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DEPARTMENT OF EDUCATION

34 CFR Part 300

[Docket ID ED-2019-OSERS-0111]

Assistance to States for the Education of Children with Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final notice of interpretation.

SUMMARY: The Individuals with Disabilities Education Act (IDEA) established the National Instructional Materials Access Center (NIMAC) in 2004 to assist State educational agencies (SEAs) and local educational agencies (LEAs) with producing accessible instructional materials for students with print disabilities. The U.S. Department of Education (Department) issues this final notice of interpretation to clarify that the definition of "print instructional materials" in IDEA includes digital instructional materials.

DATES: This final interpretation is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Background:

The NIMAC was established under IDEA in 2004 to assist SEAs and LEAs in the production of accessible instructional materials for students with print disabilities. While discussing proposed changes to IDEA in the Senate, Senator Dodd, a co-sponsor of the bill, commented on the reason for establishing NIMAC, stating "these important provisions will greatly aid blind and print disabled students by ensuring they receive their textbooks and other instructional materials in the formats they require, such as Braille, at the same time as their sighted peers." 108 Cong. Rec. S11, 656 (April 29, 2003). Similarly, the House report noted that "the provision is intended to provide students who are blind or have other print disabilities with more timely access to instructional materials used in elementary and secondary schools." H.R. Rep. No. 108-77, at 98 (April 29, 2003). Within the legislation, the scope and duties of the NIMAC as the searchable online national file repository of K-12 print textbooks in the extensible markup language (XML)-based National Instructional

Materials Accessibility Standard (NIMAS) format are clearly defined, as are the key definitions framing its operations.

These duties are:

1. To receive and maintain a catalog of print instructional materials prepared in the NIMAS, as established by the Secretary, made available to such center by the textbook publishing industry, SEAs, and LEAs.

2. To provide access to print instructional materials, including textbooks, in accessible media, free of charge, to blind or other persons with print disabilities in elementary schools and secondary schools, in accordance with such terms and procedures as the NIMAC may prescribe.

3. To develop, adopt, and publish procedures to protect against copyright infringement, with respect to the print instructional materials provided in sections 612(a)(23) and 613(a)(6) of IDEA. (Section 674(e)(2)(A)-(C) of IDEA; 20 U.S.C. 1474(e)(2)(A)-(C)).

Under section 674(e)(3)(C) of IDEA (20 U.S.C. 1474(e)(3)(C)), the term "print instructional materials" means "printed textbooks and related printed core materials that are written and published primarily for use in elementary school and secondary school instruction and are required by a State educational agency or local educational

agency for use by students in the classroom.” During the 15 years since the NIMAS was created, the use of digital educational materials<sup>1</sup> as a core component of elementary and secondary curriculum has grown significantly. Currently, the majority of States have digital learning plans and digital learning standards. In addition, State leaders have demonstrated a commitment to digital learning and the use of digital materials and to support personalized learning that meets the needs of all students.<sup>2</sup> In fact, in 2014, Florida developed a five-year plan that requires all schools to move to digital classrooms.<sup>3</sup> In a recent United States survey, 75 percent of classroom teachers expected digital content to replace traditional print textbooks by 2026.<sup>4</sup>

IDEA, however, does not specifically address the inclusion or use of digital instructional materials, which were not as common when the law was originally enacted. At this time, NIMAC does not accept digital instructional

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<sup>1</sup> For the purpose of this notice of interpretation, the Department views “digital educational materials” as “digital instructional materials.”

<sup>2</sup> State Educational Technology Directors Association (SETDA). (2019). State K12 Instructional Materials Leadership Trends Snapshot. [www.setda.org/master/wp-content/uploads/2019/03/DMAPS\\_snapshot\\_3.26.19.pdf](http://www.setda.org/master/wp-content/uploads/2019/03/DMAPS_snapshot_3.26.19.pdf).

<sup>3</sup> Florida’s Digital Classrooms Program. [www.fl DOE.org/core/fileparse.php/5658/urlt/0097843-fdoedigitalclassroomsplan.pdf](http://www.fl DOE.org/core/fileparse.php/5658/urlt/0097843-fdoedigitalclassroomsplan.pdf).

