1474(e)(3)(C).

²⁴ *Id.* § 1412(a)(23)(A); 34 C.F.R. § 300.172(a)(1).

²⁵ 20 U.S.C. §§ 1412(23)(C), 1413(a)(6)(A); 34 C.F.R. §§ 300.172(c), 300, 210(a).

²⁶ 20 U.S.C. § 1474(e)(2). Currently, all States have chosen to coordinate with NIMAC. See Julia Myers & Nicole Gaines, *NIMAC Update Presented to EPAC (APH Educ. Prods. Advisory Comm.) and ESAC (APH Educ. Servs. Advisory Comm.)* (May, 2010), available at <<http://www.nimac.us>>.

²⁷ 20 U.S.C. §§ 1412(a)(23)(C), 1413(a)(6)(A); 34 C.F.R. §§ 300.172(c)(1), 300.210(a).

maintaining a catalog of print instructional materials prepared in NIMAS that are made available to the NIMAC; (2) providing access to print instructional materials in accessible media, free of charge, to blind or other persons with print disabilities in elementary and secondary schools; and (3) developing, adopting, and publishing procedures to protect against copyright infringement, with respect to print instructional materials.²⁸

If an SEA/LEA chooses *not* to coordinate with the NIMAC, the SEA/LEA must provide an assurance that the SEA/LEA will provide instructional materials to blind or other students with print disabilities in a timely manner.²⁹ The IDEA implementing regulations of 2006 further specify that SEAs choosing to coordinate with the NIMAC must likewise provide the instructional materials to blind or students with other print disabilities in a “timely manner.”³⁰ While all SEAs must establish their own definition of “timely manner,”³¹ SEAs must ensure that all LEAs take *all reasonable steps* to provide instructional materials in accessible formats to students who need them *at the same time* that other students receive their instructional materials.³²

The 2006 IDEA regulations further state that the new provisions pertaining to the NIMAS/NIMAC process do not relieve an SEA/LEA of its “responsibility to ensure that children with disabilities who need instructional materials in accessible formats, but are not included under the definition of blind or other persons with print disabilities ... or who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner.”³³ Moreover, in comments accompanying the 2006 regulations, the U.S. Department of Education (“ED”) stated that “[t]imely access to appropriate and accessible instructional materials is an inherent component of [an LEA’s/SEA’s] obligation under [IDEA] to ensure that FAPE is available for children with disabilities and that children with disabilities participate in the general education curriculum as specified in their IEPs.”³⁴

Students Eligible to Receive Formats Developed from NIMAS Files through the NIMAC

Definition of “Blind or Other Persons with Print Disabilities” under IDEA

Under IDEA, in order to be eligible to receive formats developed from NIMAS file sets through the NIMAC, a student must fall under the category of “blind or other persons with print disabilities,” defined as students who: (1) are served under IDEA and (2) may qualify in accordance with “An Act to provide books for the adult blind,” the Act of 1931.³⁵ To meet the first prong of NIMAS/NIMAC eligibility, a student must be determined by a school-based Team to qualify as a “child with a disability” under IDEA — i.e., the student must have one of the identified disabilities and, by reason of this disability, be in need of special education and related services.³⁶ It is significant that only students served under IDEA are eligible to receive formats that have been developed from NIMAS files through the NIMAC; students receiving services under Section 504 are not eligible for NIMAS/NIMAC.³⁷

To meet the second prong of NIMAS/NIMAC eligibility, the student must qualify under the Act of 1931, the same standard of eligibility used under Chafee. As noted, the Act of 1931 was revised in 1966 to include individuals with “physical handicaps.”³⁸ The 1974 Library of Congress regulations interpreting this statutory provision established four categories for eligibility for the national library program:

- **Blindness** – “Blind persons whose visual acuity, as determined by competent authority, is 20/200 or less in the better eye with correcting glasses, or whose wide diameter if visual field subtends an angular distance no greater than 20 degrees”;
- **Visual Disability** – “Persons whose visual disability, with correction and regardless of optical

²⁸ 20 U.S.C. § 1474(e)(2).

²⁹ 20 USC §§ 1412(a)(23)(B), 1413(a)(6)(A); 34 C.F.R. §§ 300.172(b)(2), 300.210(b)(2).

³⁰ 34 C.F.R. § 300.172(c)(2).

³¹ *Id.* § 300.172(a)(2).

³² *Id.* § 300.172(b)(4).

³³ *Id.* §§ 300.172(b)(3), 300.210(b)(3).

³⁴ 71 Fed Reg. 46540, 46618 (Aug. 14, 2006).

³⁵ 20 U.S.C. § 1474(e)(3)(A).

³⁶ *Id.* § 1401(3); 34 C.F.R. § 300.8.

³⁷ See OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON THE NATIONAL INSTRUCTIONAL MATERIALS ACCESSIBILITY STANDARDS (NIMAS) 6 (Aug. 2010) [hereinafter OSEP, NIMAS Q&A, 2010].

³⁸ Pub. L. 89-522, § 1, 80 Stat. 330 (July 30, 1966) (codified as amended at 2 U.S.C. § 135a)(visited Aug. 16, 2010), available at <<http://www.loc.gov/nls/pl89522.html>>.

measurement, is certified by competent authority as preventing the reading of standard printed material”;

- **Physical Limitations** – “Persons certified by competent authority as unable to read or unable to use standard printed material as a result of physical limitations”;
- **Reading Disability Resulting from Organic Dysfunction** – “Persons certified by competent authority as having a reading disability resulting from organic dysfunction and of sufficient severity to prevent their reading printed material in a normal manner.”³⁹

Each of these categories in the Library of Congress regulations must be certified by a “competent authority.” For the first three categories, a competent authority may be any of the following: “Doctors of medicine, doctors of osteopathy, ophthalmologist, optometrists, registered nurses, therapists, professional staff of hospitals, institutions, and public or welfare agencies (e.g., social workers, case workers, counselors, rehabilitation teachers, and superintendents). In the absence of any of these, certification may be made by professional librarians or by any persons whose competence under specific circumstances is acceptable to the Library of Congress.” In contrast, for a reading disability resulting from organic dysfunction, a competent authority is defined as: “Doctors of medicine who may consult with colleagues in associated disciplines.”⁴⁰

Other Definitions of the Term “Print Disability”

While IDEA uses the phrase “blind or other persons with *print* disabilities” and the Chafee Amendment refers to “blind or other persons with disabilities,” both statutes define these terms by referencing the NLS criteria. As noted, IDEA includes the additional requirement that NIMAS eligible students must also

be served under IDEA. Other definitions of the term “print disability” have also been put forth. The U.S. Copyright Office has commented that “[v]arious terms are used formally and informally throughout the world.”⁴¹

For example, the 2008 reauthorization of the Higher Education Act (“HEA”) defined a “student with a print disability” as “a student with a disability who experiences barriers to accessing instructional material in nonspecialized formats, including an individual described in [the Chafee Amendment].”⁴² Because this definition uses the word “including” in relation to an individual covered under the Chafee Amendment, it can be assumed that the group of students comprising the category of “print disabilities” under the HEA definition is broader than that covered under Chafee and by extension IDEA. At the same time, the definition does not mention specific disabilities that would be part of the larger group. Rather, the HEA definition of print disabilities was included in a new section of the statute establishing an “Advisory Commission on Accessible Instructional Materials”⁴³ and supporting “model demonstration programs”⁴⁴ to improve access to instructional materials for postsecondary students with print disabilities.

Also in 2008, the Settlement Agreement that was reached in the Google Library Project litigation defined the term “print disability” as “any condition in which a user is unable to read or use standard printed material due to blindness, visual disability, physical limitations, organic dysfunction, or dyslexia.”⁴⁵ In order to receive special access, a user must submit written documentation⁴⁶ that he/she has been certified by an individual who is qualified as a competent authority under the NLS criteria or someone who is “otherwise certified or authorized under applicable state law or regulations to diagnose the existence of a Print Disability pursuant to standard and generally accepted methods of clinical evaluation.”⁴⁷ Thus, the Google Settlement

³⁹ Current version of the regulation is at 36 C.F.R. § 701.6(b)(1). See also 1974 version at 39 Fed. Reg. 20203 (June 7, 1974) (codified at 36 C.F.R. § 701.10(b)(1)). As noted, the Library of Congress regulations from 1970 had established three categories of disabilities for the national library program – “legally blind,” “visually handicapped,” and “physically handicapped.” See supra note 13, citing 35 Fed. Reg. 10589 (June 30, 1970) (codified at 44 C.F.R. § 501.10(b)).

⁴⁰ Current version of the regulation is at 36 C.F.R. § 701.6(b)(2). See also 1974 version at 39 Fed. Reg. 20203 (June 7, 1974) (codified at 36 C.F.R. § 701.10(b)(2)).

⁴¹ 74 Fed. Reg. 52507, 52507 (Oct. 13, 2009).

⁴² 20 U.S.C. § 1140k.

⁴³ *Id.* § 1140l.

⁴⁴ *Id.* § 1140m.

⁴⁵ Settlement Agreement, §§ 1.112, *Author’s Guild v. Google*, Case No. 05 CV 8136-JES (S.D.N.Y. Oct. 28, 2008), available at <<http://www.googlebooksettlement.com/intl/en/Settlement-Agreement.pdf>> [hereinafter Settlement Agreement].

⁴⁶ *Id.* § 7.2(b)(ii)(2).

⁴⁷ *Id.* § 1.29.

