

April 21, 2009

Maria Pallante  
Associate Register for Policy & International Affairs  
U.S. Copyright Office  
Office of Policy and International Affairs  
Copyright GC/I & R  
P.O. Box 70400  
Washington, DC 20024

Dear Ms. Pallante:

Please accept the attached comments in response to the Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Persons With Other Disabilities published in the Federal Register on March 26, 2009. The National Center for Learning Disabilities appreciates the opportunity to submit comments on the important issues raised in the Notice of Inquiry.

NCLD is a not-for-profit organization founded in 1977 that works to ensure that the nation's 15 million children, adolescents and adults with learning disabilities (LD) have every opportunity to succeed in school, work and life. We work with a national network of more than 40,000 parents, teachers and individuals with LD. Our 32-year commitment to children and adults with LD is based on the guiding principle that federal policies should reflect what research tells us. From research, we know that:

- Learning disabilities are neurologically based
- They do not go away
- They affect some 5% of the population
- They require early and accurate identification and effective intervention if students with LD are to succeed in school and life
- 2.8 million students are diagnosed with learning disabilities and receive special education services in our schools, representing 45% of students with disabilities nationwide
- 60% of students with disabilities spend 80% or more of their day in the general classroom
- The majority of students identified with LD have their primary deficit in the area of reading.

While all issues raised are worthy of attention, we address our comments to one specific question under the Subjects of Inquiry under Applicable Statutory or Regulatory Provisions: *How have the Chafee Amendment and related statutory and regulatory provisions worked in practice?*

## **COMMENTS:**

The Chafee Amendment to Copyright Law, enacted in 1996, has significantly improved the provision of accessible educational content to individuals who are blind or who have other disabilities. By providing an exemption for “authorized entities” to provide accessible versions (“specialized formats”) of print materials to qualified individuals with disabilities, it has become the statutory basis for the provision of alternate formats of core instructional materials to elementary, secondary and postsecondary students with print disabilities. As such, it has expedited the delivery of materials to students with disabilities who not only need, but also *have a right*, to receive instructional materials at the same time as their peers without such disabilities.

While the Chafee Amendment cleared the way for access by eliminating the need to request copyright permissions from publishers for each individual title converted to an accessible format for use by Chafee-eligible individuals, it is the definition of individuals who are blind or who have other disabilities that causes substantial difficulties. Therefore, a discussion of how Chafee has worked in practice would be incomplete without a discussion of the validity of the National Library Service for the Blind and Physically Handicapped (NLS) regulation used as the definition for determining those eligible under Chafee.

Under the NLS regulation, 36 CFR 701.10, those individuals who are able to qualify for services include:

- i. Blind persons whose visual acuity, as determined by competent authority, is 20/200 or less in the better eye with correcting glasses, or whose widest diameter if visual field subtends an angular distance no greater than 20 degrees.
- ii. Persons whose visual disability, with correction and regardless of optical measurement, is certified by competent authority as preventing the reading of standard printed material.
- iii. Persons certified by competent authority as unable to read or unable to use standard printed material as a result of physical limitations.
- iv. 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.

The NLS regulation further indicates that, in connection with eligibility for loan services, "competent authority" is defined as follows:

- i. In cases of blindness, visual disability, or physical limitations "competent authority" is defined to include doctors of medicine, doctors of osteopathy, ophthalmologists, 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.
- ii. In the case of reading disability from organic dysfunction, competent authority is defined as doctors of medicine who may consult with colleagues in associated disciplines.

The NLS definition is problematic for a number of reasons:

- The terms used to describe a reading disability, such as "resulting from organic dysfunction," do not reflect the research-base and current understanding of reading-related learning disabilities (which represent the vast majority of individuals with learning disabilities). Furthermore, the term "reading disability resulting from an 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 NLS regulations. The origin of this terminology is unknown, and has created great confusion to those who have attempted to interpret it.