<sup>4</sup> Harpur, P. (2017). Discrimination, copyright, and equality: Opening the e-book for the print disabled. <https://ssrn.com/abstract=2977629>.

materials. This exclusion limits access to digital materials for students who are blind or visually impaired. The exclusion also forces teachers to retrofit materials or provide alternate materials that are not equivalent to those available to students without disabilities. Additionally, these retrofitted materials may not be provided to students in a timely manner or are of inconsistent quality. Consequently, students who are blind or visually impaired are potentially denied equal educational opportunity, comparable access to materials, and access to information in a timely manner. This is especially true for students in Pre-K-3, who require embossed braille to ensure a solid foundation in early literacy, as well as for older students who use braille (embossed or digital).

Digitally formatted materials accompanied by technology have the potential to facilitate learning for all students. However, these materials will benefit students who are blind, visually impaired, or have other print disabilities only if they are available in accessible formats.<sup>5</sup>

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<sup>5</sup> Harpur, P. (2017). Discrimination, copyright, and equality: Opening the e-book for the print disabled. <https://ssrn.com/abstract=2977629>.

On October 21, 2019, the Department published a notice in the *Federal Register* (84 FR 56154) proposing to interpret “print instructional materials” in section 674(e)(3)(C) of IDEA (20 U.S.C. 1474(e)(3)(C)) to include digital instructional materials. There are no significant differences between the proposed interpretation and this final interpretation.

Other than statutory and regulatory requirements included in the document, the contents of this final notice of interpretation do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Public Comment: In response to our invitation in the notice of proposed interpretation, 48 parties submitted comments.

Analysis of Comments and Changes: An analysis of the comments and any changes in the interpretation since publication of the proposed interpretation follows. We do not address comments that raised concerns not directly related to the proposed interpretation.

Comments: Most of the comments received were in favor of the proposed interpretation. A large majority of the

commenters were in full support of the proposed interpretation with no questions or concerns.

Discussion: The Department appreciates the positive feedback and responses regarding this interpretation.

Changes: None.

Comments: Commenters generally agreed that the proposed interpretation meets the original congressional intent, responds to the increase in digital materials used for instruction, and is in line with the current educational paradigm. A few commenters provided data to support this comment. One commenter noted that the absence of digital materials from the definition of "print materials" was unintentional.

Discussion: The Department agrees that the interpretation is in line with congressional intent and is responsive to current educational needs of students with disabilities.

Changes: None.

Comments: The majority of commenters agreed that our proposed interpretation is a timely decision and will ensure timely access to high-quality digital instructional materials. They noted that given the high cost of new technologies, the proposed interpretation will be an efficient and low-cost solution to create accessible materials that allow students with disabilities to

participate and use the same educational materials available to their non-disabled peers. They said that the proposed interpretation will also help to increase equity and elevate learning for all students.

Discussion: The Department agrees that this final interpretation helps to ensure access to high-quality digital instructional materials. The Department believes that students who are blind or visually impaired and other students with print disabilities must have equal educational opportunities, comparable access to materials, and access to information in a timely manner.

Changes: None.

Comments: Several commenters noted that "digital" does not mean "accessible" and that digital materials may not work with specialized screen readers such as the DAISY audio player, electronic publication file (EPUB) readers, or refreshable braille displays. According to these commenters, allowing digital materials in the NIMAC would streamline the process of making materials accessible, provide greater access, help to improve the procurement and delivery of accessible instructional materials, and help SEAs and LEAs meet their obligations with respect to a free appropriate public education. They noted that students should be able to access educational materials in the

format they require. In addition, a few commenters stated that every child learns differently and that allowing the NIMAC to accept digital educational materials will remove barriers. Also, one State noted that this change matched their current administrative code, which requires a publisher to provide NIMAS file sets to the NIMAC if an electronic textbook is not fully accessible on current computer platforms, or is not available as a print instructional material.

