Comments of the Learning Disabilities Association of New York State to the New York State Board of Regents on the Proposed Revisions to Part 200 of the Regulations of the Commissioner of Education

December 14, 1999

This statement is presented on behalf of the Learning Disabilities Association of New York State in response to the request by the Honorable Members of the Board of Regents for comments on the proposed revisions to Part 200 of the Regulations of the Commissioner on Education. The comments submitted address the "definition of "learning disabilities" in Section 200.1 (zz)(6) of the proposed revisions. Specifically, we are concerned about the retention of the 50% discrepancy criterion in the definition of learning disability. LDA supports the adoption of the federal "severe discrepancy" standard instead of returning to the 50% discrepancy criteria which particularly denies young children the services they need until its too late.

While in the ideal world of education there might be no need to classify preschoolers as developmentally delayed or school age children as learning disabled because they would receive instruction appropriate to their individual needs within a regular education setting from preschool throughout their school careers, that ideal world appears to be far in the distance. At the present time, it is the rare and fortunate child with a learning disability who receives such consistent and appropriate instruction from an early age. The issue then becomes when and how children who have learning disabilities should be classified in order to achieve what all students in the state of New York are expected to achieve.

Higher standards of achievement for all learners are a critically necessary goal in order to allow those learners to become adults who can perform successfully in an increasingly complex and demanding world. Children who have learning disabilities (children with normal intelligence but unique learning problems) are able to achieve consistent with those higher standards, if they receive instruction to address their unique needs from their earliest years of schooling.

Federal Law and Regulations

Federal law defines the term "specific learning disability" as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations". It is further defined as including "such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia" and excluding "learning problem[s] that [are] primarily the result of visual, hearing or motor

disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage".

Since their promulgation in 1979, federal regulations have stipulated specific criteria for determining the existence of a learning disability. These procedures state that a team may determine that a child has a specific learning disability if the child does not achieve commensurate with his or her age and ability levels in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematics calculation, and or mathematics reasoning if provided with learning experiences appropriate for the child's age and ability levels and the evaluation team "finds that the child has a severe discrepancy between achievement and intellectual ability in one or more of [these areas]."

State Regulations & Riley v. Ambach

Subsequent to the promulgation of federal regulations, New York State chose to define "severe discrepancy" as a discrepancy of at least 50% between actual and expected achievement. That definition was questioned in a federal lawsuit and the history of that litigation is instructive as the Regents now consider significant revisions to Part 200 of the Commissioner's regulations.

On June 30, 1980, in the matter of Riley v. Ambach (508 F. Supp. 1222 (1980)), Judge Charles Sifton of the U.S. District Court, Eastern District, New York, ordered the New York State Education Department to cease recommending that Committees on the Handicapped use the 50% discrepancy rule as a guideline to determine that a child should be classified as learning disabled. In July of 1980, this decision was conveyed to the field in a memorandum from Deputy Commissioner, Robert R. Spilllane. In August of 1980, Commissioner Spillane further specified to the field the steps that must be taken to implement Judge Sifton's decision. In addition, he enumerated the standards to be used to appropriately identify, evaluate and place students suspected of learning disabilities. In this memorandum, Commissioner Spillane used the language of the Federal definition to define a learning disabled child as follows:

"A. A learning disabled child is:

I. A child with a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

a. Oral expression
b. listening comprehension
c. written expression
d. basic reading skill
e. reading comprehension
f. mathematics calculation, or
g. mathematics reasoning
and

II. A child may have perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and/or developmental aphasia."

The June 1980 decision was subsequently overturned on May 19, 1981 by the U.S. Court of Appeals for the Second Circuit (Riley v. Ambach, 668 F. 2d 635 (1981)) on the basis that administrative remedies had not been exhausted. It is important to note, however, that the Court made a point of questioning the validity of the continued use of the 50% discrepancy standard by citing the view of Ambach's Advisory Panel for the Education of Children with Handicapping Conditions:

> *"…that the rule is 'instrumental in the denial of special education to children otherwise qualified to receive special education' and 'since appropriate utilization of local multidisciplinary teams will more effectively identify children with a specific learning disability without a guide of 50% discrepancy, which has become a requirement that effectively denies special education to many children, 'the rule should be 'deleted in its entirety'."*

In a memorandum dated June 17, 1981, Commissioner Spillane notified the field of the appellate court decision. While noting that the 50% discrepancy standard was again in effect, Commissioner Spillane also emphasized how it was to be implemented:

