

Wyoming Department of Education  
Special Programs Unit

Reference Guide:  
Highly Qualified Providers of Special Education

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The Individuals with Disabilities Education Act (IDEA) makes clear that special education and related services must be delivered to students by highly qualified personnel. *20 U.S.C. §1412(a)(14)*. The Federal Regulations implementing the IDEA require all personnel needed to carry out Part B of the IDEA to be qualified. *34 C.F.R. §300.156*. Each state is required to establish and maintain qualifications for special educators as well as related services providers and paraprofessionals.

Teachers

With regard to special educators, the IDEA incorporates the highly qualified teacher provisions of the No Child Left Behind Act (NCLB) contained in the Elementary and Secondary Education Act. Special education teachers must be highly qualified according to federal and state standards in order to deliver special education. *34 C.F.R. §300.18*. Wyoming has adopted Professional Teaching Standards pursuant to Chapter 2 of the Wyoming Rules for the Professional Teaching Standards Board. The requirements for content area and special education endorsements are set forth in Chapter 3 of the Wyoming Rules for the Professional Teaching Standards Board. In order to teach in a public school, Wyoming educators must meet licensure requirements.

Related Service Providers

Related service personnel must also be qualified to provide services under Part B of the IDEA. *34 C.F.R. §300.156*. States must ensure that related services personnel who deliver services in their discipline or profession meet the state's certification, licensing or registration requirements, and "have **not** had certification or licensure requirements waived on an emergency, temporary, or provisional basis." *34 C.F.R. §300.156(b)*. *Emphasis added*. "Related service providers who do not meet the personnel qualifications established by the SEA would not be considered qualified to serve children with disabilities under the Act even with supervision by qualified personnel." *71 Federal Register 46611*. Wyoming requires related service providers to be licensed in order to be employed by a public school pursuant to Wyoming Rules for the Professional Teaching Standards Board, Chapter 1, Section 3(i).

Paraprofessionals

Under the Federal Regulations, paraprofessionals and assistants who are appropriately trained and supervised may be used to assist in the provision of special education and related services. *34 C.F.R.*

*§300.156(b)(iii)*. The use of paraprofessionals to assist licensed or certified staff must be closely monitored. The Comments to the Federal Regulations offer the following cautionary guidance:

“However, this provision should not be construed to permit or encourage the use of paraprofessionals as a replacement for teachers or related service providers who meet state qualification standards. To the contrary, using paraprofessionals and assistants as teachers or related service providers would be inconsistent with the State’s duty to ensure that personnel necessary to carry out the purposes of Part B of the Act are appropriately and adequately prepared and trained. Paraprofessionals in public schools are not directly responsible for the provision of special education and related services to children with disabilities; rather, these aides provide special education and related services to children with disabilities only under the supervision of special education and related services personnel.” *71 Federal Register 46612*.

### The Standard

A free appropriate public education must be available to all eligible children residing within Wyoming, unless certain limited exceptions exist. *34 C.F.R. §300.101*. The United States Department of Education, Office of Special Education Programs (OSEP) has addressed the duty of states to ensure the use of qualified staff in providing special education and related services. OSEP explained that districts must ensure highly qualified personnel deliver all services provided under the IDEA. This requirement also applies to compensatory education services. “Personnel providing compensatory services should meet the same requirements that apply to personnel providing the same types of services as part of a regular school program.” *Letter to Anonymous, 49 IDELR 44 (OSEP 2007)*. In another opinion, OSEP observed that the IDEA’s highly qualified personnel requirement applied not only to services provided during the school year, but also to those services provided as Extended School Year (ESY). *Letter to Copenhaver, 50 IDELR 16 (OSEP 2007)*.

The right to FAPE extends to children with disabilities who have been suspended or expelled from school. *34 C.F.R. §300.101(a)*. In the Comments to the Federal Regulations, the United States Department of Education interprets this provision to mean that “Children with disabilities who are suspended or expelled from their current placement in public schools must continue to be taught by highly qualified teachers, consistent with §§300.156 and 300.18.” *71 Federal Register 46579*.