Discussion: The Department appreciates the positive feedback and agrees that "digital" does not necessarily mean "accessible." Students must receive high-quality digital materials in the format they require.

Changes: None.

Comments: One commenter posed five questions about the proposed interpretation: (1) whether it applies to materials that are exclusively digital; (2) whether it applies to print materials that already comply with the NIMAS format; (3) whether the intent is for every digital element to be converted to the NIMAS format; (4) whether, if the technology of a file already meets Web Content Accessibility Guidelines (WCAG) 2.0 AA, it still needs to

go to the NIMAC; and (5) whether students with other types of disabilities<sup>6</sup> will be able to access the files.

Discussion: We appreciate the opportunity to clarify our interpretation in response to the commenter's questions.

First, digital materials submitted to the NIMAC must be submitted in a valid XML-based NIMAS format. Our interpretation does not impact print materials that have already complied with the NIMAS format. We do not intend for every digital element to be converted to the NIMAS format. Rather, the file must be able to be converted to a valid XML-based NIMAS format. If the digital technology meets WCAG 2.0 AA accessibility specifications, it will not need to be submitted to the NIMAC. Finally, for children to access NIMAS files, they will have to meet the eligibility requirements specified in IDEA. Specifically, they must be a child who is blind, visually impaired, or has a print disability.

Changes: None.

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<sup>6</sup> The NIMAC currently serves students who meet the current National Library Service definition of students who are blind, visually impaired, or have print disabilities. It should be noted that this definition was updated on December 20, 2019. The definition now aligns with section 121 of the Copyright Act of 1976, as amended by the Marrakesh Treaty Implementation Act (MTIA), P.L. 115-261.

Comments: One commenter was concerned that the change would remove the current requirements for print instructional materials.

Discussion: The current requirements regarding print instructional materials are not changing and will remain in place. The interpretation means the NIMAC may continue to accept digital textbooks and related core materials that can conform to the NIMAS XML format.

Changes: None.

Comments: A few commenters emphasized the need to continue to promote the market models that encourage publishers to create accessible K-12 instructional materials. However, one commenter noted that publishers currently do not use the principles of Universal Design for Learning (UDL) or consider the unique needs of students with print disabilities in the development of their products.

Discussion: The Department fully supports the development of born-accessible digital materials. The Department encourages publishers to meet section 508 accessibility requirements that align to the WCAG 2.0 AA standards. If publishers are creating EPUBs, the Department agrees that they should conform to EPUB Accessibility 1.0 requirements. In addition, the Department encourages publishers to produce born-accessible materials that incorporate the

principles of UDL. As the commenters noted, if digital materials are not created using these guidelines, some students will not have access to the high-quality materials necessary for learning.

Changes: None.

Comments: One commenter agreed that adding digital learning materials to the NIMAC would enhance learning experiences for both students and teachers and suggested that to ensure the best outcome, the Office of Special Education Programs (OSEP) should conduct a survey to determine the need for accessible digital instructional materials and ensure effective implementation, for which a second commenter was willing to assist with quantitative data collection. A third commenter wrote that the National Center on Accessible Educational Materials (AEM Center) is prepared to provide technical assistance and to develop models for the markup of digital materials in the NIMAS XML format.

Discussion: The Department appreciates the commenters' support. OSEP and the NIMAC will work with the AEM Center to develop and provide technical assistance on the final interpretation, and OSEP appreciates the AEM Center's offer to help with data. OSEP will consider gathering more

information to determine the needs of the target population for technical assistance.

Changes: None.

Comments: A few commenters were concerned that this interpretation would be applied too broadly to digital instructional materials and that the materials would not meet the technical specifications of the NIMAS format. In addition, they expressed concern that the interpretation may be misconstrued as extending beyond simple textbooks and related core materials. These commenters also noted that the NIMAS is a source file and the NIMAC should not be accepting files that are intended to be distributed directly to the students. Finally, one commenter suggested that we more clearly specify in the interpretation that the materials must meet the requirements of the NIMAS specification.

