

**Comments of
American Society for Deaf Children
California Association of the Deaf
California Coalition of Agencies Serving the Deaf and Hard of Hearing
California State University Deaf Education Program
Conference of Educational Administrators of Schools and Programs for the Deaf
National Association of the Deaf
on
U.S. Department of Health and Human Services
U.S. Department of Education
Policy Statement on
Inclusion of Children with Disabilities in Early Childhood Programs**

The American Society for Deaf Children, California Association of the Deaf, California Coalition of Agencies Serving the Deaf and Hard of Hearing, California State University Deaf Education Program, Conference of Educational Administrators of Schools and Programs for the Deaf, and National Association of the Deaf hereby comment on the above referenced document.

We have reviewed the document and relevant law, policy, and research. Although the development of this policy statement may be well-intended, we believe it should not be disseminated in its current form. The policy statement is not necessary, and it does not balance the legal provisions that apply to placement. It takes a one-sided view that assumes that all children should be placed in a general education setting without considering whether that setting can meet the child's needs. We recommend that the Departments change the focus of this document from advocating for physical inclusion in general education settings to ensuring that *all* children receive the services, supports, and settings they need, including specialized settings.

At the outset, we note that the premise of this document is false. There is no legal basis for an "inclusion" policy statement. The word "inclusion" as used to promote a particular placement for a child is not found anywhere in the Individuals with Disabilities Education Act (IDEA) statute or regulations, the Americans with Disabilities Act (ADA) statute or regulations, or Section 504 of the Rehabilitation Act (Section 504) statute or regulations. Promoting "inclusion" based on these laws is misguided. None of these laws require it.

A basic principle of the document with which we can agree is that children with disabilities should not be excluded from schools and public and private early childhood programs. Federal law – Section 504 and Titles II and III of the ADA - prohibit such exclusion. However, ADA and 504 do not require all students with disabilities to be placed in general education settings, nor do they prohibit early intervention or early childhood services from being provided in specialized settings. This policy statement mixes up ADA and 504 obligations with the Least Restrictive Environment (LRE) provisions of IDEA. They are not one and the same.

IDEA mandates that placement decisions be based on a child's individual needs - *after* those needs have been determined by a thorough evaluation by qualified evaluators, goals for the child have been established, and the services needed to help the child meet those goals have been described. Placement may be in the general education setting or in a specialized setting. As the Department has stated:

Placement decisions regarding a preschool child with a disability who is served under Part B of the IDEA must be individually determined based on the child's abilities and needs as described in the child's IEP. 34 CFR §300.116(b)(2). State educational agencies and LEAs should engage in ongoing short- and long-term planning to ensure that a full continuum of placements is available for preschool children with disabilities. To achieve this goal, a variety of strategies, including staffing configurations, community collaboration models, and professional development activities that promote expanded preschool options are available. (U.S. Department of Education, Dear Colleague Letter, February 29, 2012)

Under IDEA's Prior Written Notice (PWN) provisions "parents of children with disabilities must be informed that the public agency is required to have a full continuum of placement options, as well as about the placement options that were actually considered and the reasons why those options were rejected." (Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Analysis of Comments and Changes, 76 Fed. Reg. 46588)

The Department has issued further guidance applicable specifically to deaf and hard of hearing children. It has made clear that "[a]ny setting that does not meet the communication and related needs of a child who is deaf does not allow for the provision of [a free appropriate public education] and cannot be considered the LRE for the child. Just as the IDEA requires placement in the regular educational setting when it is appropriate for the unique needs of a child who is deaf, it also requires placement outside of the regular educational setting when the child's needs cannot be met in that setting." (U.S. Department of Education, Letter to Bosso, August 23, 2010, Letter to Stern, September 30, 2011, also see Deaf Students Education Services; Policy Guidance, October 26, 1992, 57 Fed. Reg. 49274)

The Department has stated:

The LRE requirements . . . express a strong preference, not a mandate, for educating children with disabilities in regular classes alongside their peers without disabilities . . .

With respect to the recommendation that the placement for children who are deaf or hard of hearing be based on the child's communication needs, [the IEP section] . . . clarifies that the IEP Team, in developing the IEP for a child who is deaf or hard of hearing, must consider the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, and the child's academic level and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

With respect to strengthening the continuum of alternative placement requirements, nothing in the LRE requirements would prevent an IEP Team from making a determination that placement in the local school is not appropriate for a particular child. [The continuum of alternative placements section] already requires each public agency to ensure that a

continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services . . .