Agreement changed the fourth NLS disability category of “reading disability resulting from organic dysfunction” into two separate disabilities: one called “organic dysfunction” and the other called “dyslexia.”

A third definition is found in the June, 2010 statement by the U.S. Delegation to the World Intellectual Property Organization (“WIPO”)⁴⁸ in response to a 2009 proposal by the World Blind Union for an international treaty to address access to copyrighted works for blind and other persons with disabilities. This statement defined a “person with print disabilities” as: “(1) a person who is blind; or (2) a person who has a visual impairment or a perceptual or reading disability which cannot be improved by the use of corrective lenses to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; [or] (3) a person who has an orthopedic- or neuromuscular-based physical disability that prohibits manipulation and use of standard print materials.”⁴⁹ This statement specifically mentions a person with a perceptual or reading disability, disabilities that would include many (but not all) individuals with learning disabilities. The WIPO definition does not mention the need for a competent authority to certify the existence of a print disability.

Finally, it is interesting to note that, according to the disability coalition known as the “Reading Rights Coalition,” the term “print disabled” was originally created in the late 1980s by George Kerscher, current Secretary General of the DAISY Consortium, to mean: “[a] person who cannot effectively read print because of a visual, physical, perceptual, developmental, cognitive, or learning disability.”⁵⁰ This definition specifically identifies perceptual,

developmental, cognitive, or learning disability, which are not included under the NLS eligibility criteria. Nor does this definition mention the need for certification by a competent authority.

Tension between the Rights of Students with Learning Disabilities and the Economic Interests of Publishers

The Rights of Students with Disabilities under IDEA, Section 504, and Title II of the ADA

Under IDEA, all students with disabilities who need accessible instructional materials in order to be involved and progress in the general education curriculum — i.e., the same curriculum provided to students without disabilities⁵¹ — must be provided these materials in a timely manner, as part of their right to a free appropriate public education (“FAPE”). There are several provisions in IDEA that underscore the connection between accessible instructional materials, involvement and progress in the general education curriculum, and FAPE. For example, the Individualized Education Program (“IEP”) must include a statement of the special education and related services, supplementary aids and services, and program modifications that will be provided for the child to be involved and progress in the general education curriculum.⁵² As noted earlier, in comments accompanying the 2006 IDEA regulations pertaining to the NIMAS/NIMAC process, ED stated that “[t]imely access to appropriate and accessible instructional materials is an inherent component of [an LEA’s or SEA’s] obligation under [IDEA] to ensure that FAPE is available for children with disabilities and that children with disabilities participate in the general education curriculum as specified in their IEPs.”⁵³ In addition, the 2006 regulations explicitly

⁴⁸ 74 Fed. Reg. 52507, 52507 (Oct. 13, 2009).

⁴⁹ Art. 1, Draft Consensus Agreement, Proposal by the Delegation of the United States of America to the Standing Comm. on Copyright and Related Rights, World Intellectual Property Organization, Twentieth Session, June 21-24, 2010, at 2, available at <<http://www.copyright.gov/docs/sccr/drafts/us-draft-consensus-instrument.pdf>>. The original treaty proposal drafted by the World Blind Union referenced only individuals who are blind or have visual impairments and did not mention “perceptual or reading disability.” Art. 15, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU) to the Standing Comm. on Copyright and Related Rights, World Intellectual Property Organization, Eighteenth Session, May 25-29, 2009, at 8, available at <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf>. The original proposal also used the phrase “unable to access any copyright work” rather than “unable to read printed works.” *Id.* (emphasis added). Moreover, the original proposal did not include the third category cited above but, rather, included a broad category: “persons with any other disability who, due to that disability, need an accessible format ... in order to access a copyright work to substantially the same degree as a person without a disability.” *Id.*

⁵⁰ Reading Rights Coalition, *The definition of “print disabled”?* (visited Aug. 30, 2010), available at <<http://www.readingrights.org/node/128>>. See also Comments from George Kerscher to the U.S. Copyright Office on the Topic of Facilitating Access to Copyrighted Works for the Blind or Persons with Other Disabilities 2 (Apr. 28, 2009). Kerscher has also recently suggested that because the term “print disabled” originated 20 years ago, it should be extended to “include reading off of a computer screen, which many times is just an image of the print page.” *Id.* at 3.

⁵¹ 34 C.F.R. § 300.320(a)(1)(i).

⁵² 20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4).

⁵³ 71 Fed. Reg. 46540, 46618 (Aug. 14, 2006).

state that the new provisions do not relieve an SEA or LEA of its “responsibility to ensure that children with disabilities who need instructional materials in accessible formats, but are not included under the definition of blind or other persons with print disabilities ... or who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner.”⁵⁴

Failure to provide accessible instructional materials in a timely manner to students with disabilities who need these materials may also constitute discrimination on the basis of disability under Section 504. Section 504, which applies to recipients of federal funds, including schools, school districts, and State departments of education, provides that “[n]o otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”⁵⁵ All students who are served under IDEA are automatically protected under Section 504.⁵⁶ In addition, because the reach of Section 504 is broader than that of IDEA, some students with disabilities who are not eligible under IDEA may be protected under Section 504. The Section 504 regulations afford qualified students with disabilities the right to FAPE, defined as the provision of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities.⁵⁷ The Section 504 regulations also require that districts not engage in discriminatory actions that deny qualified students with disabilities comparable aids, benefits, and services.⁵⁸ In order for aids, benefits, and services to

be “equally effective,” they must provide individuals with disabilities “an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement...”⁵⁹ When school districts fail to provide qualified students with disabilities needed accessible instructional materials, these students are being denied an equal opportunity to be taught the same general education curriculum and to attain the same level of achievement as their peers without disabilities.

Section 504 further prohibits districts from utilizing discriminatory “criteria or methods of administration”⁶⁰ (i.e., written/formal policies or actual practices/procedures, respectively)⁶¹ that subject qualified individuals with disabilities to discrimination on the basis of disability or that defeat or substantially impair accomplishment of the objectives of the program or activity by individuals with disabilities.⁶² When qualified students with disabilities who are in need of accessible instructional materials do not receive these materials in the same time frame in which the regular print instructional materials are made available to students without disabilities, and this delay has a negative effect on the opportunity of the students with disabilities to attain the same level of achievement that is expected for all students, the school district’s procedures for delivering accessible instructional materials may be found to violate the methods of administration provision of Section 504.⁶³

“When school districts fail to provide qualified students with disabilities needed accessible instructional materials, these students are being denied an equal opportunity to be taught the same general education curriculum and to attain the same level of achievement as their peers without disabilities.”

Title II of the ADA, which applies to public entities (regardless of whether they receive federal funding), prohibits discrimination on the basis of disability in a manner similar to Section 504.⁶⁴ In many areas, the language of Title II is virtually identical to that of

⁵⁴ 34 C.F.R. §§ 300.172(b)(3), 300.210(b)(3).

⁵⁵ 29 U.S.C § 794(a).

⁵⁶ 34 C.F.R. § 104.3(i)(2)(iii).

⁵⁷ 34 C.F.R. § 104.33(b)(1).

⁵⁸ *Id.* § 104.4(b)(1); see also 28 C.F.R. § 35.130(b)(1).

⁵⁹ 34 C.F.R. § 104.4(b)(2).

⁶⁰ *Id.* § 104.4(b)(4).

⁶¹ See *Illinois State Bd. of Educ.*, 20 IDELR 687, at **4-5 (OCR IL 1993).

⁶² 34 C.F.R. § 104.4(b)(4).

⁶³ See *Letter to: California State Univ.*, 108 LRP 20251, at *3 (OCR CA 2003)(finding a violation in the higher education context of the “methods of administration” provision).

⁶⁴ 42 U.S.C. § 12132.

Section 504. For example, Title II includes a series of provisions that prohibit certain discriminatory actions that deny qualified individuals with disabilities comparable aids, benefits, and services as well as provisions that prohibit discriminatory criteria or methods of administration.⁶⁵ Title II also requires all public entities to provide “auxiliary aids and services” to qualified individuals with disabilities, when necessary to afford these individuals an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by the public entity, and to take appropriate steps to ensure that communications with qualified individuals with disabilities are as effective as communications with others.⁶⁶

Thus, school districts have an obligation under IDEA, Section 504, and Title II of the ADA to ensure the timely provision of accessible instructional materials to *all* students with disabilities who need these materials. This obligation is grounded in the obligation of school districts under IDEA to ensure that students with disabilities receive FAPE and are involved and progress in the general education curriculum. The obligation of school districts to ensure the timely provision of accessible instructional materials to students with disabilities who need these materials is also grounded in the overall prohibition of discrimination against qualified students with disabilities under Section 504 and Title II of the ADA as well as the more specific requirements to ensure comparable aids, benefits, and services and nondiscriminatory criteria/methods of administration under Section 504 and Title II; to provide auxiliary aids and services and ensure effective communications under Title II; and to provide FAPE under Section 504.

“School districts have an obligation under IDEA, Section 504, and Title II of the ADA to ensure the timely provision of accessible instructional materials to *all* students with disabilities who need these materials.”