Discussion: Although we do not think changes to our interpretation are necessary, we appreciate the opportunity to clarify this important point. Only digital instructional materials that can meet the requirements of the NIMAS specification are appropriate for the NIMAC. NIMAS files are not in a format that can be distributed directly to students. These include digital materials that fit a traditional book format with static print and images.

This means that the NIMAC would accept valid NIMAS file sets derived from conforming digital instructional materials that were never produced in a traditional print format. This interpretation refers to the subset of digital instructional materials that are composed primarily of static images and text that can meet the requirements of the NIMAS specification. "Conforming" in this context means digital instructional materials that can be accurately rendered in NIMAS 1.1, including an XML content file using the Baseline Element Set. The Baseline Element Set contains an XML content file, a package file, a portable document format (PDF) copy of the title page (or whichever page(s) contain(s) the International Standard Book Number (ISBN) and copyright information), and a full set of the content's images. See <http://aem.cast.org/creating/nimas-technical-specification-annotated.html>. OSEP will work with AEM-related technical assistance centers to fully support the implementation of the interpretation.

Changes: None.

Comments: A few commenters noted that in applying the proposed interpretation to digital instructional materials, if a State chooses to coordinate with the NIMAC, it would not need to send materials already produced or rendered in

accessible formats. In addition, one of these commenters noted that the NIMAC should only receive materials that are in a "source file format."

Discussion: The Department agrees. If digital instructional material is already in an accessible format, it would not need to be sent to the NIMAC. Digital instructional materials are accessible if they meet the standards set forth in section 508 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act). In addition, the NIMAC can only accept materials in a valid NIMAS XML format, which is a source file format.

Changes: None.

Comments: A few commenters wanted to emphasize the continued need for braille instruction in elementary and secondary schools. They commented on the importance of embossed braille and noted that digital materials continue to remain inaccessible for the population of students that require it. They also noted the importance of embossed braille for teaching early literacy skills. One commenter wrote that allowing the NIMAC to accept digital materials would be a significant step forward in addressing accessibility needs and would allow eligible students to receive these materials in a timely manner.

Discussion: The Department agrees that braille instruction and embossed braille remain critical for teaching early literacy skills and instruction in K-12 settings for students who are blind and visually impaired. The Department believes that allowing the NIMAC to accept digital files that meet the NIMAS standard will provide a way for students to receive these materials in a timely manner in the format they require.

Changes: None.

Comments: One commenter noted that the Department's interpretation is consistent with the MTIA, which amended section 121 of the Copyright Act of 1976, as amended (Copyright Act), to comply with the terms of the Marrakesh Treaty. The commenter wrote that similar to the Department's interpretation to include digital instructional materials under the definition of "print instructional materials," MTIA and the accompanying Senate report use the terms "print" and "text" interchangeably. A second commenter noted that the NIMAC Limitation of Use Agreement should be updated to reflect the changes to the Copyright Act enacted in MTIA.

Discussion: The Department appreciates the feedback and agrees that the interpretation is in line with both congressional intent and the updated definition in the

Copyright Act. On December 20, 2019, the President signed legislation to align the National Library Service's definition of "blind and other persons with disabilities" with section 131 of the Copyright Act.<sup>7</sup> The NIMAC Limitation of Use Agreement will be updated to reflect the changes to the Copyright Act enacted in MTIA once the regulations are published by the National Library Service at the Library of Congress.

Changes: None.

Comments: One commenter wrote that the Association of American Publishers has supported the NIMAC and validated its mission since its inception and noted that this interpretation seems timely and sensible. However, the commenter was concerned that, with this change, current guidance will be out of date. The commenter suggested delaying the effective date of the notice of interpretation until guidance is updated.

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<sup>7</sup> The IDEA uses the term "blind or other persons with print disabilities" in 20 U.S.C. 1412(a)(23)(E)(i) and 34 CFR 300.172(e)(1)(i). However, that term has been removed from the Copyright Act and replaced with the term "eligible person." "Eligible person" means an individual who, regardless of any other disability-- (A) is blind; (B) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or (C) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading." (17 U.S.C. 121(d)(3).)