The process for determining the educational placement for children with low-incidence disabilities (including children who are deaf, hard of hearing, or deaf-blind) is the same process used for determining the educational placement for all children with disabilities. That is, each child's educational placement must be determined on an individual case-by-case basis depending on each child's unique educational needs and circumstances, rather than by the child's category of disability, and must be based on the child's IEP. We believe the LRE provisions are sufficient to ensure that public agencies provide low-incidence children with disabilities access to appropriate educational programming and services in the educational setting appropriate to meet the needs of the child in the LRE.

. . . [W]e agree [that Congress made clear its] intent that State funding mechanisms support the LRE requirements and do not provide an incentive or disincentive for certain placement decisions . . .

(Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Analysis of Comments and Changes, 71 Fed. Reg. 46585-46586)

Likewise, the Department has issued interpretation and policy letters clarifying that infants and toddlers and their families may receive services outside settings deemed the "natural environment."

" . . . § 303.344(d)(1) requires that the identification of the early intervention service needed, as well as the appropriate setting for providing each service to an infant or toddler with a disability, be individualized decisions made by the IFSP Team based on that child's unique needs, family routines, and developmental outcomes . . ." (Early Intervention Program for Infants and Toddlers with Disabilities, Analysis of Comments and Changes 76 Fed. Reg. 60158)

Further:

The legislation amends current law to recognize that there may be instances when a child's individualized family service plan cannot be implemented satisfactorily in the natural environment. The Conferees intend that in these instances, the child's parents and the other members of the individualized family service plan team will together make this determination and then identify the most appropriate setting in which early intervention services can be provided. H.R. Conf. Rep. No. 108-779, at 238. (U.S. Department of Education, Letter to Morris, June 7, 2005)

This is in keeping with best practices recommendations from professionals. For example, the Joint Committee of American Speech-Language-Hearing Association (ASHA) and the Council on Education of the Deaf (CED) recommends:

When determining the setting for services for families and their young children:

- consider home, community, and program settings (*including center-based programs*) that provide full support for language and communication development for the child and family
- base recommendations on a comprehensive assessment of the child and the family's priorities, resources, and concerns
- provide families with comprehensive information about all programs and providers
- encourage families to visit all programs providing services to young children with hearing loss and their families
- support families in selecting the programs, providers, settings, and services that best meet the needs of the child and family
- recommend programs and services that employ qualified providers who are fluent users of the language(s) and communication modality (or modalities) of the child.

(Joint Committee of ASHA and the Council on Education of the Deaf, Natural Environments for Infants and Toddlers Who Are Deaf or Hard of Hearing and Their Families, not dated, <http://www.asha.org/aud/Natural-Environments-for-Infants-and-Toddlers/>, emphasis in original).

The Departments of Education and Health and Human Services policy statement confuses LRE with placement in the general education setting. In fact an LRE for one child may be different than an LRE for another. This document treats all infants, toddlers, and young children served under IDEA as though they all have the same needs, which can all be met the same way. It ignores the individualized character of early intervention and early childhood education. The document stresses the provisions of the law that encourage placement in general education settings without adequately balancing them with clear law and policy that stresses consideration of individual needs.

Further, IDEA requires States to ensure that their funding mechanisms do not create barriers to properly placing the child. (20 U.S.C. 1412(a)(5)), 34 C.F.R § 300.114) Suggestions in this document that only general education settings should be funded (p. 12) conflict with the law and should be removed. Recommendations that States should use resources to push "inclusion" only (p. 7) conflict with law and best practice. Recommendations that Individualized Family Service Plan (IFSP) Teams and Individualized Education Program (IEP) Teams develop "goals, progress measurement, strategies, and supports" that can only be implemented in one setting (p. 12) conflict with law and best practice. Recommendations that parents should be encouraged to advocate for "inclusion" (p. 12), rather than appropriate settings and services, conflict with IEP development and PWN provisions. In addition, they are deeply hurtful and insulting to parents who search high and low for a program that can truly meet their child's needs.

