

Guidance Related to OSEP's Letter to Couillard *August 2013*

This guidance document was developed in response to the Office of Special Education Program's (OSEP) March 2013 *Letter to Couillard* regarding special education personnel working with students who are not identified as students with disabilities. A copy of the letter is at <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-011637r-wi-couillard-rti3-8-13.pdf>.

Special education and related services are designed to meet the unique needs of students with disabilities in the context of the entire educational experience. All students should be educated in the least restrictive environment (LRE) to the maximum extent appropriate and have access to the general education curriculum in order to meet educational standards that apply to all children. To provide the most effective supports to students with disabilities, it is common for schools to maximize staff's varied expertise through general and special education personnel working together in general education inclusive environments. While this practice is encouraged, care should be taken to ensure staff are performing these duties within what is permissible. This document provides guidelines for determining permissible tasks for special education teachers working in inclusive settings. This guidance also applies to speech and language pathologists, who are special educators.

Three considerations guide decision-making about special education teachers instructing students who have not been identified as having a disability and needing special education. These are due process, funding, and licensing.

- **Due process:** Students may not receive special education services unless the local educational agency (LEA) has gone through proper referral, evaluation, and placement procedures. Procedural safeguards including specific parental rights apply. Instruction by a special education teacher beyond the scope of incidental benefit is considered special education (see below).
- **Funding:** All staff who are required to be licensed must work within the scope of the position for which they are employed or contracted, and may only perform duties permitted by their funding source. Guidance within this document applies regardless of whether the teacher is funded through federal, state, or local sources.
- **Licensing:** All staff must be appropriately licensed under PI 34 and work within the parameters of their certifications and contracts. Special education teachers are licensed to provide special education or related services to eligible students with disabilities in accordance with their individualized education programs (IEPs).

Instructional Tasks

The reason for a special education teacher performing an instructional task must be to implement specific services outlined in a student's IEP. Special education teachers may not spend additional time, perform additional tasks, or perform tasks that interfere with the provision of services

outlined in IEPs for students not currently identified as needing special education or related services. Examples of activities not permitted by special education teachers as cited in OSEP's *Letter to Couillard* include grading papers and spending time on parent teacher conferences for students without disabilities. However, the incidental benefit provision of the Individuals with Disabilities Education Act (IDEA) (CFR §300.208) permits one or more nondisabled students to benefit from the special education and related services, and supplementary aids and services provided to a student with a disability in accordance with the student's IEP.

Determinations of what constitutes an incidental benefit must be made on a case-by-case basis. Situations in which a special education teacher is responsible for targeted instruction of one or more students without IEPs is considered beyond "incidental benefit." Likewise, instruction in special education environments should occur only when specified in IEPs. When determining if it is permissible for special education personnel to perform an instructional task or assignment with a non-disabled student, the following guiding questions may be helpful:

1. Is the reason for the special education teacher performing the task related to specific needs of at least one child with a disability as outlined in his or her IEP?
 - ✓ If no, it is not permissible for the special education teacher to perform the task.
2. Will the task require additional time beyond what is required to address the needs of at least one child with a disability as outlined in his or her IEP?
 - ✓ If yes, it is not permissible for the special education teacher to perform the task.
3. Will the provision of free appropriate public education (FAPE) or any IEP services be compromised if the special education teacher performs the task?
 - ✓ If yes, it is not permissible for the special education teacher to perform the task.
4. Will the task result in a student or students not currently identified as needing special education and related services receiving instruction beyond the scope of incidental benefit by the special education teacher?
 - ✓ If yes, it is not permissible for the special education teacher to perform the task.

Special education teachers are permitted to participate in co-teaching and intervention configurations within the guidelines above. If concerns are brought to the Department of Public Instruction (DPI), they will be examined on a case-by-case basis.

Participation on Decision-Making Teams

Many schools have established grade-level, content-area, and/or building-level teams to analyze data related to students' response to instruction and intervention, and to subsequently make instructional or referral decisions based on that analysis. As part of their child find obligations, special education personnel may be members of collaborative teams that determine whether to refer a student for an evaluation to determine whether the student is a student with a disability, in part, based on data collected from general education interventions. As members of such teams, these staff members are encouraged to share their expertise in addressing the needs of students with disabilities with other personnel to assist them in identifying, locating, and evaluating students with disabilities in accordance with child find responsibilities. These types of pre-referral processes cannot be used to delay a referral for a special education evaluation. Under Wisconsin law, the LEA must proceed with the evaluation process when a referral is received.

Special education teachers may also share their expertise on collaborative teams that plan instructional interventions for all students. Their expertise on such topics as using data to inform instruction, selecting data collection tools, and matching instruction to specific needs is a valuable asset to a schoolwide system of support.

However, special education personnel may not spend additional time, perform additional tasks, or perform tasks that interfere with the provision of services outlined in IEPs for students not currently identified as needing special education or related services. Assessing, observing, or screening individual students who are not eligible for special education or outside of a special education evaluation process is not permissible.

Finally, occupational and physical therapists may not be assigned to participate as regular members of such teams because of state licensing and practice rules for these particular professionals. Pupil services personnel (i.e. psychologists, school social workers, school nurses, and school counselors) may be assigned as regular members.

Options for Increased Flexibility

Flexible Funding Options

All LEAs have the option to use up to 15% of their IDEA allocations to provide interventions to students not identified as needing special education or related services, but who need additional supports to succeed in the general education curriculum (CFR §300.226). These interventions must be provided within the scope of general education. Information and technical assistance on Coordinated Early Intervening Services (CEIS) can be found at http://sped.dpi.wi.gov/sped_ceis.

Additionally, those LEAs with Title I Schoolwide schools have the option of setting aside a proportionate amount of their IDEA allocations to support activities in a Title I Schoolwide program at the school level (CFR §300.206). Information and technical assistance on IDEA Title I Schoolwide Set-Aside can be found at http://sped.dpi.wi.gov/sped_grt-title1-setaside.

Dual Licensure

Individuals who have both general education and special education licenses may perform duties that correspond with each license if they are employed or contracted with the LEA for those distinct roles, have clearly delineated duties, and keep required Personnel Activity Reports (PARs) if federally funded. For example, a teacher provides special education services 60% of the day and general education interventions 40% of the day. This teacher is funded 60% with IDEA Flow-through dollars, and 40% with IDEA CEIS dollars. His contract with the LEA reflects his position as a 60% special education teacher and 40% general education teacher, and he accurately keeps PARs.