In summary, qualified, licensed service providers must deliver special education and related services.

Although the IDEA and Federal Regulations are clear that no legal right of action is created on behalf of an individual student or class of students for the failure to provide a highly qualified teacher or related service provider, parents retain the right to file a complaint with the SEA or federal investigatory agency alleging inadequate staff qualifications. For example, the Office for Civil Rights determined that a California school district denied students a free appropriate public education (FAPE) as a result of

staffing shortages. Specifically, staff shortages resulted in the district's speech therapists providing only consultation service, not direct service as indicated on IEPs. The physical therapists provided only "medically necessary" services, ignoring students who might need physical therapy to benefit from their educational program. Accordingly, OCR found the district in violation of Section 504 requirements for failing to ensure that FAPE is provided to all students with disabilities. *Konocti Unified School District, 40 IDELR 49 (OCR 2003)*.

In a similar investigation, OCR acknowledged that the district made efforts to hire a certified teacher, but found that because a teacher assigned to a class for students with emotional disabilities was not a certified instructor, the student was denied FAPE. The district entered a compliance agreement with OCR to rectify the deficiency. *Adams County/Ohio Valley School District, 51 IDELR 140 (OCR 2008)*.

Although a parent has no legal right of action due to inadequate staff qualifications, this provision has not served to bar a cause of action **alleging a denial of FAPE** due to lack of qualified staff. If a student has been denied FAPE, including a denial of FAPE due to lack of highly qualified service providers, hearing officers and courts are assuming jurisdiction.

The Seventh Circuit Court of Appeals found the lack of qualified staff rose to the level of a denial of FAPE, explaining that FAPE "is an education provided by qualified personnel." *Evanston Community Consolidated School district Number 65 v. Michael M., 40 IDELR 175 (7<sup>th</sup> Cir. 2004)*. In the *Evanston* case, the 7<sup>th</sup> Circuit held that the student was denied FAPE because the occupational therapist had received her Masters degree in August, passed her state licensing exam the following March, but did not receive her license until May, two months later. The school district argued that the delay in licensure of the occupational therapist was a technical violation. The 7<sup>th</sup> Circuit Court of Appeals disagreed. "It is a violation involving the qualifications of the school personnel who are providing services. Failure to follow the state's requirements for licensing occupational therapists . . . is different from a minor procedural violation." *Id.* The 7<sup>th</sup> Circuit upheld an award of compensatory services.

A similar result was obtained in the United States District Court, Eastern District of Pennsylvania. In the *Damian J.* case, the district's failure to assign a qualified teacher to the student's emotional support class amounted to a denial of FAPE. The teacher did not have a degree in education, was not certified or licensed to teach in any state, and had no prior experience teaching special education. *Damian J. v. School District of Philadelphia, 49 IDELR 161 (E.D. Pa. 2008)*. The court ordered compensatory education as a remedy.

A Texas due process hearing officer did not excuse a district's failure to provide speech language therapy over a three year period despite the district's difficulties finding certified providers to deliver services. *El Paso Independent School District, 48 IDELR 233 (Texas SEA 2007)*. Finding that the student was harmed by the lack of service, compensatory services were awarded.

### In Summary

FAPE must be provided by highly qualified, licensed educators and related services professionals. This is true for all special education and related services, including compensatory education services, extended school year services, and services provided to children who have been suspended or expelled from school.

Recognizing that staff shortages in special education occur on a nation-wide level, the duty to provide FAPE based on individual student needs cannot be compromised. It is clear that OSEP, OCR, hearing officers and courts are consistent in finding that the lack of qualified providers, even those due to staff shortages, may ultimately result in a denial of FAPE. Recruitment efforts may be taken into consideration, but do not alter the outcome. Under the IDEA and Section 504, students are entitled to receive FAPE based on their individual needs. Staff shortages will not insulate a district from liability for a failure to provide FAPE.