Positions Taken by the Association of American Publishers (“AAP”)

Citing the legislative history of the 1996 Chafee Amendment, the AAP has repeatedly asserted that the intent of the drafters was for the Chafee Amendment to serve the needs of a discrete, “specifically-defined population” of individuals with disabilities that did not represent a “viable commercial market” for the publishing community in order for the copyright exemption not to result in economic hardship for publishers.⁶⁷ Consequently, the AAP has resisted extension of Chafee to cover more broadly the category of individuals with learning disabilities, a large, heterogeneous group, which, the AAP believes, would extend the reach of Chafee from the intended few hundred thousand beneficiaries to millions of individuals and would create an economic burden for the publishers.⁶⁸ The AAP has stated that “the Chafee Amendment only addresses the needs of individuals with print disabilities based on some physical or organic dysfunction — i.e., its narrow focus does not address ‘learning disabilities’ as defined under [IDEA].”⁶⁹

Furthermore, the AAP has taken the position that “digital talking books,” which the AAP acknowledges are currently the “preferred choice among specialized formats,” were not envisioned at the time of the enactment of the Chafee Amendment to be part of the copyright exemption.⁷⁰ The AAP has pointed out that digital talking books are becoming increasingly similar to commercial ebooks and audiobooks, which can be used by large numbers of individuals without disabilities and do not require special playback equipment.⁷¹ Although, as noted earlier, specialized formats are statutorily defined under the Chafee Amendment to mean Braille, audio, digital text, or large print that are exclusively for use by blind or other persons with disabilities,⁷² the

⁶⁵ 28 C.F.R. § 35.130(b).

⁶⁶ *Id.* § 35.160(a). See also U.S. DEPT OF JUSTICE, REVISED REGULATIONS IMPLEMENTING TITLE II AND TITLE III (to be codified at 28 U.S.C. § 35.160(a)(1)) (visited Aug. 16, 2010), available at <<http://www.ada.gov/regs2010/ADAregs2010.htm>>.

⁶⁷ See, e.g., AAP, Apr. 2009, *supra* note 17, at 7; Memo from Allan Adler & Liz Delfs (AAP) to Joseph Frye regarding the Chafee Amendment – Background and Current Issues (AAP Position Paper Presented at AHEAD 2004) (Apr. 18, 2004)[hereinafter AAP, 2004].

⁶⁸ AAP, Apr. 2009, *supra* note 17, at 8.

⁶⁹ AAP, 2004, *supra* note 67, at 4.

⁷⁰ AAP, Apr. 2009, *supra* note 17, at 8.

⁷¹ *Id.*

⁷² 17 U.S.C. § 121(d)(4).

term “digital text” is not defined. According to the AAP, the term “specialized format” was intended to apply *only* to products that require the use of special text-to-speech software or equipment in order to ensure exclusive use by blind and other persons with disabilities, and was not intended to refer to text that was available to the general public or could easily be sent over the internet.⁷³ Thus, the AAP has stated:

Definitional limitations on the applicability of the Chafee Amendment, which have generated a number of practical implementation issues in the field since the exemption was first enacted, are now producing more complicated issues as government authorities and advocacy groups raise their goals and seek to meet the educational needs of a much broader population of students with diverse ‘learning disabilities’ by fully utilizing the capabilities of new digital technologies.⁷⁴

The AAP has argued that changing perspectives on disability, coupled with new technological advances, suggest that the regulatory approach of Chafee should be replaced by a market-based approach.⁷⁵ Under a *market-based approach*, publishers would compete with each other to develop their own versions of accessible materials, including universally designed texts,⁷⁶ without the need for authorized entities to operate under the Chafee copyright exemption. Universally designed texts are those that have options and flexibility to address the diverse learning needs of students built into the text from the beginning, rather than adapting or converting the text after the fact.⁷⁷ Ultimately, the development and sale of universally designed texts through a market-based approach has the potential to benefit all students, both those with and without disabilities; however, the adoption of a full market model is far ahead in the future.

⁷³ AAP, 2004, *supra* note 67, at 4. In contrast, the Association on Higher Education And Disability (AHEAD) has stated: “Students with disabilities should not be relegated to using outdated technology simply because the latest technology was not contemplated at the time the Chafee Amendment was drafted. Students with disabilities must have access to the latest technology available to improve their access to text materials and permit them to compete equally on the academic playing field.” AHEAD, Position Statement: AHEAD’s Perspective on the Issues of Textbook Access (Dec. 2006), *available at* <<http://www.ahead.org/resources/e-text/position-statement>> [hereinafter, AHEAD, 2006].

⁷⁴ AAP, 2004, *supra* note 67, at 2.

⁷⁵ AAP, Apr. 2009, *supra* note 17, at 8.

⁷⁶ In comments to the 2006 IDEA regulations, ED stated that “[NIMAS] is not intended to provide materials that are universally designed.” 71 Fed. Reg. 46540, 46617 (Aug. 14, 2006) (emphasis added). ED similarly noted that the purpose of NIMAS was “to improve the quality and consistency of print instructional materials converted to accessible formats for persons who are blind and persons with print disabilities, not to alter the content (e.g., the depth, breadth, or complexity) of the print instructional materials.” *Id.*

⁷⁷ AAP, Apr. 2009, *supra* note 17, at 9; See also Center for Applied Special Technology, National Center on Universal Design for Learning, UDL Guidelines – Version 1.0 (visited Aug. 30, 2010), *available at* <<http://www.udlcenter.org/aboutudl/udlguidelines>>.

Analysis of the NLS Eligibility Criteria for NIMAS/NIMAC

Learning disabilities are not explicitly included in the NLS regulations; rather, the fourth eligibility category refers to “a reading disability.” Most, but not all students with learning disabilities have a reading disability (approximately 80%).⁷⁸ In order to qualify under the NLS regulations, an individual with a reading disability must satisfy the following three requirements:

- The reading disability must result from organic dysfunction;
- The reading disability must be certified by a doctor of medicine who may consult with colleagues in associated disciplines; and
- The reading disability must be of sufficient severity to prevent the reading of printed material in a normal manner.⁷⁹

The present section analyzes how each of these requirements limits NIMAS/NIMAC eligibility for students with learning disabilities as well as how the application of these requirements results in the creation of a subset of students with learning disabilities who have a right to receive accessible instructional materials but are unable to receive materials that have been produced from NIMAS files and obtained through the NIMAC.

The reading disability must result from “organic dysfunction”

Explanation of “organic dysfunction” by the Library of Congress

Only those individuals who have been certified by a competent authority as having a reading disability “resulting from organic dysfunction” are eligible under the fourth NLS category. The Library of Congress provided little explanation in the Federal

Register when it published the regulations in 1974, beyond stating that it had received feedback from experts in various fields with respect to language to describe the disability categories and corresponding competent authorities.⁸⁰ In a 1997 document entitled *NLS Factsheets: Talking Books and Reading Disabilities*, which provided additional clarification regarding eligibility for individuals with reading disabilities, the Library of Congress stated that the term “organic dysfunction” means a disability that is “physically-based” or has a “physical origin,” in accordance with the language of the 1966 statute.⁸¹ The 1966 statute authorized the national library program to loan books “to the blind and to other *physically* handicapped readers ... unable to read normal printed material as a result of *physical limitations*.”⁸² The Library of Congress further indicated that for individuals with reading disabilities, “[t]he cause, when physical, lies within the central nervous system.”⁸³ Moreover, the Library of Congress specifically pointed out that “[t]he following groups of individuals are not automatically eligible: those who have learning disabilities, dyslexia, attention deficit disorder, attention deficit-hyperactivity disorder, chronic-fatigue syndrome, autism, functional illiteracy, or mental retardation, unless there is a specific accompanying visual or physical handicap.”⁸⁴ Thus, in order for an individual to qualify under the fourth NLS category, he/she must be certified by a competent authority as having a reading disability that is based on a physical dysfunction in the central nervous system.

Outdated terminology from the 1960s and 1970s

The term “organic dysfunction,” which does not appear in IDEA, Section 504, or the ADA, reflects outdated terminology⁸⁵ used primarily by medical

⁷⁸ See, e.g., G. Reid Lyon, Sally E. Shaywitz, & Bennett A. Shaywitz, A Definition of Dyslexia, 53 ANNALS OF DYSLEXIA 1, 2 (2003).

⁷⁹ 36 CFR § 701.6(b)(1)(iv). See also Library of Congress, *NLS Factsheets: Talking Books and Reading Disabilities* (1997), available at <<http://www.loc.gov/nls/reference/factsheets/readingdisabilities.html>> [hereinafter LOC, Reading Disabilities].

⁸⁰ 39 Fed. Reg. 20203 (June 7, 1974).

⁸¹ LOC, *Reading Disabilities*, supra note 79.

⁸² Pub. L. 89-522, § 1, 80 Stat. 330 (July 30, 1966) (codified as amended at 2 U.S.C. § 135a) (visited Aug. 16, 2010), available at <<http://www.loc.gov/nls/pl89522.html>> (emphasis added).

⁸³ LOC, *Reading Disabilities*, supra note 79.

