



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

DEC 15 2008

Sherry Kolbe  
Executive Director and CEO  
NAPSEC  
1522 K Street, N.W.  
Washington DC 20005-1202

Dear Ms. Kolbe:

The U.S. Department of Education, Office of Special Education Programs (OSEP) is in receipt of your letter dated July 18, 2008, requesting clarification on Highly Qualified teacher requirements. Specifically, you requested information about the Highly Qualified teacher requirements for teachers who teach to functional levels versus grade levels. You stated that members of your organization, the National Association of Private Special Education Centers (NAPSEC), serve students that cannot be successfully educated in the regular education classroom and that these students are usually the “more severe and profound” population of special education students. The Part B regulations implementing the 2004 reauthorization of the Individuals with Disabilities Education Act (IDEA), at 34 CFR §300.18, defines the term highly qualified special education teachers. As you know, 34 CFR §300.18(h) specifies that this definition does not apply to teachers hired by private elementary and secondary schools. You indicate though, that some States are requiring, as a matter of State law, that private school teachers in private schools that accept placements by public agencies meet the same “highly qualified” standards that the States apply to teachers in public schools. In this context you ask for clarification of the “highly qualified” requirements for teachers teaching students at a functional, rather than grade, level.

Under 34 CFR §300.18(c) the requirements are set out for special education teachers teaching to alternate academic achievement standards established by a State under 34 CFR §200.1(d). This section provides:

When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate academic achievement standards established under 34 CFR §200.1(d), highly qualified means the teacher, **whether new or not new to the profession**, may either:

1. Meet the applicable requirements of section 9101 of the Elementary and Secondary Education Act (ESEA) and 34 CFR §200.56 for any elementary, middle, or secondary school teacher who is new or not new to the profession; or
2. Meet the requirements of paragraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher, or, in the case of instruction above the elementary level, meet the requirements of subparagraph (B) or (C) of section

9101(23) of the ESEA as applied to an elementary school teacher and have subject matter knowledge appropriate to the level of instruction being provided and needed to effectively teach to those standards, as determined by the State. (Emphasis added)

The regulations promulgated under Title 1 of the ESEA permit States to use alternate academic achievement standards to evaluate the performance of a small group of children with the most significant cognitive disabilities who are not expected to meet grade-level standards even with the best instruction. An alternate academic achievement standard sets an expectation of performance that differs in complexity from a grade-level academic achievement standard. Therefore, 34 CFR §300.18(c) allows special education teachers teaching exclusively children who are assessed against alternate academic achievement standards to meet the highly qualified teacher standards that apply to elementary school teachers, or, if a teacher (who is teaching exclusively to alternate achievement standards) is teaching students who need instruction above the elementary school level, the teacher must have subject matter knowledge appropriate to the level of instruction needed to effectively teach to those standards. The purpose of this requirement is to ensure that teachers exclusively teaching children who are assessed based on alternate academic achievement standards above the elementary level have sufficient subject matter knowledge to effectively instruct in each of the core academic subjects being taught, at the level of difficulty being taught. For example, if a high school student (determined by the individualized education program (IEP) Team to be assessed against alternate academic achievement standards) has knowledge and skills in math at the 7th grade level, but in all other areas functions at the elementary level, the teacher would need to have knowledge in 7th grade math in order to effectively teach the student to meet the 7th grade math standards. States determine, within the parameters set out in 34 CFR §300.18(c), specific requirements for “highly qualified” special education teachers.

You also seem to be concerned with the standards that some States have established for determining which children with disabilities may take assessments based on alternate academic achievement standards. This also is largely a State matter. The regulations implementing Title 1 of the ESEA specify that if a State chooses to implement an assessment based on alternate academic achievement standards for students with the most significant cognitive disabilities, the State must adopt clear and appropriate guidelines for IEP Teams to apply in determining which children will be assessed based on those alternate academic achievement standards. 34 CFR §200.1(f). In calculating adequate yearly progress (AYP) for schools, local educational agencies (LEAs) and the State, a State may include the proficient and advanced scores of students with the most significant cognitive disabilities based on alternate academic achievement standards provided that the number does not exceed 1.0 percent of all students in the grades addressed in reading/language arts and in mathematics. 34 CFR §200.13(c)(2)(i).

Finally, you raise the issue of “testing [special education students] to the student’s abilities”, in contrast to administering age-appropriate assessments. As you know, the amendments made to the ESEA by the No Child Left Behind Act of 2001, Pub. L. No. 107-110, require States to establish challenging academic content standards and academic achievement standards, and to ensure that all students with disabilities are fully included in State accountability systems and have access to challenging instruction that is linked to the State academic content standards. See 34 CFR §§200.1-200.3, 200.6. While testing students with disabilities based on their individual

abilities might provide useful information for reporting progress to parents and to IEP Teams, it cannot substitute for assessments based on the State's challenging academic achievement standards, as testing based on individual student abilities often will not be aligned to State standards and it is not possible to set achievement standards based on individualized assessments. Further, individualized assessments will not ensure that States are making consistent judgments about schools and LEAs in terms of AYP determinations. Although States and LEAs may develop assessments based on individual student abilities, these assessments are not required by Title I and cannot substitute for the assessments that are required by Title I. We believe that the flexibility provided to States in the regulations implementing Title I of the ESEA to develop alternate assessments based on alternate and modified academic achievement standards adequately addresses how students with disabilities may be included in the State assessment and accountability systems required by Title I of the ESEA.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

We hope this provides the information you need. If you have questions about this issue, please do not hesitate to contact Laura Duos in the Office of Policy and Planning at (202) 245-6772.

Sincerely,



William W. Knudsen  
Acting Director  
Office of Special Education  
Programs