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Education Law into Practice

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CHALLENGES BASED ON LACK OF TEACHER LICENSING QUALIFICATIONS UNDER THE IDEA^{a1}

The chronic shortage of special education teachers has been well documented,¹ including but not at all limited to high-poverty schools² and rural communities.³ The COVID-19 pandemic has exacerbated this perennial and pervasive problem.⁴ One of the obvious results is that a significant number of students with individualized education programs (IEPs) will not have fully certified special education teachers.

It is understandable that parents of students with disabilities would be particularly concerned if their child's special education teacher was not duly certified, much less "highly qualified."⁵ If they seek a remedy via adjudication *478 under the Individuals with Disabilities Act (IDEA),⁶ which provides their child with a "free appropriate public education" (FAPE),⁷ they face a problematic provision that Congress added in 2004 and contextually revised in 2015.

IDEA Proviso

The 2004 amendments of the IDEA, as part of the harmonization with the No Child Left Behind Act (NCLBA) of 2001,⁸ incorporated the NCLBA's more rigorous requirements for special education teachers to be "highly qualified."⁹ At the same time, the IDEA amendments had the following accompanying proviso:

Notwithstanding any other individual right of action that a parent or student may maintain under [part B of the IDEA], nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to meet the applicable requirements described in this paragraph, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this subchapter.¹⁰

Upon the 2015 enactment of the Every Student Succeeds Act (ESSA) to replace the NCLBA,¹¹ including elimination of the "highly qualified" provision, Congress included a conforming provision for the IDEA. As a result, the currently applicable provisions of the IDEA (a) require a regular special education teaching license,¹² and (b) retain the aforementioned proviso.¹³

The *Cooper* Case

Despite the interpretive problems of this negating rule of construction proviso, it has only arisen in one "published" court decision to date.¹⁴ More *479 specifically, in *Cooper v. School City of Hammond*,¹⁵ a federal district court in Indiana reviewed a hearing officer's decision that found the school's failure to provide the student with a properly certified teacher for

months contributed to a denial of FAPE,¹⁶ yet provided no compensatory remedy.¹⁷ The court's ruling was limited, in relevant part, to responding to the district's motion to dismiss this part of the parent's appeal. Citing the rule-of-construction proviso, the court granted the motion, concluding that "there is no private right of action for alleged failure to comply with teacher qualifications."¹⁸ The parent apparently cited more than one hearing officer decision that granted them, reasoning that "all of the cases she cites are from administrative hearings [that] may be governed by different rules and remedies."¹⁹

Hearing Officer Decisions

The IDEA proviso has surfaced in a limited number of hearing or review officer decisions to date,²⁰ at least sufficient to reveal a variety of interpretations and applications.²¹ Some simply interpreted the proviso so broadly as to render challenges to teacher qualifications non-actionable.²²

***480** However, a case arising not long after the 2015 revision of the IDEA provides a more nuanced interpretation. In this case, a Texas hearing officer rejected a challenge to the special education teacher's qualifications, interpreting the paired prohibition and proviso as meaning that "the challenge cannot be based simply on the fact the teacher does not meet the qualification requirements of the law; rather the challenge must demonstrate that the lack of qualifications has prevented the child from receiving [FAPE]."²³

As a variation of the overall FAPE approach, in a recent decision a Massachusetts hearing officer interpreted the proviso as not precluding consideration of the lack of a certified teacher under the failure-to-implement theory for denial of FAPE.²⁴ More specifically, relying on evidence that if the district had completed the necessary paperwork the teacher's certification would have been renewed, the hearing officer concluded that the lapse was "technical" and, in light of the child's progress, the district's implementation did not constitute a denial of FAPE.²⁵ Illustrating the converse side of the same approach, in another case a District of Columbia hearing officer concluded that the failure to provide a certified special education teacher was material rather than merely technical, thus constituting denial of FAPE.²⁶