⁸⁴ *Id.*

⁸⁵ See Comments from James H. Wendorf, Executive Director, National Center for Learning Disabilities (“NCLD”), to U.S. Copyright Office on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities 3 (Apr. 21, 2009) [hereinafter NCLD, 2009] (stating that “the term ‘reading disability resulting from organic dysfunction’ is not defined in authoritative medical or education literature, nor is such a category recognized in special education law or any other statutory provision outside the domain of N:S regulations”); Comments from Steve Noble, Learning Disabilities Association of America (“LDA”) to U.S. Copyright Office on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities 1 (Apr. 2, 2009) [hereinafter LDA, 2009] (stating same).

researchers such as neurologists and psychiatrists in the 1960s and 1970s, the period during which the Library of Congress regulations were initially published. For example, a 1969 article entitled *Reading Problems: Glossary of Terminology* explained that the term “organic reading disability” was used by neurologists to refer to a child who has “[a] physical abnormality of the brain, deduced from a neurological examination with or without corroborating laboratory evidence and historical data.”⁸⁶ Similarly, a 1966 study of children with specific reading disabilities by psychiatrists defined “organic reading disability” as referring to “the difficulties of ... children who have abnormalities in one or more areas of the classical neurological examination of cranial nerves, muscle tone and synergy, and deep and superficial reflexes.”⁸⁷ Also during these years, medical researchers began to use the term “minimal brain dysfunction”⁸⁸ to describe “‘soft signs’ of organicity”⁸⁹ or “‘organic’ factors of a subtle nature”⁹⁰ to refer to “[s]ubtle, borderline, equivocal, but still-detectable deviations from normal on the traditional neurological examination...”⁹¹

“The term “organic dysfunction,” which does not appear in IDEA, Section 504, or the ADA, reflects outdated terminology⁹² used primarily by medical researchers such as neurologists and psychiatrists in the 1960s and 1970s, the period during which the Library of Congress regulations were initially published.”

By the late 1980s, the term “organic” began to be disfavored among neurologists and psychiatrists, who criticized the artificial distinction between an organic and a psychological/functional diagnosis.⁹³ Moreover, with the help of advancements in neuroimaging technologies, extensive research emerged to document the neurological basis of learning disabilities.⁹⁴ Research also began to show genetic influences on learning disabilities.⁹⁵ Because the NLS requirement concerning “organic dysfunction” reflects terminology that is no longer in use, the language is likely obfuscating for both educators and parents,⁹⁶ as they try to determine eligibility for NIMAS-based materials under IDEA. Moreover, the fact that educators may view the term “organic dysfunction” as “medical” rather than “educational,” may lead them to be more reluctant to consider students with learning disabilities as eligible for NIMAS under the category of reading disability resulting from organic dysfunction. To have an eligibility criterion describing the specific nature of the disability under question written in archaic language and therefore confusing, can only serve to limit the number of students who will be found eligible to receive accessible instructional

⁸⁶ Doris V. Gunderson, *Reading Problems: Glossary of Terminology*, 4 READING RES. Q. 534, 545 (1969) (defining the term “structural defect of the central nervous system”). This glossary also defined the term “organic” as “[h]aving to do with the structure or functioning of a part of the body; often used in differentiating physical from psychological causation.” *Id.* at 542.

⁸⁷ Archie A. Silver & Rosa A. Hagin, *Maturation of Perceptual Functions in Children with Specific Reading Disability*, 19 READING TEACHER 253, 253 (1966).

⁸⁸ SAM D. CLEMENTS, MINIMAL BRAIN DYSFUNCTION IN CHILDREN 1 (NINBD Mono. No. 3 U.S. Dep’t Health, Educ., & Welfare, Pub. Health Serv. Publication No. 1415) (1966).

⁸⁹ Abraham Towbin, *Cerebral Dysfunctions Related to Perinatal Organic Damage: Clinical-Neuropathologic Correlations*, 87 J. ABNORMAL PSYCHOL. 617, 627 (1978).

⁹⁰ Martha Bridge Denckla, *The Neurological Basis of Reading Disability*, in READING DISABILITY: A HUMAN APPROACH TO LEARNING 25, 29 (Florence G. Roswell & Gladys Natchez eds., 1977).

⁹¹ *Id.* at 31.

⁹² See Comments from James H. Wendorf, Executive Director, National Center for Learning Disabilities (“NCLD”), to U.S. Copyright Office on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities 3 (Apr. 21, 2009) [hereinafter NCLD, 2009] (stating that “the term ‘reading disability resulting from organic dysfunction’ is not defined in authoritative medical or education literature, nor is such a category recognized in special education law or any other statutory provision outside the domain of N:S regulations”); Comments from Steve Noble, Learning Disabilities Association of America (“LDA”) to U.S. Copyright Office on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities 1 (Apr. 2, 2009) [hereinafter LDA, 2009] (stating same).

⁹³ See, e.g., F. Timothy Leonberger, *The Question of Organicity: Is It Still Functional?* 20 PROF. PSYCHOL.: RES. & PRAC. 411, 411 (1989). In 1994, the American Psychiatric Association’s DSM-IV removed the previously included category of “organic mental disorders.” See MICHAEL FIRST, ALLEN FRANCES, & HAROLD ALAN PINCUS, DSM-IV-TR GUIDEBOOK 85 (2004).

⁹⁴ See, e.g., Sally E. Shaywitz & Bennett A. Shaywitz, *Reading Disability & the Brain* 61 EDUC. LEADERSHIP 7, 8 (2004); George W. Hynd, Richard Marshall, & Jose Gonzalez, *Learning Disabilities and Presumed Central Nervous System Dysfunction*, 14 LEARNING DIS. Q. 283, 289 (1991). In comments submitted to the U.S. Copyright Office in 2009, NCLD and LDA both noted that “[a]lthough the conceptual understanding of learning disabilities has grown over the last 40 years, it is firmly understood that they are, by nature, of neurological origin. The body of research evidence that has been collected ... clearly supports the view that reading disabilities, in particular, are based on physiological impairments in the brain.” NCLD, 2009, *supra* note 85, at 3; LDA, 2009, *supra* note 85, at 2.

⁹⁵ See, e.g., Yulia Kovas & Robert Plomin, *Learning Abilities and Disabilities: Generalist Genes, Specialist Environments*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 284, 284-87 (2007).

⁹⁶ See NCLD, *supra* note 85, at 3 (noting the confusion resulting from the term “reading disability resulting from organic dysfunction”); LDA, *supra* note 85, at 2 (commenting on same).

materials under this criterion.⁹⁷ It is ironic that the “organic dysfunction” language may lead educators to exclude students with learning disabilities, a group to which the definition, if understood, actually applies.

Comparison of the NLS eligibility criterion for organic dysfunction with the definition of specific learning disability under IDEA

The precursor to IDEA, the Education for All Handicapped Children’s Act (P.L. 94-142), which was enacted in 1975,⁹⁸ approximately the same time at which the NLS regulations were issued, followed a different trajectory in purpose and development. While the NLS regulations grew out of a background of providing books “to blind and to other physically handicapped readers,” the IDEA definition of specific learning disability (“SLD”) was based on the work of Dr. Samuel Kirk, who had been the first to use the term “learning disability” in 1962.⁹⁹ The current definition for SLD under IDEA, which has remained essentially unchanged from 1975,¹⁰⁰ is as follows:

(A) In general. The term ‘specific learning disability’ 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.

(B) Disorders included. Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(C) Disorders not included. Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.¹⁰¹

The NLS requirement that a reading disability be based on a physical dysfunction in the central nervous system is not, on its face, inconsistent with IDEA. Although, as noted, IDEA does not use the term “organic dysfunction,” the IDEA definition for SLD suggests a neurological basis for learning disabilities by including disorders, in particular “brain injury” and “minimal brain dysfunction,” that neurologists at the time of the EAHCA’s enactment in 1975 attributed to central nervous system dysfunction. While the names of these disorders mentioned in IDEA, like organic dysfunction in the fourth NLS category, reflect outdated terminology, they also underscore the relationship between learning disabilities and the central nervous system.¹⁰² It is noteworthy that the definition of learning disabilities put forth by the National Joint Committee on Learning Disabilities (“NJCLD”), originally developed in 1981, goes further than IDEA by referencing a neurological basis for learning disabilities, stating that such disabilities “are intrinsic to the individual and presumed to be due to the central nervous system.”¹⁰³

Thus, while the “organic dysfunction” language may serve to limit the number of students with learning disabilities who are identified as NIMAS/NIMAC-eligible because of its unfamiliarity to educators and parents, this language is not directly at odds with the IDEA definition of SLD and should be viewed as including students with learning disabilities. At the same time, a marked distinction between the NLS criterion and IDEA lies in the fact that the NLS regulations require a medical doctor to certify the existence of a physical dysfunction in the central nervous system, whereas IDEA does not require such proof or certification, by a doctor or anyone else, as a prerequisite for identification of a student under the category of SLD.

⁹⁷ AHEAD similarly criticized the Chafee Amendment as being “viewed by most in the disability service and advocacy community as overly restrictive, outdated, and inefficient in insuring full access to copyrighted materials by persons with print-related disabilities.” Comments from Michael Shuttic, President of the Association on Higher Education And Disability (AHEAD), to the U.S. Copyright Office 2 (Apr. 20, 2009).

⁹⁸ Pub. L. 94-142, 89 Stat. 773, as amended (Nov. 29, 1975) (codified at 20 U.S.C. § 1400 *et seq.*).

⁹⁹ See Samuel A. Kirk & Barbara Bateman, *Diagnosis and Remediation of Learning Disabilities*, 29 EXCEPTIONAL CHILDREN, 73, 73 (1962). In 1963, Kirk used the term “learning disabilities” before a group of parents who subsequently formed the Association for Children with Learning Disabilities (“ACLD”), which later became the LDA. See Daniel P. Hallahan & Cecil D. Mercer, *Learning Disabilities: Historical Perspectives* (Learning Disabilities Summit: Building a Foundation for the Future White Papers) 13 (2001). In 1968, the U.S. Office of Education’s National Advisory Committee on Handicapped Children (“NACHC”), chaired by Kirk, developed a definition of learning disability to be used as a basis for federal legislation. *Id.* at 15. This definition was included in the Children with Specific Learning Disabilities Act of 1969, incorporated into P.L. 91-230 (1970). *Id.*

¹⁰⁰ See P.L. 94-142, 89 Stat. 793, § 620(b)(4)(A).

