



Wyoming Department of Education

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WYOMING DEPARTMENT OF EDUCATION SPECIAL PROGRAMS DIVISION SPECIAL EDUCATION COMPLAINT INVESTIGATION

Complainant:

Respondent:

Case #: C 0162-11

COMPLAINT DECISION FOR ISSUE #4 AND ORDER FOR CORRECTIVE ACTION

Date of Decision: December 16, 2011

On September 20, 2011 the Wyoming Department of Education (WDE) received a complaint and supporting documentation filed by _____, (hereinafter "Complainants") alleging violations of special education law with respect to _____ (hereinafter "Student"), by Respondent _____ (hereinafter "District").

Pursuant to 34 C.F.R. §§300.151 through 300.153 of the Federal Regulations implementing the Individuals With Disabilities Education Act (IDEA), WDE conducted an investigation into the allegations raised in the complaint. Consistent with the IDEA, Federal Regulations, and the Wyoming Department of Education Rules, Chapter 7, WDE issued an original decision in this matter on November 18, 2011 resolving three issues. On that same date, WDE issued a 30 day extension of the 60 day investigatory timeline for exceptional circumstances for the fourth issue only regarding a highly qualified teacher. WDE now issues a final decision resolving this issue.

Complaint Issue:

Issue #4

Whether the District provided instruction by a highly qualified special education teacher to the Student in accordance with 34 C.F.R. §§300.18 and 300.156.

Investigatory Process:

- Review of records consisting of the following:
 - Original letter of complaint and supporting documents.
 - The Student's special education and cumulative files.
 - Electronic correspondence.
- Follow up inquiries with the Complainants, including a questionnaire and an interview.
- Follow up inquiries with the District, including staff interviews and additional document submissions.
- Consultation with and review of documentation from WDE's Title II-A State Coordinator.
- The District and Complainant were given the opportunity to submit additional information to WDE for consideration throughout the investigation of this complaint.

Applicable Federal Regulations or State Rules:

- 34 C.F.R. §300.17 Free Appropriate Public Education (FAPE)
- 34 C.F.R. §300.18 Highly Qualified Special Education Teachers
- 34 C.F.R. §300.22 Individualized Education Program
- 34 C.F.R. §300.39 Special Education
- 34 C.F.R. §300.101 Free Appropriate Public Education (FAPE)
- 34 C.F.R. §300.156 Personnel Qualifications

Wyoming Professional Teaching Standards Board, Chapters 1-9

Relevant Time Period:

Pursuant to 34 C.F.R. §300.153(c), WDE has the authority to investigate allegations of violations that occurred not more than one year prior to the date the complaint was received. In light of this limitation, the investigation and any findings of noncompliance will be limited to the period commencing September 21, 2010 to September 20, 2011. However, in order to fully understand the needs of the Student, the concerns of the Complainants, and the position of the District, the Student's special education history was thoroughly reviewed.

Findings of Fact Pertaining to Issue #4:

1. Prior to August 2009, the Student attended school in another state.

2. In the previous school district, the Student was identified as eligible under Section 504 of the Rehabilitation Act of 1973 for services and accommodations due to a visual impairment.
3. The Student enrolled in the District in August 2009. At all times relevant to this complaint, the Student was a resident of the District.
4. The Student initially received accommodations and services in the district through a Section 504 Plan.
5. A Referral for Special Education Evaluation dated December 14, 2009, signed by the Principal, indicated that the Complainants "requested an evaluation for an IDEA disability due to concerns regarding [Student's] academic progress, need for mobility training and possible additional accommodations."
6. Prior Written Notice and Consent for Evaluation documented that the team proposed to conduct an initial evaluation for special education eligibility, and that additional assessment data was necessary. Assessments were proposed in the areas of academics, vision and mobility. Complainant Father offered his consent for the evaluation on December 14, 2009.
7. A Notice of Team Meeting documented that the team was convened on January 21, 2010 for the purpose of reviewing assessment results, developing an IEP, and determining placement.
8. Based on the evaluation results, the team determined that the Student met the criteria for a learner with a visual impairment and in need of special education. The January 21, 2010 Prior Written Notice documented that the team proposed the Student was eligible for special education as visually impaired, but proposed additional assessments to gather comprehensive information regarding math abilities. The Complainant Mother offered her consent for the additional assessment on January 21, 2010.
9. A Notice of Team Meeting convened the team to develop an initial IEP on February 10, 2010.
10. The Student's IEP as planned by the IEP team on February 10, 2010 contained one Measurable Annual Goal as follows:
 1. Baseline: When performing subtractive tasks, [Student] counts down to arrive at the answer. does not demonstrate an understanding of part whole relationships of numbers. uses fingers to count.
 2. Target: [Student] will be able to do simple addition and subtraction problems by making friendly numbers (example $9 + 5$, will verbally state that you take one from five to make ten and then add four).
 3. Method of measurement: Measure by weekly covered addition and subtraction tasks.

