



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

MAY - 7 2007

Dr. Tuck Tinsley
President
American Printing House for the Blind, Inc.
1839 Frankfort Avenue
Louisville, KY 40206

Dear Dr. Tinsley:

The Office of Special Education Programs (OSEP) at the U. S. Department of Education is responding to your request for clarification on an issue concerning the "indemnification clause" that the National Instructional Materials Access Center (NIMAC) has apparently included in its Limited Use Agreements with State educational agencies (SEAs). OSEP has asked the Office of General Counsel (OGC) at the Department for legal guidance on this NIMAC clause:

6.3 YOU [the State agency] agree to indemnify and hold US [the NIMAC] harmless from any liability, loss, cost, damage or expense, including reasonable attorney's fees and costs, that may result from any claim made by any publisher or copyright owner that YOU, or any one acquiring copies of copyrighted materials downloaded from the Web Site through YOU, is not visually impaired, reading disabled or other wise legally entitled to download and use the Content from the NIMAC Web Site under the provisions of 17 U.S.C. Sec. 121 and related laws. This indemnity includes claims arising out of YOUR breach of any of YOUR obligations under this Agreement, whether by reason of intentional misuse or because of YOUR negligence.

Some State officials have refused to sign the agreement, because they have indicated that their State law prohibits State agencies from agreeing to indemnify other entities. It is our understanding that, while NIMAC representatives may have contacted Congressional staffers and asked for a legislative remedy that would provide sufficient protection "shielding" the NIMAC from liability when carrying out its duties under section 674(e) of the Individuals with Disabilities Education Act (IDEA), any legislative action would take some time, and it is not clear that Congress will act. In the "interim," NIMAC has asked for the Department's interpretation of section 674(e)(5) of IDEA, and asked to what extent this provision provides any protection for the NIMAC from lawsuits contesting their grant activities. This statutory provision reads as follows:

(5) Liability of the Secretary.--Nothing in this subsection shall be construed to establish a private right of action against the Secretary for failure to provide instructional materials

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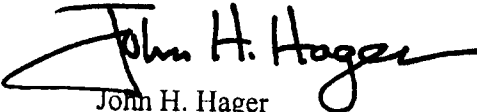
directly, or for failure by the National Instructional Materials Access Center to perform the duties of such center, or to otherwise authorize a private right of action related to the performance by such center, including through the application of the rights of children and parents established under this Act.

It is our view that, while this provision is somewhat ambiguous, the stronger interpretation of the language "or to otherwise authorize a private right of action related to the performance by such center, including through the application of the rights of children and parents established under this Act," would be that this language would apply to NIMAC. Although there is no meaningful legislative history, the phrase before that language appears to pertain to the Secretary's liability with respect to the duties of the NIMAC. Therefore, it appears that the only way to give appropriate meaning to the language at the end of the provision is to interpret it to provide some protection to NIMAC. This provision does not appear to provide all of the protections that are included in the current indemnification clause. For example, it does not appear to address attorney's fees and costs, and actions based upon an authority other than section 674(e), such as under the Copyright Act. Thus, the appropriate interpretation of this provision should be limited to state that there is nothing in subsection 674(e) that authorizes a private right of action against NIMAC related to the performance of its duties under this subsection.

In addition, please be aware that it is less likely that a court would grant deference to our opinion in this instance, because the question does not address a program issue but a legal issue of the court's jurisdiction.

Please let me know if you have any questions about this matter.

Sincerely,



John H. Hager