¹⁰¹ 20 U.S.C. § 1401 (30); 34 C.F.R. § 300.8(c)(10).

¹⁰² Section 504 similarly suggests a neurological basis for eligibility by defining a physical or mental impairment as: “(A) any physiological disorder or condition ... affecting one or more of the following body systems: neurological...; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome ... and specific learning disabilities.” 34 C.F.R. § 104.3(j)(2)(i).

¹⁰³ National Joint Committee on Learning Disabilities, *Learning Disabilities: Issues on Definition* 3 (1990), available at <<http://www.ldonline.org/about/partners/njclcd/archives>>.

The reading disability must be certified by a doctor of medicine who may consult with colleagues in associated disciplines

Explanation provided by the Library of Congress

According to the Library of Congress, the NLS regulations were drafted to require a “doctor of medicine” to be the competent authority in the case of a reading disability resulting from organic dysfunction in order to certify “not only that a reading disability exists and is serious enough to prevent reading regular printed material in a normal manner, but also that the identified condition has a physical basis.”¹⁰⁴ Moreover, “nonorganic factors – such as emotional or environmental causes, intellectual or educational deficiencies... must be ruled out.”¹⁰⁵ While the other disability categories in the NLS regulations have an extensive list of individuals who may serve as a competent authority for the purpose of certification, the only permissible competent authority for the fourth category is a doctor of medicine, who may consult with colleagues from other disciplines.¹⁰⁶ The Library of Congress further indicated that the distinction between a competent authority for a reading disability and that for the remaining disability categories was intentional:

For most eligible people served by this program, the cause of the inability to read printed material — such as blindness, paralysis, loss of arms or hands, extreme weakness, or palsy — is readily observable. In these cases, professionals in various fields related to health care, education,

or rehabilitation are acceptable as certifying authorities. With persons classified as reading disabled, usually only the effect is readily apparent. The cause, when physical, lies within the central nervous system, and, under the existing regulation, this cause can be determined only by competent medical authority.¹⁰⁷

Thus, the reason given that only a medical doctor can serve as the competent authority in the case of a reading disability is that the organic or physical basis of the disability in the central nervous system would not be “readily observable” and could, therefore, be determined only by a competent medical authority.

Inconsistency with the school-based processes of IDEA and Section 504

The requirement that a reading disability be certified by a doctor of medicine who may, but is not required to, consult with other colleagues runs counter to the school-based evaluation process required under IDEA and Section 504. IDEA specifies that districts

must conduct a full and individual evaluation to assess the child in all areas of suspected disability including, among other areas, health, vision, general intelligence, academic performance, and motor abilities.¹⁰⁸ IDEA also includes several requirements to ensure the valid administration of the assessments comprising the evaluation, including the provision that such assessments must be administered “by trained and knowledgeable personnel.”¹⁰⁹ Section 504 contains a similar requirement that *schools/school districts* conduct an evaluation “before taking any action with respect to the initial placement ... in regular or special education and any subsequent

significant change in placement.”¹¹⁰ Thus, under both statutes, the evaluation is to be conducted and

“The requirement that a reading disability be certified by a doctor of medicine who may, but is not required to, consult with other colleagues runs counter to the school-based evaluation process required under IDEA and Section 504.”

¹⁰⁴ LOC, *Reading Disabilities*, *supra* note 79.

¹⁰⁵ *Id.*

¹⁰⁶ 36 C.F.R. § 701.6(b)(2).

¹⁰⁷ LOC, *Reading Disabilities*, *supra* note 79.

¹⁰⁸ 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

¹⁰⁹ 20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv).

¹¹⁰ 34 C.F.R. § 104.35. See also *E. Side Union High Sch. Dist.*, 52 IDELR 269 (OCR CA 2009) (discussing the need for an evaluation for the purposes of Section 504 to cover “all areas of educational need.”).

the assessments are to be administered by school personnel, not a doctor of medicine.¹¹¹

Furthermore, there is *no requirement under IDEA for a school district to obtain medical documentation* as part of the evaluation process. The Office of Special Education Programs (“OSEP”) has previously discussed the need for a medical assessment in the context of Attention Deficit Disorder (“ADD”), a disability that most often falls under the category other health impairments (“OHI”). In *Letter to Williams*, OSEP stated that IDEA “does not necessarily require a school district to conduct a medical evaluation for the purpose of determining whether a child has ADD. If a public agency believes that a medical evaluation by a licensed physician is needed as part of the evaluation to determine whether a child suspected of having ADD meets the eligibility criteria of the OHI category, or any other disability category under [IDEA], the school district must ensure that this evaluation is conducted at no cost to the parents.”¹¹² Moreover, “[i]f the school district believes that there are other effective methods for determining whether a child ... meets the eligibility requirements ... then it would be permissible to use qualified personnel other than a licensed physician to conduct the evaluation.”¹¹³ There is similarly no requirement for a medical assessment under Section 504.¹¹⁴

In contrast to the NLS regulations, which require that certification be made only by a physician, who may act alone, IDEA requires decisions regarding SLD eligibility to be made by a *multidisciplinary, school-based Team*, consisting of the child’s parents as well as the child’s regular education teacher, and at least one person qualified to conduct diagnostic

examinations such as a school psychologist, speech language pathologist, or remedial reading teacher.¹¹⁵ As part of the evaluation process, the student must also be observed in his/her learning environment.¹¹⁶ In addition, in order to ensure that the student’s underachievement is not the result of a lack of appropriate instruction in reading (i.e., to help rule out nonorganic factors), the Team must consider data regarding whether the child was provided appropriate instruction in regular education settings as well as documentation of repeated assessments at regular intervals, reflecting assessment of the student’s progress during instruction.¹¹⁷ Furthermore, the Team must provide specific documentation regarding the eligibility determination, including (1) a statement with information such as the basis for the Team’s determination of eligibility, the student’s progress toward grade level state standards, “educationally relevant medical findings, if any”; and (2) written certification from each member of the Team that the report reflects the member’s conclusion (if the report does not reflect the members conclusion, the member must provide a separate statement).¹¹⁸ Such an extensive evaluation process yields much more rich data and information than an examination by a medical doctor.

Once a student has been found eligible for IDEA based on a determination of SLD, a multi-disciplinary IEP Team¹¹⁹ must review the evaluation results, the student’s academic, developmental, and functional needs, the student’s strengths, and the parent’s concerns¹²⁰ in order to determine what services are appropriate for the student, including whether the student needs accessible instructional materials. In developing the IEP, the Team must identify, among other things, the student’s present levels of academic

¹¹¹ In comments submitted to the U.S. Copyright Office in 2009, NCLD and LDA stated: “A reading-related disability is not routinely diagnosed by a medical professional. There are no standard medical diagnostic procedures conventionally used to identify learning disabilities, and schools do not normally refer students to medical professionals to make such a determination. Instead, the presence of a learning disability is typically diagnosed by school psychologists or other specially trained educational professionals who have the competency to administer and interpret results from standardized psycho-educational diagnostic instruments.” NCLD, *supra* note 85, at 3; LDA, *supra* note 85, 2.

¹¹² *Letter to Williams*, at *5. See also *Letter to Anonymous*, 34 IDELR 35, at *2 (OSEP 2000) (discussing the option of filing a State complaint if school districts do not inform parents that “medical evaluations for ADD/ADHD determinations are available at no cost to a parent”).

¹¹³ *Letter to Williams*, at *5.

¹¹⁴ *Id.* (“Section 504 does not necessarily require a school district to conduct a medical assessment. If a school district determines, based on the facts and circumstances in an individual case, that a medical assessment is necessary to make an appropriate evaluation consistent with 34 CFR § 104.35(a) and (b), then the district must ensure that the child receives this assessment at no cost to the parents. If alternative assessment methods meet the evaluation criteria, then these methods may be used in lieu of a medical assessment.”).

¹¹⁵ 34 C.F.R. § 300.308

¹¹⁶ *Id.* § 300.310.

¹¹⁷ *Id.* § 300.309(b).

¹¹⁸ *Id.* § 300.311.

¹¹⁹ The IEP Team consists of the child’s parents; at least one regular education teacher; at least one special education teacher; a representative of the district who is qualified to provide or supervise the provision of special education services, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the district; an individual who can interpret the instructional implications of the evaluation results; other individuals at the discretion of the parent or agency; and when appropriate, the child. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a).

¹²⁰ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).

achievement and functional performance; measurable annual goals; and special education and related services, supplementary aids and services, program modifications or supports for school personnel that will enable the student to be involved and progress in the general education curriculum.¹²¹ In addition, the Team must consider whether the student needs assistive technology devices and services.¹²² All of these requirements reflect the active involvement of the Team in the decision to provide accessible instructional materials to a particular student.