In other hearing or review officer cases, the proviso played only a latent or tangential role. In some cases, the hearing officer found that the parent did not prove the threshold requirement of lack of regular certification.²⁷ Illustrating the proviso's tangential use, a North Carolina review officer cited it to reinforce his affirmation of the hearing officer's denial of discovery of confidential teacher personnel files in a child find case.²⁸ More specifically, this use of the proviso was conditioned on the premise that the requested access to personnel files is for the purpose of determining the qualifications of the student's special education teachers.²⁹

State Complaint Decisions

Surprisingly in light of the proviso's preserved alternative for administrative dispute resolution under the IDEA,³⁰ state complaint decisions also ***481** appear to be infrequent with regard to the IDEA's teacher qualifications requirement. In some cases, the decision was that the teacher at issue met the threshold qualification requirement.³¹

However, other cases found a violation of this requirement.³² For instance, in a complaint brought on behalf of thirty special education students in a Minnesota school district, the decision was that the district violated the teacher certification requirement for slightly more than half of them during the trimester in question.³³ The corrective action was for the district to promptly conduct an IEP meeting for each of these sixteen students to determine "whether compensatory education is necessary to remedy any educational harm to that Student."³⁴ As another example, the decision arising from a complaint on behalf of a student

in the state of Washington was that the district violated the requirement as applied to implementation of the student's IEP for the first, but not the second, part of the period in question.³⁵ For the first part of the period, the reliance on paraprofessionals without the IEP-specified special education teacher amounted to a violation and, in light of the finding of a resulting substantive loss to the student, the corrective action consisted of compensatory education and training in IEP implementation.³⁶ However, for the second part of the period, the investigator concluded that the district's use of a substitute teacher, who only had an emergency certificate, was not a violation because she received collaborative support and supervision from a fully certified special education teacher.³⁷

Discussion

Examined from a potential parent-plaintiff perspective,³⁸ concerns about the legally required qualifications of the child's special education teacher(s), at least in terms of state certification, warrant careful consideration rather than knee jerk filing for adjudication. First, consider the legal standards for special education licensing under the IDEA intertwined with state law.

*482 Recognize that although the ESSA removed the NCLBA's "highly qualified" requirements in the IDEA, they remain in some states' licensure standards.³⁹

Second, if there is reason to suspect that any special education teacher of the child lacks the requisite state certification, exhaust informal institutional channels for determining the relevant facts and remedy any legal deficiency. Depending on the state and the school district, these channels extend to alternate dispute resolution mechanisms, such as ombudspersons or mediators.⁴⁰

Third, examine the direct decisional dispute resolution mechanism of the state complaint process, which has certain advantages in terms of transactional time and costs.⁴¹ It also generally results in more parent-favorable outcomes but less substantive remedies for the child.⁴²

Finally, if the informed choice is for adjudication,⁴³ focus the complaint on the broader issue of FAPE, including but not at all limited to the certification of the special education teacher(s).⁴⁴ The pertinent proviso starts with the preserving exception for any other individual right of action that a parent or student may maintain under the IDEA,⁴⁵ which obviously and most frequently concerns FAPE. Reinforcing this interpretation, the agency commentary accompanying the IDEA regulations that arose after the 2004 IDEA amendments explained that "if the *only reason* a parent believes that their child was denied FAPE is that the child did not have a highly qualified teacher, the parent would have no right of action under the Act on that *483 basis."⁴⁶ Finally, if the adjudicator's decision is that the lack of special education certification was part of a denial of FAPE, the remedy of compensatory education is suitable, although not automatic or exclusive.⁴⁷

In sum, for perceived lack of certification of special education teachers, think at least thrice before resorting to legal action. Due to its inherent limits and costs, law may not be the certified solution.