Discussion: The Department agrees that the interpretation will supersede the current practice that is reflected in the "Publishers and Conversion Houses FAQ" on the NIMAC website. It is the Department's intent to update the FAQ, and we do not believe that it is necessary to delay the effective date of the notice.

Changes: None.

Comments: One commenter asked how the proposed interpretation applies when the purpose of converting digital instructional materials is the ability to create embossed braille. The commenter noted that interactive or adaptive programs do not easily translate to a static braille format.

Discussion: The Department has considered this issue. We agree that interactive and adaptive programs do not translate to a static braille format. Digital instructional materials intended for the NIMAC would be those materials that follow a traditional textbook format, consisting of static text and images. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA), as amended, would require that interactive and adaptive digital materials be made accessible where needed to provide an equal educational opportunity to students

with disabilities, as discussed further in the response to the next comment.

Changes: None.

Comments: One commenter asked how digital materials that are not part of the scope of the NIMAC will fit into the IDEA scheme for delivery to students with print disabilities in a timely manner.

Discussion: The current scope of the NIMAC is limited, but IDEA still requires the provision of free educational materials, including textbooks and instructional materials, in accessible formats to eligible children and students. SEAs and LEAs must provide materials in accessible formats in a timely manner (IDEA Part B, section 612(a)(23)(A) and section 613(a)(6)(B)) (20 U.S.C. 1412(a)(23)(A), 1413(a)(6)(B)).

Further, section 504 of the Rehabilitation Act and the Department's implementing regulations prohibit discrimination against individuals with disabilities by recipients of Federal financial assistance from the Department, and, among other things, require the provision of a free appropriate public education to elementary and secondary students with disabilities. (34 CFR 104.4, 104.33). The ADA also prohibits discrimination against individuals with disabilities, and the regulations

implementing Title II of the ADA include a specific requirement that public entities ensure that communication with students with disabilities is as effective as communication with students without disabilities, through the provision, in a timely manner, of auxiliary aids and services. (28 CFR 35.130(a), 35.160). These laws require SEAs and LEAs to provide educational materials in accessible formats where needed to provide these students with an equal educational opportunity.

Changes: None.

Comments: One commenter noted that it would be useful to understand how the proposed interpretation fits into the broader world of accessibility efforts and what it means for the future of the NIMAS and NIMAC.

Discussion: The Department fully supports the ongoing work of the Web Accessibility Initiative of the World Wide Web consortium on the WCAG 2.0 AA and the EPUB3 accessibility specifications along with the updated section 508 standards in the Rehabilitation Act. However, even if materials are born-accessible, some students will still have needs that cannot be met by commercially available instructional materials, even if they meet WCAG 2.0 AA accessibility and section 508 standards. This is particularly true for students who access instruction through embossed braille

and tactile graphics. When this is the case, NIMAS files provided to the NIMAC ensure that students will receive high-quality instructional materials in a timely manner.

Changes: None.

#### Final Interpretation

Given the purpose of NIMAC, the trend toward digital instructional materials and resources, and the silence of the statute on the acceptance of digital files, the Department interprets the phrase "printed textbooks and related printed core materials" referred to in the definition of "print instructional materials" in section 674(e)(3)(C) of IDEA (20 U.S.C. 1474(e)(3)(C)) to include digital instructional materials that comply with NIMAS, because that is the primary medium through which many textbooks and core materials are now produced. The Department considers digital materials submitted to NIMAC to be in digital print format, which falls under the larger category of "print" and is consistent with the statutory language of section 674(e)(3)(C) of IDEA (20 U.S.C. 1474(e)(3)(C)). The Department believes this interpretation to be aligned with the purpose of the statute, which is to provide timely instructional materials to students who are blind or have other print disabilities. Therefore, under this interpretation, NIMAC would be able

to accept digital instructional materials submitted in a valid XML-based NIMAS format.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under FOR FURTHER INFORMATION CONTACT.

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Mark Schultz,  
*Commissioner, Rehabilitation  
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Delegated the authority to perform  
the functions and duties of the  
Assistant Secretary for the Office  
of Special Education and  
Rehabilitative Services.*

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