> *"As a result of the appellate court decision, the use of a 50% or greater discrepancy between expected achievement and actual achievement, determined on an individual basis, as contained in section 200.1 (d) (4) of the Commissioner's Regulations, is again in effect for the purpose of determining whether or not a child is learning disabled.* ***However, the 50% discrepancy standard is to be used as a guideline in making a qualitative assessment of the child's ability and achievement; it is not to be applied as a quantitative formula. The Department will consider the use of a 50% discrepancy formula as a compliance violation*** [emphasis added]*."*

Proposed Revisions to Part 200 Regulations

In an earlier draft of the Regents' proposed revisions to the Part 200 Regulations, the 50% discrepancy rule had been deleted in its entirety, however, it has been reinstated in the latest draft publication. It is the position of LDA that as the New York State Education Department and the Regents reexamine the special education regulations, the inclusion of the 50% standard is one that must be seriously reconsidered. As currently defined and implemented, that mathematical standard has meant that children who have learning disabilities, particularly those with dyslexia, the most common of the learning disabilities, are rarely classified until at least third grade, a time when their peers are expected to be reading proficiently but when these children, who have not been receiving, the necessary specialized help, are reading, by definition, at a first grade level or less.

Studies published within the last five years by major research institutions such as Yale University have shown that reading disorders such as dyslexia are most likely the results of faulty wiring in the brain. Traditional methods of reading instruction, whether whole language or phonics based, fail to address the individual needs of these children. No single strategy will work for every child because researchers now know that individual children respond differently to similar deficits. Additionally there is growing evidence that there is a window of opportunity

for children to learn to read between ages 5 and 7. After the age of 7, the time and intensity of the intervention needed to develop the skill increases dramatically. With this information, it is abundantly clear that early intervention is critical. When children who have learning disabilities are identified at an early age and provided with specialized services that are appropriate to their individual needs, they do significantly better in school than their unidentified and unassisted peers.

Use of research-based best practice in assessing and determining eligibility of students who have learning disabilities is obviously the key to providing such students with appropriate services during this period of time when it counts the most. While reading is perhaps the most important early skill, clinicians that are trained to evaluate the uneven pre-academic and academic functioning of young children are equally able to identify other signs of learning disabilities and to prescribe appropriate instructional interventions for them. Given these clinical advances, it is even more important to use an evaluation model, which incorporates multiple sources of data and informants to make eligibility decisions for children who have learning disabilities. Continuing to use a mathematical formula will doom many such children to a lifetime of school failure at a time when it has been amply documented that all children can learn and that children with learning disabilities can achieve, within the regular classroom, at a level consistent with the new higher standards for their peers.

We believe that the State Education Department was on the right track when it attempted to revise the Commissioner's Regulations to eliminate the long discredited 50% discrepancy criterion in the earlier draft of the Part 200 amendments. We observe that the requirement was reinstated not on the basis of a change in the federal law or regulations or our new knowledge in the area of learning disabilities. Rather, it was restored because of concerns that tampering with the 50% discrepancy criterion would result in more children being identified as in need of special education services. In our view, the critics of the earlier draft reinforce the position of the plaintiffs in Riley v. Ambach litigation and demonstrate the inefficacy of the Spillane guideline that the 50% discrepancy be used qualitatively rather than quantitatively. In fact, the 50% discrepancy criterion was revived because it has been and continues to be a very effective mechanism to deny services to children who have learning disabilities.

We call upon the Regents to adhere to federal law and regulations and to the growing body of research which has vastly expanded our knowledge of learning disabilities by removing the 50% discrepancy standard from the definition of learning disabilities in Section 200.1 (zz) (6) in the final Commissioner's regulations. The current proposal to "clarify in guidance documents the reference to the 50% discrepancy" is both disingenuous and wholly inadequate. Proponents of the 50% discrepancy criterion would not have fought so hard to retain it in regulations if it was not an effective deterrent to early identification of children who have learning disabilities. Guidelines communicated to the field by memoranda simply do not carry the weight and force of published regulations. Moreover, to those who support retention of the 50% criterion as a "gate-keeping" mechanism, we point out that children who meet the definition of learning disabled are not eligible for special education unless, by reason of their disability, they need supports and services that are only available in special education. School districts that are appropriately meeting the needs of students who have disabilities in their general education programs thus have nothing to fear from a legally sound definition of learning disability.

We realize that a change to the federal “severe discrepancy” standard will result in a need to develop further regulations regarding the criteria for determining a “severe discrepancy”. If the regulatory definition is changed we pledge our commitment to work with the State Education Department and other stakeholders in expeditiously completing this important task.