

Comments to the United States Copyright Office, Library of Congress

Re: Federal Register Notice of Inquiry ([March 26, 2009](#)) on the topic of facilitating access to copyrighted works for “blind or other persons with disabilities”

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Date: April 21, 2009

1. Applicable Statutory or Regulatory Provisions: How have the Chafee Amendment and related statutory and regulatory provisions worked in practice?

Problem Summary:

The current Chafee Amendment language is inherently flawed due to its connection with the National Library Service qualification criteria, and results in an unintended discrimination against people with learning disabilities.

Discussion:

The current statutory language of the Chafee Amendment, codified as 17 USC 121, is ill suited to meet the needs of the majority of people with learning disabilities who require equitable access to reading materials. The Chafee Amendment was designed to help individuals with print disabilities by ostensibly streamlining the creation of alternative formats by authorized entities. Instead, however, the Amendment has inadvertently created barriers to access for countless thousands of people with learning disabilities who could benefit from these materials. The Amendment has caused an unintended segregation of people with print disabilities into subgroups of “haves” and “have nots,” much to the contrary intention of the Individuals with Disabilities Education Act (IDEA) and the civil rights mandates of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act.

Although the Library of Congress (LOC) clearly has the legal authority to interpret and implement the Congressional mandates of 2 USC 135.a (“An Act to provide books for the adult blind”), it is not appropriate to apply the resulting service limitations (as promulgated in 36 CFR 701.10) outside the confines of the operations of LOC’s own National Library Service (NLS). Doing so creates a number of potential legal conflicts for entities who are explicitly authorized under the Chafee Amendment language to create alternative format materials, but who would be required to limit these materials only to the subset of individuals with disabilities who qualify under NLS regulations.

The educational setting, in particular, represents one of the clearest examples of the problem of applying the Chafee language beyond NLS. In practice, if schools and other educational institutions were to follow the NLS service criteria in determining which students qualify to receive alternative format materials, they would be illegally discriminating against a large number of students with disabilities who can legally receive reading accommodations under other laws (e.g., IDEA, Section 504 or the ADA). To further compound this complex problem, the 2004 reauthorization of IDEA now 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 underscores the severity of the issue and the need to resolve this problem.

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.

It is important to note that 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 been an issue of great confusion to many who have attempted to interpret it.

On the other hand, the recognition of specific learning disabilities within federal law began as early as 1969, with the passage of the Children with Specific Learning Disabilities Act (PL 91-230). 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. Furthermore, 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-related learning disabilities, in particular, are based on physiological impairments in the brain.

However, to require a medical doctor to make such a certification is flawed on two counts. First of all, there is a dual standard that either by design, or inadvertently, makes it harder for people with learning disabilities to be qualified for NLS services, since it is the only disability category singled out for certification by a medical professional. Individuals with other types of disabilities are allowed a much wider variety of professionals who would be considered competent authorities to certify their disabilities. Secondly, a 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

usually diagnosed by school psychologists or other specially trained educational professionals who have the competency to administer and interpret results from standardized psychoeducational diagnostic instruments.

As a result, 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 which 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.

Although the information request issued by LOC was not intended to gather feedback on the current validity of the NLS regulation, it is very clear that after almost 28 years this regulatory language would benefit from a full review. Nonetheless, since the Chafee Amendment language was designed to cover the operations of countless organizations beyond the umbrella of the National Library Service, the copyright exemption offered by 17 USC 121 should never have been so constructed as to tie other authorized entities into observing the NLS qualification criteria.

The only logical conclusion to this dilemma is to rewrite the Chafee Amendment language and its extension to the NIMAS provisions of the IDEA, so that any individual whose disability would legally require the provision of a reading accommodation under any other statute would automatically be a qualified individual under the Chafee copyright exemption. Doing so would end the current dual standard that is now in place, and ensure that all people with disabilities be treated in an equitable manner.