Section 504 similarly mandates a team-based process for interpreting evaluation data and making placement decisions. Under the Section 504 regulations, in making such decisions, the school district must: (1) “draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior”; and (2) “ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.”¹²³

Thus, a multi-disciplinary Team, comprised of school-based personnel and the student’s parents — not a medical doctor — is involved in the carefully thought out processes of determining whether a student is eligible to receive services under IDEA or Section 504 and whether a student’s disability-related needs require the student to receive instructional materials in an accessible format. These intricate processes negate the need for certification by a medical doctor, a requirement that may, in fact, lead to administrative delays in the time it takes for a student to receive the materials that he/she needs. The NJCLD has noted that although its definition of

learning disabilities includes a presumption of central nervous system dysfunction, the definition does not imply that the identification of learning disabilities should be restricted to a physician because “evidence of central nervous system dysfunction may or may not be elicited during the course of a medical-neurological examination” and “[t]he critical elements in the diagnosis of learning disabilities are elicited during psychological, educational and/or language assessments.”¹²⁴

Disproportionate effect on low-income students

The requirement that NIMAS eligibility for a reading disability must be certified by a medical doctor will likely have a disproportionate effect on students from low-income backgrounds.¹²⁵ In answer to the question whether LEAs are “required to pay for additional medical certification to verify that a student’s print disabilities are organic in nature,” OSEP stated that “LEAs have the responsibility, including the assumption of any costs, to obtain the appropriate certification [for NIMAS eligibility] for the students.”¹²⁶ Although the LEA must bear the cost of obtaining certification by a doctor, the requirement of medical certification benefits families with easy access to private doctors. Moreover, because it may be possible to obtain certification for NIMAS as part of an independent evaluation, parents with the economic means to pay for such an evaluation on their own will clearly be at an advantage over those who must request an independent evaluation at public expense.¹²⁷ In addition, school personnel may be less willing to pursue eligibility under the reading disability category if they know that the district will be obligated to assume the costs associated with obtaining the appropriate medical certification.

“The requirement that NIMAS eligibility for a reading disability must be certified by a medical doctor will likely have a disproportionate effect on students from low-income backgrounds.”

¹²¹ 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(III); 34 C.F.R. §§ 300.320(a), (1), (2), (4).

¹²² 20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v).

¹²³ 34 C.F.R. § 104.35(c). According to ED’s Office for Civil Rights (“OCR”), the federal agency charged with enforcing Section 504, a proper 504 plan should include documentation concerning: (1) the manner in which the disability impacts the student’s participation in the classroom and school; (2) the services the student will receive to ensure the provision of FAPE; and (3) identification of the person responsible for providing the service. *San Dieguito Union Sch. Dist.*, 53 IDELR 242, at *8 (OCR CA 2009).

¹²⁴ *Id.* at 2.

¹²⁵ See NCLD, *supra* note 85, at 3-4 (noting that the medical certification requirement “results in a disproportionately negative impact on those who are poor and without easy access to health care professionals ... [because] children who have health coverage and easy access to medical professionals get a ‘certification’ while those who do not may frequently be unable to satisfy this requirement...”).

¹²⁶ OSEP, NIMAS Q&A, 2010, *supra* note 37, at 6-7.

¹²⁷ 34 C.F.R. § 300.502.

Overreliance on the medical model of disability

The requirement that a reading disability must be certified as organic by a medical doctor promotes the medical model of disability, a paradigm that views disability as a medical infirmity that can be “cured” with appropriate “treatment.”¹²⁸ The medical model, which overemphasizes medical labels and diagnoses, has been criticized as being inappropriate for educational policies and practices and as promoting outdated, stereotypical and ableist assumptions¹²⁹ about students with disabilities. Dating back to the 1960s and 1970s, some educators were critical of the overreliance on medical diagnoses such as “minimal brain dysfunction,” which they saw as having little relevance to teachers and instruction. For example, a prominent book on learning disabilities from 1969 stated that: “even though most specific learning disorders probably arise from underlying neurologic disturbances... [i]solation of definite or presumed etiologies for the observed disabilities are of only tangential interest and value to the teacher-clinician ... in the preparation of an instructional program for the child.”¹³⁰

The medical certification requirement in the NLS criteria is inconsistent with current best practice in special education that promotes movement away from the medical model. Recent changes to IDEA, including a shift from the concept of a severe discrepancy, which emphasizes the measuring of intelligence, toward a response to intervention framework, which emphasizes instruction and interventions,¹³¹ reflects an intent to minimize the effects of the medical model in the context of special education. Moreover, it is noteworthy that the American Academy of Pediatrics, Section on Ophthalmology, has explicitly stated: “Pediatricians should not diagnose learning disabilities but should

inquire about the child’s educational progress and be vigilant in looking for early signs of evolving learning disabilities.”¹³² The requirement that students with reading disabilities must be certified by a medical doctor for the purpose of NIMAS eligibility, along with the use of the phrase “organic dysfunction” serve to enhance, rather than diminish, reliance on the medical model of disability.

Alternative Approaches to the Medical Certification Requirement: RFB&D/ Bookshare and Virginia Department of Education

Because of the above problems associated with the medical certification requirement of the NLS criteria, some organizations have opted to take a different approach. Recording for the Blind & Dyslexic (“RFB&D”) and Bookshare, two major authorized entities under the Chafee Amendment, have reasoned that, because learning disabilities are based on “physiological impairments,” students with learning disabilities can qualify under the NLS category of “physical limitations.”¹³³ Unlike individuals with a “reading disability resulting from organic dysfunction,” individuals with “physical limitations” may be certified by personnel other than a medical doctor, including certain school personnel such as a social worker or counselor.¹³⁴ In discussing this approach, a representative from RFB&D stated: “Obviously we believe that research backs up that interpretation, and we believe that these individuals have a legitimate need for accessible content, particularly in the case of K-12 students where their access to that content is guaranteed by other federal laws. But we certainly acknowledge that this is a gray area. We’ve worked carefully with other stakeholders to address this, but I believe clarification from the appropriate entities would be useful.”¹³⁵

¹²⁸ See NATIONAL RESEARCH COUNCIL, EDUCATING ONE AND ALL: STUDENTS WITH DISABILITIES AND STANDARDS-BASED REFORM 81 (1997).

¹²⁹ Thomas Hehir, *Confronting Ableism*, 64 EDUC. LEADERSHIP 9, 9 (2007).

¹³⁰ PATRICIA I. MYERS & DONALD D. HAMMILL, METHODS FOR LEARNING DISORDERS 5 (1969). See also Barbara D. Bateman, *Educational Implications of Minimal Brain Dysfunction*, 27 READING TEACHER 662, 666 (1974).

¹³¹ 34 C.F.R. § 300.307(a).

¹³² American Academy of Pediatrics, Section on Ophthalmology, Council on Children with Disabilities, American Academy of Ophthalmology, American Association for Pediatric Ophthalmology and Strabismus and American Association of Certified Orthoptists, *Joint Statement—Learning Disabilities, Dyslexia, and Vision*, 124 PEDIATRICS 837, 841 (2009) (emphasis added).

¹³³ See Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities: Public Meeting Organized by the Library of Congress, at 0026 (May 18, 2009) (statement of Brad Thomas, RFB&D), available at <<http://www.copyright.gov/docs/sccr/transcripts/sccr5-18-09.pdf>> [hereinafter, Thomas statement]. See also AHEAD, 2006, *supra* note 72 (stating that RFB&D and Bookshare currently serve students with learning disabilities and students with traumatic brain injuries because “as the biological and neurobiological bases of some learning disabilities that impair students’ access to print are better understood, a compelling argument is made for students with learning disabilities to be considered “physically disabled” ... [and] no rational argument can be made for excluding students with traumatic brain injuries (or other organic brain dysfunctions), whose symptoms may be similar to those of students with learning disabilities.”).

¹³⁴ In comments to the U.S. Copyright Office in 2009, NCLD and LDA both noted that many school personnel are likely not taking the approach of RFB&D and Bookshare because although this approach “may be a logical conclusion, it is not a conclusion that is immediately obvious to many people who attempt to interpret the Chafee Amendment language as it is written.” NCLD, *supra* note 85, at 4; LDA, *supra* note 85, at 3.

¹³⁵ Thomas, *supra* note 132, at 0026-0027.

Taking another approach, the Virginia Department of Education (“VDOE”) has stated that “[a] doctor’s diagnosis is not needed if staff appropriately trained in the administration of research based assessments for the diagnosis of reading disabilities can adequately determine whether or not a student would require print materials in alternate formats.”¹³⁶ The VDOE points to the extensive scientific research demonstrating an “organic” basis for reading disabilities and to the fact that school personnel, trained in the administration of research-based diagnostic assessments, are the ones who identify a student and determine whether such a student would benefit from print materials in a specialized format.¹³⁷ The VDOE has also noted that school personnel such as reading specialists should qualify as “colleagues in associated disciplines” with whom a competent medical authority may consult.¹³⁸ According to the VDOE:

There is conclusive scientific evidence from genetic research and studies of the brain that has demonstrated a clear neurobiological or ‘organic’ link as the basis of reading disabilities. A variety of neuroanatomical techniques including CT scans, PET, rCBF, SPECT as well as electrophysiological measures including EEG, ERP, and AEP have been used to determine an ‘organic’ link to reading disabilities. Based on this definitive research, it is the belief of the VDOE that students identified as having a reading disability through the use of research based diagnostic instruments would qualify for services through [the Virginia Accessible Instructional Materials Center]. An IEP/504 team may also work closely with a medical doctor to obtain additional diagnostic evaluations as needed.¹³⁹

The reading disability must be of sufficient severity to prevent the reading of printed material in a normal manner

Relationship to the language of the 1966 Statute

The final requirement for a reading disability to qualify under the fourth NLS disability category (reading disability resulting from organic dysfunction) is that the disability must be “of sufficient severity to prevent the reading of printed material in a normal manner.”¹⁴⁰ This language derives from that found in the 1966 statute (upon which the 1974 regulations were based), which specified that the national library program was to be limited “to blind and to other physically handicapped readers certified ... as *unable to read normal printed material as a result of physical limitations*.”¹⁴¹ The second and third disability categories in the regulations (visual disability and physical limitations, respectively) also contain language that is similar to the 1966 statute – namely, “[p]ersons whose visual disability ... is certified ... as *preventing the reading of standard printed material*” and “[p]ersons certified ... as *unable to read or unable to use standard printed material as a result of physical limitations*.”¹⁴² Thus, all three disability categories use the words “unable to read” or “prevent(ing) the reading,” consistent with the language of the 1966 statute (“unable to read”). The second and third disability categories, however, refer to the reading of “standard printed material,” corresponding to the reading of “normal printed material” in the 1966 statute, while the fourth disability category uses the phrase “reading ... printed material *in a normal manner*.”