Footnotes

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1 *See, e.g.*, Bonnie Billingsley, *Special Education Teacher Attrition and Retention: A Review of the Literature*, 89 Rev. Educ. Res. 697 (2019) (synthesizing thirty research studies from 2002 to 2017 analyzing factors associated with the continuing attrition and retention problems among special education teachers); Erling E. Boe, *Long-Term Trends in the Demand, Supply, and Shortage of Special Education Teachers*, 40 J. Special Educ. 138 (2004) (finding that the shortage of fully certified teachers for students with disabilities has been chronic since 1987-88 and has increased annually from 7.4% in 1993- to 13.4% in 2002-03); Bill Thornton, Gary Peltier, & Ricky Medina, *Reducing the Special Education Teacher Shortage*, 80 Clearing House 233 (2007) (discussing contributing factors and suggesting recommendations for addressing the continuing shortage of special education teachers).

2 *See, e.g.*, Loretta Mason-Williams, *Unequal Opportunities: A Profile in the Distribution of Special Education Teachers*, 81 Exceptional Child. 247 (2015) (finding particular shortages of special education teachers in high-poverty schools).

3 *See, e.g.*, C. Lynn Hodge & Bernita L. Krumm, *NCLB: A Study of Its Effect on Rural Schools*, 28 Rural Special Educ. Q. 20 (2009) (citing the long-standing shortage of special education teachers in rural communities while finding that the “highly qualified teacher” requirement intensified this problem).

4 *See, e.g.*, Michael A. DiNapoli, Eroding Opportunity: COVID-19's Toll on Student Access to Well-Prepared and Diverse Teachers (Feb. 2021), <https://learningpolicyinstitute.org/blog/covid-eroding-opportunity-student-access-prepared-diverse-teachers> (observing that the pandemic has worsened the teacher shortages in high need subjects, including special education).

5 This brief legal analysis does not address qualifications, including training, beyond certification except for the limited reference to the transitory IDEA requirements for “highly qualified” special education teachers. Similarly, its scope does not extend to the certification or other qualification of related services personnel or paraprofessionals.

6 20 U.S.C. §§ 1401 *et seq.* (2018).

7 *Id.* § 1412(a)(1).

8 Pub. L. No. 107-110, 115 Stat. 1439, § 1119(a)(2) (2001).

9 Pub. L. No. 108-446, 118 Stat. 2686, §§ 602(10), 612(a)(14)(C)-(D) (2004). The most onerous of the definitional requirements was for special education teachers who provided instruction in multiple subjects exclusively to students with disabilities to have state licenses for each of these core subjects. *Id.* at § 612(14)(D).

10 *Id.* § 1412(a)(14)(E). Although this proviso refers broadly to qualifications of staff persons generally, the analysis of its application is herein limited to a more circumscribed scope. *See supra* note 5.

11 Pub. L. No. 114-95, 129 Stat. 1814, § 9214(d)(2) (2015).

12 20 U.S.C. § 1412(a)(14)(C) (2018). The requirement for what this provision terms “full” certification excludes waivers via “emergency, temporary, or provisional” certification. *Id.* However, it includes an alternative route option that meets specified criteria. *Id.* This option provides some latitude, especially for times or places of acute shortage. *E.g.*, Emergency Provisions for Special Education Student Teaching and Practicum Requirements, 120 LRP 12434 (Mich. SEA Apr. 6, 2020) (providing temporary approval via the alternate route for school closure during the pandemic).

13 *Id.* § 1412(a)(14)(E) (2018). For the corresponding IDEA regulation, which mirrors the statutory wording of the proviso except for the addition to an individual student of “or a class of students,” see 34 C.F.R. § 300.156(e) (2019).

14 “Published” in this context refers to the broad meaning of appearing in Westlaw and/or the Individuals with Disabilities Education Law Report (IDELR) rather than the narrow sense of being officially published. Within this broader context for the cases after the 2004 IDEA amendments, an occasional other court decision addressed the lack of special education teacher certification without specifically reaching the applicable requirement with its accompanying proviso. *See, e.g.*, B.M. v. N.Y.C. Dep’t of Educ., 569 F. App’x 57 (2d Cir. 2014) (rejecting the claim based on lack of exhaustion); S.S. v. Bellflower Unified Sch. Dist., 79 IDELR ¶ 201 (C.D. Cal. 2021) (using the lack of proper certification to find denial of FAPE via applicable standard for incomplete implementation of the IEP); Damian J. v. Sch. Dist. of Phila., 49 IDELR ¶ 161 (E.D. Pa. 2008) (concluding that special education teacher’s lack of certification and training contributed to denial of FAPE based on material failure to implement the IEP).