11. The February 10, 2010 IEP contained the following special education services:

SPECIALIZED INSTRUCTION	AMOUNT	FREQUENCY	START DATE
Math	150 Minutes	Weekly	02/16/2010
Study Strategies	215 Minutes	Weekly	02/16/2010

12. The District issued Prior Written Notice and the Complainants offered their consent on February 10, 2010 for the initial provision of services.

13. The Student's IEP was amended on March 8, 2010 to discontinue math goal and special education service, as Complainants chose to utilize a private tutor for the Student's math needs.

14. The IEP team was convened on January 12, 2011 for the annual IEP review. Actual participants in the IEP team meeting included the Complainants, the Student, the Special Education Teacher, a Regular Education Teacher, the Case Manager, the Principal, and the School Counselor.

15. The IEP included the measurable postsecondary goal for the Student to attend a four year college majoring in history. A course of study was outlined for the Student.

16. The January 12, 2011 IEP contained the following services:

SPECIALIZED INSTRUCTION	AMOUNT	FREQUENCY	START DATE
Study Strategies	215 Minutes	Weekly	01/18/2011

17. A subsequent Notice of Team Meeting was issued on June 14, 2011 convening the team on June 16, 2011.

18. The Student's IEP and current needs were reviewed at the June 16, 2011 meeting. The Student's special education service was not amended during this meeting.

19. The Complainants filed this complaint on September 15, 2011. However, the complaint did not meet the regulatory requirements until it was supplemented with the necessary information on September 20, 2011.

20. Throughout the time period relevant to this complaint, the Special Education Teacher providing service to the Student was licensed by the Wyoming Department of Education as a grade 6-12 Social Studies Teacher. An Exception Authorization was issued for special education K-12 on July 9, 2010, and again on July 9, 2011.

21. The "Highly Qualified Status" section on the special education teacher's credential is blank.

22. An inquiry to WDE's Title II-A State Coordinator resulted in the following response on November 7, 2011: "[Special Education Teacher] is certified and highly qualified to teach all of the Social Studies areas at the secondary level, grades 6-12. He is on an exception authorization for Special Education. One who is on an exception authorization is not highly qualified."
23. The District provided documentation received from the Title II-A Program within WDE regarding highly qualified staff and accreditation. The documents are summarized as follows:
- April 22, 2011 letter from the Title II-A Program Manager to the District requesting that a Highly Qualified Staffing Plan be submitted for approval to WDE. The letter indicates, in relevant part and in bold print, that **"All teachers of core academic subjects in federally funded programs must be highly qualified in order to work in those programs – Title I, Class Size Reduction, and Part B, IDEA (Special Education)."** (Emphasis in original.) The special education teacher was identified as a teacher who did not meet the highly qualified requirements for whom a Highly Qualified Teacher Plan must be developed.
 - The District submitted a Highly Qualified Teacher Plan and the requisite assurances to WDE's Title II-A Program on September 21, 2011.
 - The District's Highly Qualified Teacher Plan was approved by WDE's Title II-A Program in a letter dated September 21, 2011.
 - The Title II-A Program Director approved the District's Agreement and Assurances contained in the Highly Qualified Teacher Plan on September 26, 2011.
24. The Special Education Teacher affirmed that he provides no direct instruction to the Student. time in special education is provided to help if asks for assistance. The Special Education Teacher described the time as "study skills for relaxation or independent work."

Conclusions Pertaining to Issue #4:

1. The Student is identified as a learner with a Visual Impairment under the Individuals with Disabilities Education Act (IDEA).
2. Once identified as eligible for service under the IDEA, the Student is entitled to receive FAPE. The District is obligated to ensure that the Student receives FAPE by providing

special education and related services reasonably calculated to provide the Student educational benefit. See 34 C.F.R. §§300.17 and 300.101.

3. *Special education* means specially designed instruction to meet the unique needs of a student with a disability. *Specially designed instruction* is further defined as adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the disability, and to ensure access of the child to the general curriculum. See 34 C.F.R. §300.39.
4. Highly qualified teachers or providers must deliver special education services. Any public elementary or secondary school teacher teaching core academic subjects must be highly qualified. 34 C.F.R. §300.18(a).
5. Core academic subjects include: English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history and geography. 34 C.F.R. §300.10.
6. The Federal Regulations implementing the IDEA state, in relevant part: When used with respect to any public elementary school or secondary school special education teacher teaching in a State, highly qualified requires that the teacher has obtained full state certification as a special education teacher and holds a license to teach in the State as a special education teacher. See 34 C.F.R. §300.18(b).
7. There is no provision in the IDEA or the Federal Regulations permitting waiver of the highly qualified requirement on a temporary, emergency, or provisional basis. 34 C.F.R. §300.18(b)(1)(ii).
8. It is possible under stringently monitored conditions to be considered highly qualified if the teacher is participating in a State monitored and supervised alternative route to special education certification. 34 C.F.R. §300.18(b)(2). There is no evidence in the record to support that the special education teacher sought an alternative route to certification.
9. Any public elementary school or secondary school special education teacher teaching in a State, who is not teaching a core academic subject, can be considered highly qualified if the teacher has obtained full State certification as a special education teacher and holds a license to teach special education, or if the teacher holds at least a bachelor degree and participated in an alternative route to certification. 34 C.F.R. §303.18(b)(3).
10. The Wyoming Professional Teaching and Standards Board (PTSB) offers a special education endorsement as certification for special educators. An *endorsement* is defined as "Verification that licensure requirements have been met at the grade level(s) and in the specialization area(s) appropriate to the applicant's preparation, training, and experience."