The use of the words “unable to read” and “prevent(ing) the reading” in the statute and regulations suggests that the intent was to limit the group of eligible individuals to those who are unable to read or access printed text at all – i.e., virtual nonreaders. At the same time, the fourth category adds the qualifier that the reading disability must prevent the reading of printed materials “in a normal

¹³⁶ Virginia Accessible Instructional Materials Center (AIM-VA), *Guidance Document: Reading Disability Due to Organic Dysfunction* (visited Aug. 23, 2010), available at <http://kihd.gmu.edu/aim/news_aimva/organic_dysfunction_doc/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ 36 C.F.R. § 701.1(b)(1)(iv).

¹⁴¹ Pub. L. 89-522, § 1, 80 Stat. 330 (July 30, 1966) (codified as amended at 2 U.S.C. § 135a) (visited Aug. 16, 2010), available at <<http://www.loc.gov/nls/pl89522.html>>.

¹⁴² 36 C.F.R. §§ 701.6(b)(1)(ii), (iii).

manner.” First, it must be pointed out that the use of the word “normal” is insulting to individuals with disabilities because it suggests that they are in some way “not normal.” Second, the phrase “in a normal manner” is vague and open to multiple interpretations. On the one hand, IEP/504 Teams and/or doctors may interpret this phrase, consistent with the word “prevent,” as referring only to virtual nonreaders (i.e., those at the most extreme end of the reading spectrum who are unable to read at all). Such an interpretation would limit those who could be found eligible for NIMAS/NIMAC based on the fourth NLS category to a very small group. On the other hand, this phrase may also potentially open up the group of NIMAS/NIMAC eligible individuals to those beyond virtual nonreaders. Even if it is assumed that reading “in a normal manner” refers to a normal manner as compared to a person’s age-equivalent peers, there is no information regarding what this phrase means – e.g., how many levels below his/her peers a person must be reading in order to satisfy the “sufficient severity” standard. Therefore, based on the NLS language alone, depending on the person or group making the determination, a student who is currently reading two grade levels below his/her age-equivalent peers, may – or may not – be considered reading in “a normal manner.” Similarly, a high school student reading at a fifth grade level may – or may not – be considered reading in a normal manner.

Comparison to IDEA and Section 504/Title II of the ADA

As noted above, “sufficient severity” may be interpreted to refer either to nonreaders or to a broader group. Under IDEA, however, there is no requirement that a student must be a virtual nonreader in order to receive accessible instructional materials. Rather, as part of the right to FAPE,

“Under IDEA, the timely provision of appropriate, accessible instructional materials to students with disabilities who need these materials in order to be involved and progress in the general education curriculum is an “inherent component” of the obligation to provide FAPE.”

IDEA affords students with disabilities the right, not only to have “access” to the general education curriculum, but also, consistent with their IEP, to be “involved” and “progress” in the general education curriculum.¹⁴³ The distinction between mere access, on the one hand, and involvement and progress, on the other, is important in the context of students with learning disabilities. Some middle and high school students with learning disabilities, for example, may be able to *decode* or *access* print on a basic level. These students, however, may be unable to read at a sufficient level of difficulty to *derive meaning from*¹⁴⁴ the print instructional materials that comprise the general education curriculum and acquire the higher level critical thinking skills that are embedded in this curriculum because of their learning disability.¹⁴⁵

Under IDEA, the timely provision of appropriate, accessible instructional materials to students with disabilities who need these materials in order to be involved and progress in the general education curriculum is an “inherent component” of the obligation to provide FAPE. Thus, when a student is unable to participate in the content areas of the general education curriculum because he/she is unable to read at a sufficient level of difficulty to acquire the knowledge and skills presented in a science or social studies textbook, the student should receive accessible instructional materials in a timely manner as part of his/her right to receive FAPE. Similarly, under Section 504 and Title II of the ADA, students with disabilities must be provided an equal opportunity to learn the knowledge and skills that are being taught to all other students. Tom Hehir, former director of OSEP under President Clinton, has argued that the practice of school districts of requiring students with learning disabilities to “read” printed textbooks at grade level, rather than allowing these students to use books on tape and other accessible

¹⁴³ See, e.g., 20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2) .

¹⁴⁴ Reading is defined under the No Child Left Behind Act of 2001 as “a complex system of deriving meaning from print that requires all of the following: (A) The skills and knowledge to understand how phonemes, or speech sounds, are connected to print. (B)The ability to decode unfamiliar words. (C) The ability to read fluently. (D) Sufficient background information and vocabulary to foster reading comprehension. (E) The development of appropriate active strategies to construct meaning from print. (F) The development and maintenance of a motivation to read.” 20 U.S.C. § 6368(5).

¹⁴⁵ The use of accessible instructional materials, including audio and text-to-speech digital formats, as part of classroom instruction has implications for the administration of a “read aloud” accommodation on statewide assessments, the latter of which pertains to validity issues based on the particular construct being measured.

instructional materials, reflects ableist assumptions that suggest there is one “right” way to learn.¹⁴⁶

At the same time, it must be noted that, while it is important for students with disabilities who need accessible instructional materials to be able to receive these materials as part of their IEP or 504 plan, school districts must also make sure that students are not being provided accessible instructional materials at the expense of receiving appropriate reading instruction. Failure to teach a student with a disability how to read, as appropriate to his/her disability-related needs, would also be a violation of IDEA, Section 504, and Title II. Research suggests that students with learning disabilities may benefit from an approach that combines remedial reading instruction with “compensatory strategies” that include accessible instructional materials such as “books on tape, having someone read a book aloud, or using assistive technology (AT) that can read books aloud and highlight words on the screen.”¹⁴⁷

Students Who Are Entitled to Accessible Instructional Materials under IDEA, Section 504, and Title II of the ADA, but Not Eligible for NIMAS/NIMAC

As noted earlier, in order to be eligible for NIMAS/NIMAC, students with disabilities must meet the IDEA definition of “blind or other persons with print disabilities” by satisfying the following two requirements: (1) they are served under IDEA and (2) they qualify under one of the NLS disability categories. Students who meet the first prong because they are on an IEP, but do not meet the second prong because they do not qualify under one of the NLS categories, are not eligible for NIMAS/NIMAC. To qualify under the NLS category of “reading disability,” a student must: (1) have a reading disability resulting from organic dysfunction; (2) be certified by a competent medical authority; and (3) have a reading disability of sufficient severity to prevent the reading of print in a normal manner.

As has been described, these criteria are difficult to meet.

School districts, however, have an obligation under IDEA, Section 504, and Title II of the ADA, to ensure the timely provision of accessible instructional materials to all students with learning disabilities who need these materials in order to be involved and progress in the general education curriculum. Consequently, the application of the NLS criteria to eligibility for NIMAS/NIMAC results in the creation of a subset of students with learning disabilities: (1) who are served under IDEA and for whom the district has an obligation to provide accessible instructional materials, *but* (2) who are not eligible to receive these materials through the NIMAS/NIMAC process.¹⁴⁸ In response to this occurrence, the 2006 IDEA regulations explicitly state that SEAs and LEAs are not relieved of their obligation to ensure that students with disabilities who need instructional materials in accessible formats, but are not included in the category of “blind or other persons with print disabilities,” receive these materials in a timely manner.¹⁴⁹ For these students, OSEP has clarified that “SEAs and LEAs must obtain the materials from other sources.”¹⁵⁰ In addition, there may be students with learning disabilities (or other disabilities) who need accessible instructional materials but, because they are on a 504 plan rather than an IEP, are not eligible for NIMAS/NIMAC. For this group as well, districts are required to provide these students with accessible instructional materials; however, again, the materials must be provided in some way other than through the NIMAS/NIMAC process.¹⁵¹

Because the purpose of the NIMAS and the NIMAC provisions was to create a streamlined, more efficient and cost-effective process for producing and delivering accessible instructional materials, when districts are unable to obtain such materials through this process, there are few options, and the options that are available are more costly and time-consuming to pursue — e.g., purchasing the accessible materials directly from the publisher, if possible. Another option would be for the district to make a copy of the materials on its own and

¹⁴⁶ See Hehir, *supra* note 128 at 11-12.

¹⁴⁷ See Martha L. Thurlow, et al., *Disabilities and Reading: Understanding the Effects of Disabilities and Their Relationship to Reading Instruction and Assessment* (Mar. 2009), available at <<http://www.readingassessment.info/resources/publications/DisabilitiesReadingReport/PARADisabilitiesReadingReport.html>>.

¹⁴⁸ See LDA, *supra* note 85, at 1 (noting that the Chafee Amendment “has caused an unintended segregation of people with print disabilities into subgroups of ‘haves’ and ‘have nots’”).