The document cites research to show the benefits of "inclusion." However, the research used to justify the position statement is not inclusive of all students with disabilities. Typically studies on this topic do not include children who are deaf or hard of hearing.

Deaf and hard of children constitute a small percentage of IDEA-served children. The count of IDEA-served deaf and hard of hearing children is around one percent of the age 3-5 IDEA population and one percent of the Part C population. (Out of 745,349 IDEA-served children age 3-5, 9,325 are documented in the “hearing impairment” category (U.S. Department of Education, IDEA Section 618 Data Products: State Level Data Files, <http://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#part-b>). Out of the 339,071 infants and toddlers served under Part C (ECTA Center, Part C National Program Data, <http://ectacenter.org/partc/partcdata.asp>), fewer than 3500 are documented as being deaf or hard of hearing (Centers for Disease Control and Prevention, Summary of 2013 National CDC EHDI Data, <http://www.cdc.gov/ncbddd/hearingloss/ehdi-data2013.html>). Therefore, it is not likely that deaf and hard of children appear in research samples. A comprehensive research review that did look at the experience of deaf and hard of hearing children came to a different conclusion: children who are deaf or hard of hearing face great difficulties with communications and interactions with hearing peers in “inclusive” settings (Yu-Han Xie, Y., Potmėšil, M., and Peters, B., Children Who Are Deaf or Hard of Hearing in Inclusive Educational Settings: A Literature Review on Interactions With Peers. *J. Deaf Stud. Deaf Educ.* (2014) 19 (4): 423-437, doi:10.1093/deafed/enu017.

To the extent that this document states that general education settings should be required to accept and serve children with disabilities under Section 504 and the ADA, with appropriate accommodations and auxiliary aids and services, we heartily agree. We are pleased that the Department of Education and Department of Justice have been issuing guidance on the obligations these laws confer on public and private entities, as applicable, for the past several years. The document at hand should build on the work that has been done in this arena and provide assistance to entities in carrying out these obligations. For example, in November 2014 the Department of Justice and Department of Education issued joint guidance on the obligations of public schools to provide “effective communication” to individuals who are deaf or hard of hearing (and others). This thorough guidance spells out the ADA requirements that public schools must ensure that communication with deaf and hard of hearing individuals is “as effective as communication with students without disabilities.” Schools must provide “auxiliary aids and services” to provide “effective communication.” In determining appropriate auxiliary aids and services the public school must give “primary consideration” to the request of the deaf or hard of hearing individual (or parent). (U.S. Department of Education, Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities, <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>)

These requirements apply to the public programs identified in this document. (Private programs also have ADA obligations.) If a preschool is truly going to be “inclusive” for deaf and hard of hearing children it must ensure that such effective communication is provided. Inclusive environments for deaf and hard of hearing children include:

- professionals who are fluent in American Sign Language (ASL) and the methods and approaches used to support deaf and hard of hearing children’s ASL acquisition

- professionals who are fluent in spoken English and the methods and approaches used to support deaf and hard of hearing children’s spoken language acquisition
- professionals who are trained to support visual technologies such as communication through video over the Internet and flashing notification systems
- professionals who are trained to support listening technologies such as hearing aids and cochlear implants
- deaf and hard of hearing professionals who can serve as role models to children and can provide real life information to families, most of whom are hearing
- a critical mass of age-level and language peers.

(Adapted from National Association of State Directors of Special Education (NASDSE), Deaf and Hard of Hearing Students Educational Service Guidelines, not dated)

Finally, any statement that a Federal agency produces should be devoid of inflammatory language. The word “segregate” and its variants historically have been used to describe the egregious practice of oppressing African-American individuals in all areas of society. These terms have no place in discussions about specialized settings for vulnerable populations. Similarly, describing “inclusion” as a “moral imperative” is deeply offensive to the parents who seek out specialized settings in order to afford their children full linguistic and communicative access to professionals and peers.

In closing, we recommend that the Departments shift the focus of the document to ensuring that *all* children receive the services, supports, and settings they need and ensuring that entities receive the informational and financial resources necessary to help deaf and hard of hearing children reach their full linguistic, social-emotional, and academic potential. We stand ready to assist the Departments in this endeavor.

Contact:
 Barbara Raimondo, Esq.
 Conference of Educational Administrators of Schools and Programs for the Deaf
baraimondo@me.com
 301/792-2884