Although 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 since the last revision of NLS regulation 36 CFR 701.10 in 1981 clearly supports the view that reading disabilities, in particular, are based on physiological impairments in the brain.

- The requirement for a medical doctor to make such a certification of a reading disability is equally antiquated and without foundation. A reading-related learning 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. Not only is the requirement for certification by a medical doctor totally inconsistent with federal laws protecting children and adults with learning disabilities (the IDEA, Section 504 and the ADA) it also results in a disproportionately negative impact on those who are poor and without easy access to health care professionals. The result of this "certification" requirement is that 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 and therefore be denied access to accessible formats despite having been deemed “eligible” for special education service under the IDEA and/or protections from discrimination on the basis of disability under the ADA and Section 504. Such a disparity of access -- based on socio-economic status -- is certainly not in keeping with our nation’s democratic principles nor is it defensible by any public policy.

Lastly, since “reading disability” is the only disability category singled out in the regulation for certification by a medical professional (individuals with other impairments and disabilities are allowed a much wider variety of professionals who would be considered competent authorities to certify their disabilities). The “certification” requirement for a reading disability is discriminatory.

- Recognition of specific learning disabilities within federal law began as early as 1969, with the passage of the Children with Specific Learning Disabilities (SLD) Act (PL 91-230). That recognition has lived on in the IDEA since its passage in 1975, then as the Education for all Handicapped Children Act (EHA). As mentioned above, never has eligibility for services under the SLD category of IDEA depended on a certification by a medical doctor.
- The 2004 reauthorization of IDEA references the same limited NLS service population criteria within the statutory language implementing the provisions of the National Instructional Materials Accessibility Standard (NIMAS). This most recent legislative development- designed to further the removal of barriers to instructional materials for students with disabilities thereby ensuring full and equal access – has been compromised by the limitations of the NLS criteria.

As a result of the conflicting federal policies described above, many in education have been confused over how to meet federal and state mandates requiring access to instructional content for students with learning disabilities in alternative formats, while at the same time complying with the current language of the Chafee Amendment (and by extension, the NIMAS language in IDEA). In some cases, authorized entities like Recording for the Blind & Dyslexic and Bookshare.Org have taken the position that learning disabilities do not have to be certified by medical professionals because they are “physical disabilities” by virtue of the conceptual understanding that learning disabilities are based on physiological impairments in the brain. While this 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. Therefore, many state and local education agencies have felt obliged to enforce the dual standard created by the tie to NLS service qualifications, even though doing so places them in the difficult legal and ethical dilemma of how to serve the needs of students with learning disabilities while also complying with the provisions of the Copyright Act.

The result of this conflict is an unserved population of children and young adults with reading-related disabilities who fail to achieve to their full potential because of a lack of equal access to accessible instructional materials. We estimate this unserved group to number in the millions.

NCLD recommends a full review of the Chafee Amendment language and, by extension, its influence on the NIMAS provisions of the IDEA. In our opinion, an updated and just provision would ensure that any individual whose disability would legally require the provision of a reading accommodation under any other statute (IDEA, Section 504, ADS) would automatically be a qualified individual under the Chafee copyright exemption.

NCLD is prepared to assist the Copyright Office in its work on these important and critical issues.

Sincerely,



James H. Wendorf  
Executive Director  
National Center for Learning Disabilities

**NATIONAL CENTER FOR LEARNING DISABILITIES, INC.**

**PUBLIC POLICY OFFICE**

611 Pennsylvania Ave SE #400 • Washington, D.C. 20003 • PH 703-476-4894 • Email: LKaloi@NCLD.org

**NCLD HEADQUARTERS**

381 Park Avenue South • Suite 1401 • New York, NY 10016 • TEL 212.545.7510 • FAX 212.545.9665

\* \* \* \*

*NCLD works to increase opportunities and improve outcomes for children and adults with learning disabilities (LD) by providing accurate information to the public, developing and disseminating innovative educational programs, and advocating for more effective policies and legislation to help individuals with LD.*