



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

THE ASSISTANT SECRETARY

NOV 14 2008

Dr. Tuck Tinsley
American Printing House for the Blind
1839 Frankfort Avenue
Louisville, KY 40206-3148

Dear Dr. Tinsley:

As our staffs have discussed, the Department has been assessing the effectiveness of the procedures used by the National Instructional Materials Access Center (NIMAC) for designating authorized users (AUs) to have access to the NIMAC database under its grant, which is administered by the American Printing House for the Blind (APH). The Department has received correspondence or otherwise heard from a number of States, authorized media producers (AMPs), members of Congress, and other interested parties regarding the procedures and many have requested additional flexibility in the process. As noted below, we recommend that NIMAC should expand the eligibility of AUs to include any entity that meets the eligibility requirements under section 121(d)(1) of the Copyright Act of 1931, as amended.

The purpose of the NIMAC grant is to eliminate unnecessary delay in providing "access to print instructional materials, including textbooks, in accessible media, free of charge, to blind or other persons with print disabilities in elementary and secondary schools," as stated in section 674(e) of the Individuals with Disabilities Education Act (IDEA). To accomplish this task, NIMAC operates a central repository of electronic files that comply with the National Instructional Materials Accessibility Standard (NIMAS). As part of the process for distributing these files, NIMAC requires States to designate AUs, who have authority to access the NIMAC database on behalf of States. This process was developed in consultation with and ultimately approved by the Department.

Since the term AU does not appear in the IDEA, nor are there any provisions in the IDEA that limit the authority of State educational agencies (SEAs) or local educational agencies (LEAs) to contract with organizations, agencies or individuals to access NIMAC file sets on their behalf, there appears to be some flexibility for determining appropriate AUs in this context. The use of AUs is part of the procedures that NIMAC has designed to protect against copyright infringement, consistent with section 674(e)(2)(C) of the IDEA, which requires NIMAC to "develop, adopt, and publish procedures to protect against copyright infringement, with respect to the print instructional materials provided under sections 612(a)(23) and 613(a)(6)." Under these procedures, AUs acting on behalf of SEAs and LEAs have access to all files in the NIMAC, but may only legally download files for materials purchased by SEAs and LEAs. The current NIMAC agreement that AUs must sign in order to access the NIMAC database, limits who can be an AU to representatives of public agencies.

Comments from States, AMPs, members of Congress, and other interested parties included the concern that the requirement limiting AUs only to representatives of public agencies unnecessarily restricts the authority and flexibility of SEAs and LEAs to determine who can best serve as an AU for them. The feedback also included the concern that the current requirement contributes to delays in the process of obtaining and converting NIMAS-compliant files into accessible educational materials and getting those materials to the children who need them. We have been examining the issue of access for some time, and our staffs have considered various options that NIMAC could implement to address these concerns.

Based on this input and our further experience with this process, the Department is concerned that the procedures we originally approved may be too limiting and that the interests of students who are blind or have other print disabilities would be better served if SEAs and LEAs had the authority to contract with additional entities to perform the duties of AUs. At the same time, we recognize the need to protect the copyright interests of authors and publishers. As such, NIMAC should revise its procedures for appointing AUs to allow SEAs and LEAs to designate AUs that they determine meet the following qualifications for authorized entities under section 121(d)(1) of the Copyright Act: "a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities. . ."

This Copyright Act requirement is well known by AMPs, publishers, NIMAC, SEAs and LEAs, and others involved in the production and dissemination of accessible materials and provides an appropriate benchmark for protecting copyright holders. SEAs and LEAs already make determinations under this section of the Copyright Act in selecting AMPs -- entities that are used by SEAs and LEAs to convert file sets to accessible instructional materials. The NIMAC User Agreement currently requires all SEAs and LEAs to use only AMPs that meet this copyright requirement. Furthermore, we expect that most of the AUs selected by SEAs and LEAs under this expanded process would be existing AMPs. We believe that this approach would provide additional flexibility to States and also address the copyright concerns of publishers because this provision of the Copyright Act is a recognized standard, and both the publishers and the SEAs and LEAs have extensive experience with organizations that meet this standard.

Under this proposed revision for appointing AUs, SEAs and LEAs would have increased flexibility and authority to streamline their accessible instructional materials delivery systems by contracting with non-profit organizations or other governmental agencies both outside and within their States. While NIMAC would not be put in the position of determining independently whether AUs meet the criteria under the Copyright Act -- this would be the responsibility of each SEA and LEA -- the process would still be consistent with NIMAC's obligation in section 674(e) of IDEA to protect against copyright infringement. NIMAC's copyright obligation is clearly identified in its User Agreement, which imposes very detailed and specific requirements upon each AU to uphold the integrity of the copyright process. Upon becoming aware of any copyright or other

infraction committed by any AU, NIMAC is authorized under the Agreement to immediately terminate the AU's ability to access the NIMAC.

The Department also considered the option of designating only certain "national" AMPs for AU status, such as APH, Benetech, and Recording for the Blind and Dyslexic, Inc. This approach, however, did not address the issues including the statutory purposes as effectively.

In summary, the recommended procedures for appointing AUs – that is, allowing SEAs and LEAs the flexibility to designate AUs according to the criteria under section 121(d)(1) of the Copyright Act – would increase the ability of SEAs and LEAs to ensure timely access to print instructional materials in elementary and secondary schools. At the same time, this revision would limit the expansion of eligibility to those entities that can meet an established standard under the Copyright Act, thus addressing the need to ensure appropriate copyright protection. This approach achieves the appropriate balance to address these matters.

We look forward to working with APH to help determine how NIMAC might best implement this recommendation. We appreciate the work of NIMAC and the Printing House to further the education of children who are blind or who have other print disabilities.

Sincerely,



Tracy R. Justesen

cc:

Heidi San Carlos, Guam CEDDARS, U. of Guam, Pacific CIMAP

Jeff Diedrich, MI's I.T.S. and A.I.M Consortium

Julia Freedman, RFB&D, Inc.

James Fruchterman, Benetech/Bookshare.org

Chuck Hitchcock, CAST – NIMAS TA Center

David Rose, CAST – A.I.M.

Skip Stahl, CAST – NIMAS Development Center