15 *Cooper v. Sch. City of Hammond*, 2021 WL 4819611, 79 IDELR ¶ 250 (N.D. Ind. Oct. 15, 2021).

16 The other contributing factors were failures to adequately evaluate the student's needs and to provide the parent with a timely copy of the IEP. *Id.* at *3-4.

17 In explanation, the court quoted the hearing officer's reason for denying the parent's request for compensatory education: "since the Student is only a fifteen year old freshman, who has until he is 22 years of age to receive special education and related services and the Student may be entitled to receive Recovery Services due to COVID-19 pursuant to the recent memorandum from the [state education department]." *Id.* at *4. The other part of the hearing officer's rationale was that the denial of FAPE was not intentional and not likely to recur. *Id.*

18 *Id.* at *7. The court observed that, per the final clause of the proviso, the parent may resort to the IDEA's alternative decisional dispute resolution mechanism-the state complaint process. *Id.*

19 *Id.*

20 The review officer decisions are attributable to the approximately eight states, including New York and North Carolina, that have opted for a second tier of administrative adjudication under the IDEA. For the hearing officer decisions, some did not reach the proviso because they found that the district met the certification requirement. *E.g.*, City of Chi. Sch. Dist., 57 IDELR ¶ 207 (Ill. SEA 2011).

21 However, contrary to the Cooper court's tentative distinction (*supra* text accompanying note 19), the rules and remedies of IDEA hearing officers is the same as that for courts. *See, e.g.*, Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. Nat'l Ass'n Admin. L. Judiciary 1 (2011) (showing the concurrent authority of hearing/review officers and courts under the IDEA, with the exception of attorneys' fees, which was not a factor in the *Cooper* court's ruling). Nevertheless, the potential distinction is that the *Cooper* ruling was limited to the district's dismissal motion to a discrete count specific to teacher qualifications, although it arguably extended to the hearing officer's ruling that the special education teacher's lack of certification was only part of a broader issue of FAPE. *See supra* note 16 and accompanying text.

22 *E.g.*, District of Columbia Pub. Sch., 116 LRP 6053, at *6 (D.C. SEA Nov. 24, 2016); Kipp Delta Sch. Dist., 116 LRP 34786, at *6 (Ark. SEA Aug. 1, 2016).

23 Tex. Sch. for the Deaf, 115 LRP 46571, at *27 (Tex. SEA Aug. 15, 2015).

24 Springfield Pub. Sch., 120 LRP (Mass. SEA Nov. 10, 2020). The hearing officer used the prevailing standard of whether the failure to fully implement the IEP was material, or more than a minor discrepancy. *Id.* at *42 (citing *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)).

25 *Id.* at *43-44.

26 District of Columbia Pub. Sch., 116 LRP 10552, at *9-10 (D.C. SEA Jan. 14, 2016).

27 *E.g.*, District of Columbia Pub. Sch., 115 LRP 40486, at *5-6 (D.C. SEA May 8, 2015).

28 Franklin Cnty. Bd. of Educ., 121 LRP 1634, at *6 (N.C. SEA Nov. 9, 2020). As the review officer explained by way of background, North Carolina law not only provides confidentiality of teacher personnel files but also allows for discovery in IDEA due process hearings. *Id.* at *6.

29 *Id.*

30 *Supra* note 18 and text accompanying note 10.