¹⁴⁹ 34 C.F.R. §§ 300.172(b)(3), 300.210(b)(3).

¹⁵⁰ OSEP NIMAS Q&A, 2010, *supra* note 37, at 6.

¹⁵¹ *Id.*

then, if necessary, be prepared to argue a defense of “fair use” in response to a potential challenge by a publisher of a copyright violation.¹⁵² Districts, however, may be reluctant to risk getting into a situation in which they have to argue the fair use doctrine because determination of its applicability is made on a case-by-case basis. There also have been no court cases, to date, in either the K-12 or higher education context that have addressed the fair use doctrine with respect to the conversion of instructional materials into specialized formats.¹⁵³ School personnel may ultimately hesitate to include in an IEP or 504 plan the need for accessible instructional materials when a student is not eligible for NIMAS/NIMAC in light of the few and less attractive options that would be available. The difficulty for districts to provide accessible instructional materials in ways other than through the NIMAS/NIMAC process may, therefore, result in the denial of accessible instructional materials to students with learning disabilities who need such materials and the resulting constructive exclusion of these students from participation in the general education curriculum, in violation of IDEA, Section 504, and Title II of the ADA.

The Department of Justice recently issued a joint policy letter with ED, addressing the use by some colleges and universities of electronic book readers, such as Amazon’s Kindle, that are inaccessible to students who are blind or have low vision because the readers do not contain a text-to-speech function.¹⁵⁴ Citing the comparable aids, benefits,

and services provisions of the ADA and Section 504, the letter made the following statement: “Requiring use of an emerging technology in a classroom environment when the technology is inaccessible to an entire population of individuals with disabilities – individuals with visual disabilities – is discrimination prohibited by the [ADA] and [Section 504] unless these individuals are provided accommodations or modifications that permit them to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner.”¹⁵⁵ The letter further noted that students who are blind or have low vision must be able to “acquire the same information, engage in the same interactions, and enjoy the same services as sighted students with substantially equivalent ease of use.”¹⁵⁶ Although this letter referred to colleges and universities, the same legal obligations concerning comparable aids, benefits, and services are incumbent on school districts under Section 504 and Title II. Moreover, while the letter addressed the use of electronic book readers, the same legal analysis would apply to printed textbooks and other instructional materials in both the higher education and K-12 contexts under Section 504 and Title II. Thus, this letter underscores that failure to provide needed accessible instructional materials to qualified students with disabilities that results in their being denied an equal opportunity to participate in the general education curriculum and to acquire the same information that is being taught to students without disabilities constitutes discrimination under Section 504 and Title II.

¹⁵² The doctrine of “fair use” is an additional exemption to copyright infringement under the U.S. Copyright Act, which states that “the fair use of a copyrighted work, including such use by reproduction in copies... or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107. Four factors are specified in the law that are to be considered on a case-by-case basis in determining whether the fair use doctrine should apply: (1) the purpose and character of the use, (2) the nature of the work, (3) the amount and substantiality of the portion used, and (4) the effect on potential market for or value of the work. *Id.*

¹⁵³ In one case in California, a federal district court found that the release of copyrighted test protocols to the parent of a student with a disability prior to an IEP meeting was a fair use under the U.S. Copyright Act. See *Newport-Mesa Unified Sch. Dist.*, 371 F. Supp.2d 1170, 1179 (C.D. Cal. 2005).

¹⁵⁴ *Joint “Dear Colleague” Letter: Electronic Book Readers*, 110 LRP 37424, at *1 (OCR June 29, 2010).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *2.

Conclusion and Issues for Future Consideration

The NIMAS and the NIMAC provisions were incorporated into IDEA 2004 to improve the production and delivery of accessible instructional materials to students “with print disabilities.” The application of the limiting NLS criteria to eligibility for NIMAS/NIMAC, however, leads to the creation of a subset of students with learning disabilities, for whom the district has an obligation to provide accessible instructional materials, but who are not eligible to receive these materials through the NIMAS/NIMAC process. Because it is difficult, in terms of cost and time, for districts to provide accessible instructional materials in ways other than through NIMAS/NIMAC, some students with learning disabilities, who need accessible instructional materials in order to be involved and progress in the general education curriculum and to learn the content and skills that are embedded in this curriculum, may not receive the accessible materials to which they are entitled, in violation of their rights under IDEA, Section 504, and Title II of the ADA.

The NLS eligibility criteria are limiting for a variety of reasons:

- **Reading disability must result from “organic dysfunction”** — Because this term is outdated, school personnel may not understand what an organic dysfunction is and may believe that students with learning disabilities are not eligible to receive materials that have been developed from NIMAS files through the NIMAC, even though students with learning disabilities, according to current medical research, result from an organic dysfunction. Moreover, school personnel may consider the eligibility requirements to be too medical to apply to students with learning disabilities and therefore may not consider these materials as an important pedagogical tool for these students.
- **Reading disability must be certified by a medical doctor** — This requirement runs counter to the multi-disciplinary, school-based processes required under IDEA and Section 504, according to which students with learning disabilities are thoroughly evaluated on a variety of diagnostic instruments and determined eligible by a multi-disciplinary

school-based Team, with no requirement for medical documentation. Medical certification also promotes the medical model of disability and will have a disproportionate effect on students from low-income backgrounds. There is the further possibility that school personnel will be reluctant to identify students with learning disabilities for NIMAS/NIMAC because OSEP has noted that districts are responsible for assuming all costs associated with the medical certification process.

- **Reading disability must be “sufficiently severe to prevent the reading of printed material in a normal manner”** — There is the risk that school personnel may interpret this phrase in a narrow, restrictive way as referring only to virtual nonreaders rather than to students who may be able to decode or access print material on a basic level but who are unable to read at a sufficient level of difficulty to acquire the complex knowledge and skills embedded in the instructional materials that comprise the general education curriculum being taught to all students.

Making revisions to the eligibility criteria for NIMAS/NIMAC will not be easy. Both Chafee and the NIMAS/NIMAC provisions, which built on Chafee, were passed as a result of careful negotiations that created a delicate balance between the interests of the publishers and the rights of individuals with disabilities. Because the copyright exemption provided to third party authorized entities underlying the NIMAS/NIMAC process is rooted in the Chafee Amendment (Sec. 121 of the U.S. Copyright Act), one possibility for changing the eligibility criteria for NIMAS/NIMAC would be for Congress to modify Sec. 121 of the U.S. Copyright Act. Such modifications to Chafee could either focus exclusively on the population of students eligible for NIMAS/NIMAC or the overall Chafee population, which is comprised of a broader group of individuals, including students at the higher education level. The former might prove more successful in light of the IDEA-created NIMAS/NIMAC process as well as the entitlement to FAPE under IDEA, which is not available at the higher education level. It should be emphasized that making a change in Chafee will likely be difficult in light of the resistance that the publishers may bring to

bear on this issue. Alternatively, but even more complicated and also likely to encounter resistance, an attempt could be made to modify the Library of Congress regulations defining the four categories of eligibility for the NLS program. Under this approach, Chafee and IDEA would continue to reference the NLS eligibility criteria, although in a modified form. This approach would have the added difficulty of trying to change a long-standing federal program, the NLS. OSEP, unfortunately, is unable to issue guidance on revising the eligibility criteria for students receiving materials developed from NIMAS files that are obtained through the NIMAC because OSEP cannot override existing federal law.

“Making revisions to the eligibility criteria for NIMAS/NIMAC will not be easy.”

As the debate concerning accessible instructional materials continues to unfold, the publishers will likely continue to object to broadening eligibility for NIMAS/NIMAC to include students with learning disabilities. It is therefore important for the debate to remain focused on the obligation of school districts to

ensure the timely provision of appropriate, accessible instructional materials to students with learning disabilities who need these materials in order to participate in the general education curriculum and to have an equal opportunity to attain the same high academic standards that are set for all students.

About the Author: Joanne Karger, J.D., Ed.D., is an attorney at the Center for Law and Education (CLE), where she represents low-income families and provides technical assistance to legal services and *pro bono* attorneys in cases involving education issues, including the rights of students with disabilities under IDEA, Section 504, and Title I/NCLB. Dr. Karger also serves as a consultant for the Center for Applied Special Technology (CAST), analyzing legal and policy issues associated with the provision of accessible instructional materials and access to the general education curriculum for students with disabilities. Prior to joining CLE, Dr. Karger served on a team of consultants that evaluated the special education programs of New York City, the District of Columbia, and several low-income school districts in Massachusetts. She has a law degree from Boston College Law School and a doctorate in education from the Harvard Graduate School of Education in Administration, Planning, and Social Policy.

This report was written with support from the National Center on Accessible Instructional Materials (NCAIM), a cooperative agreement between CAST and the U.S. Department of Education, Office of Special Education Programs (OSEP), Cooperative Agreement No. H327T090001. The opinions expressed herein do not necessarily reflect the policy or position of the U.S. Department of Education, Office of Special Education Programs, and no official endorsement by the Department should be inferred.

For additional information, please contact:
Laura Kaloi, Public Policy Director, at LKaloi@NCLD.org



The National Center for Learning Disabilities works to ensure that the nation's 15 million children, adolescents and adults with learning disabilities have every opportunity to succeed in school, work and life. NCLD provides essential information to parents, professionals and individuals with learning disabilities, promotes research and programs to foster effective learning and advocates for policies to protect and strengthen educational rights and opportunities.

©2010 The National Center for Learning Disabilities, Inc. All rights reserved.
 For more information please visit www.LD.org.