PTSB Rules, Chapter 1, Section 3(k). The special education teacher has not met the requirements for a special education endorsement.

11. The Student's Special Education Teacher possesses standard certification in "Social Studies Comprehensive 6-12" and an Exception Authorization in special education K-12. Both were granted by PTSB. The special education teacher does not currently hold a special education teaching license or endorsement.

12. Wyoming defines an Exception Authorization as follows:

The document which allows an applicant to teach or provide professional services for up to one year in a public school in Wyoming having met all the requirements of Chapter 5.

PTSB Rules, Chapter 1, Section 3(l).

13. "A teacher cannot be considered a highly qualified special education teacher if the teacher has had special education certification or licensure waived on an emergency, temporary, or provisional basis. This would include any new certification category that effectively allows special education certification or licensure to be waived on an emergency, temporary, or provisional basis." *71 Federal Register 46557.*
14. Since the special education teacher only possesses an "Exception Authorization" acting as a waiver to full special education endorsement or certification, the special education teacher is not considered a highly qualified teacher within the meaning of 34 C.F.R. §§300.18 and 300.156.
15. The Student's special education teacher is the only secondary special education teacher in the school. In order to provide special education to students with disabilities, the special education teacher must be highly qualified as defined in the IDEA and Federal Regulations.
16. The United States Department of Education has opined:

Special education teachers who do not directly instruct children in any core academic subject or who provide only consultation to highly qualified teachers of core academic subjects do not need to demonstrate subject-matter competency in those subjects. These special educators could provide consultation services to other teachers, such as adapting curricula, using behavioral supports and interventions, or selecting appropriate accommodations for children with disabilities. They could also assist children with study skills or organizational skills and reinforce instruction that the child has already received from a highly qualified teacher in that core academic subject area.

71 Federal Register 46558.

17. In light of the conflicting information received by the District from different divisions within WDE, and the correspondence relied upon by the District, it is apparent that confusion exists

regarding the different highly qualified teacher requirements between regular education and special education.

18. Although the confusion does not eliminate or reduce the IDEA obligation to provide special education services by highly qualified teachers, it does mitigate and explain the District's misunderstanding of the highly qualified teacher requirement.
19. As applied to the specific facts regarding this Student, the special education teacher provided only study skills and organizational support as needed. One might argue that this support is permissible by virtue of the Comment in the Federal Register noted in Conclusion #17 above. However, this Comment only dispenses with the requirement to demonstrate subject-matter competency. It does not dispense with the requirement for special education licensure or certification. The special education teacher at issue in this complaint did not possess special education licensure or certification.
20. Therefore, during the time period relevant to this complaint, the District failed to provide special education services to the Student by a highly qualified special education teacher. However, that failure is not individually compensable for this Student in light of the fact that IEP did not provide any specially designed instruction.

Decision Pertaining to Issue #4:

Whether the District provided instruction by a highly qualified special education teacher to the Student in accordance with 34 C.F.R. §§300.18 and 300.156.

WDE finds that the District failed to provide services and instruction by a highly qualified special education teacher. WDE finds the District in violation.

Corrective Action Plan:

1. As soon as possible, but in no case later than the commencement of the 2012-2013 school year, the District shall cease the provision of special education services to students by a teacher not highly qualified to teach special education. The District shall submit an assurance of compliance, and a special education staffing plan that verifies the plan for provision of special education service by highly qualified teachers. The required assurance and staffing plan must be submitted to WDE within 45 days of the date of this decision.
2. The special education staffing plan may include support from the current special education teacher. Since the teacher at issue is a highly qualified regular education teacher, the special education teacher may support the specially designed instruction planned and

implemented by a highly qualified special education teacher in the same manner as a regular education classroom teacher supports implementation of IEP goals and services, but cannot be solely responsible for the planning, implementation and delivery of special education services.

3. Because the Student was not receiving specially designed instruction, which has been previously addressed in the first part of this decision issued on November 18, 2011, no further Student-specific corrective action is warranted.
4. All required submissions must be sent to WDE to the attention of Diana Currah, with a copy to the Complainants.

Please direct questions regarding this complaint investigation to the Wyoming Department of Education, Special Programs Division at 307-857-9285 or 800-228-6194.

Sincerely,

A handwritten signature in blue ink that reads "Peg Brown-Clark". The signature is fluid and cursive, with the last name "Clark" having a prominent flourish.

Peg Brown-Clark
State Director of Special Education
Special Programs Division Director

cc:

Superintendent
Board Chair
Cindy Hill, Superintendent of Public Instruction
John Masters, WDE Legal Counsel