31 *E.g.*, In re Student with a Disability, 121 LRP 7021, at *4 (Wash. SEA Feb. 22, 2021); In re Student with a Disability, 120 LRP 5150, at *2 (Kan. SEA Dec. 17, 2019); In re Student with a Disability, 120 LRP 5178, at *4-5 (Kan. SEA Dec. 6, 2019); *cf.* Union Cnty. Coll. Corner Joint Sch. Dist., 79 IDELR ¶ 88 (Ind. SEA 2021); Westview Sch. Corp., 73 IDELR ¶ 164 (Ind. SEA 2018) (solely based on state law).

32 *E.g.*, Nw. Colo. Bd. of Cooperative Educ. Serv., 114 LRP 32935 (Colo. SEA May 14, 2014) (before elimination of the "highly qualified" requirement); Franklin Cnty. Sch. Dist., 119 LRP 4531 (Fla. SEA June 4, 2018) (after elimination of the "highly qualified" requirement).

33 In re Student with a Disability, 120 LRP 476, at *6 (Minn. SEA Dec. 30, 2019).

34 *Id.*

35 Lake Washington Sch. Dist., 121 LRP 14509 (Wash. SEA Mar. 1, 2020).

36 *Id.* at *13-14.

37 *Id.* at *14-15.

38 Although the author adheres to an impartial perspective, it is convenient to synthesize the applicable authority on this limited issue from the viewpoint of the parents of IDEA-eligible students. Readers on the district side of the proverbial table can benefit from not only the same careful circumspection but also more generally the wider view that extends across said table.

39 Ambra L. Green et al., *From NCLB to ESSA: Implications for Teacher Preparation and Policy*, 32 J. Disability Pol'y Stud. 204 (2021) (finding a wide degree of variability among the states in their special education certification requirements in the wake of the NCLBA).

40 See, e.g., Erin R. Archerd et al., *The Ohio State University Dispute Resolution in Special Education Symposium Panel*, 30 Ohio St. J. on Disp. Resol. 89, 94 (2014) (referencing “upstream,” or pre-filing, resolution mechanisms under the IDEA).

41 See, e.g., Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes-Complaint Procedures and Impartial Hearings: An Update*, 369 Educ. L. Rep. 550 (2019) (identifying, via a systematic comparison, the advantages and disadvantages of these two alternate decisional dispute resolution mechanisms under the IDEA). A parallel investigative avenue under the overlapping coverage of Section 504 is the complaint resolution process of the U.S. Department of Education's Office for Civil Rights (OCR). See, e.g., Provo City (UT) Sch. Dist., 69 IDELR ¶285 (OCR 2016) (finding that the district violated FAPE under Section 504 by not providing a duly certified teacher for the initial part of the period at issue); Charlotte-Mecklenburg (NC) Schs., 114 LRP 6075 (OCR 2013) (finding that the district met the highly qualified teacher requirement).

42 See, e.g., Perry A. Zirkel, *The Complaint Procedures Avenue of the IDEA: Has the Road Less Traveled by Made all the Difference?* 30 J. Special Educ. Leadership 88 (Sept. 2017) (finding that the state complaint process generally provides a higher percentage of parent-favorable rulings but wider and less deep remedies).

43 Contrary to the *Cooper* court's dicta (*supra* text accompanying note 19), the relevant rules and remedies under the IDEA are not different between due process hearings and courts. The limited differences, such as the authority for attorneys' fees, are another matter.

44 See *supra* notes 14, 23-26 and accompanying text.

45 See *supra* text accompanying note 10.

46 71 Fed. Reg. 46,562 (Aug. 14, 2006) (emphasis added).

47 The hearing officer's denial of this requested remedy in the *Cooper* case (*supra* note 17), which the court did not address, was far from cogent. In part, the hearing officer's rationale illustrates current confusion between the recovery services and compensatory education. See, e.g., Perry A. Zirkel, *COVID-19 Confusion: Compensatory Services and Compensatory Education*, 30 S. Cal. Rev. L. & Soc. Just. 39 (2021). The other part, which concerns intent and likelihood of recurrence, lacks any legal authority and appears to be reversible error.