



ALAN WILSON
ATTORNEY GENERAL

September 26, 2012

The Honorable John W. Matthews, Jr.
Senator, District No. 39
P.O. Box 142
Columbia, South Carolina 29202

Dear Senator Matthews,

We received your letter requesting an opinion of this Office as to whether the South Carolina Department of Education (the "SCDOE") properly certified a number of individuals who do not have a post-graduate degree as speech-language therapists in the public schools. In your letter, you quote relevant provisions of S.C. Code Regs. 43-64(II)(C) which provide that individuals must have, *inter alia*, a master's degree to obtain certification as a speech-language therapist. In addition, you quote the relevant provisions of 34 C.F.R. § 300.156, one of the regulations implementing the federal Individuals with Disabilities Education Act (IDEA), which sets forth the personnel standards states must establish for individuals providing certain services such as speech-language therapy to children with disabilities. Based on your review of these regulations, you state as follows:

[I]t is evident that the intent of Congress was that State Education Agencies (SEA) provide appropriately and adequately prepared and trained personnel that have the knowledge and skills to serve students with disabilities. Additionally, Congress intended for the SEAs to use "comparable" qualifications that apply to the professional discipline in general. For speech language pathologists (referred to as speech-language therapists in SC), the minimal entry level is considered to be the American Speech Language Hearing Association Certificate of Clinical Competence (CCC). This certificate requires a master's or doctoral degree comprised of required knowledge and skills achieved through course work and clinical practicum, completion of the Clinical Fellowship (CF), and successful completion of the Praxis exam in speech-language pathology.

In summary, recognizing that the federal government and our state regulations all seem to call for the delivery of speech and language services by appropriately qualified personnel, where a master's degree is the minimum requirement, I ask for your opinion on whether the SC Department of Education has properly certified these 335 individuals lacking that qualification.

We contacted the SCDOE to obtain additional information relevant to your question. The SCDOE supplied us with copies of the "Policies and Procedures" that were filed with and approved by the U.S. Department of Education (the "USDOE") in 2000 ("2000 Policies and Procedures") and 2004 ("2004 Policies and Procedures"). Through these Policies and Procedures, the SCDOE ensured its compliance with the IDEA and its implementing regulations. In addition, we were able to obtain a copy of the "South

Carolina Speech-Language Impairment Guidelines” issued by the SCDOE on September 1, 2010 (“2010 Speech-Language Guidelines”).

Law/Analysis

The State Board of Education (the “State Board”) is statutorily empowered to, *inter alia*, “[p]rescribe and enforce rules for the examination and certification of teachers” and “[g]rant State teachers’ certificates and revoke them for immoral or unprofessional conduct, or evident unfitness for teaching...” S.C. Code § 59-5-60; see also § 59-25-110 (“The State Board of Education, by rules and regulations, shall formulate and administer a system for the examination and certification of teachers”); § 59-25-150 (“The State Board of Education may, for just cause, either revoke or suspend the certificate of any person”). In accordance with aforementioned powers, the State Board has adopted regulations setting forth the certification requirements for teachers and other personnel in the public schools. The certification requirements for certain advanced level personnel, including speech-language therapists, are specifically set forth in S.C. Code Regs. 43-64.

As you mention, a master’s degree is clearly required by state regulations as S.C. Code Regs. 43-64(II)(C) provides that an individual must meet the following qualifications to obtain certification as a speech-language therapist in the public schools:

- (1) *Master’s degree*
- (2) Completion of an advanced program approved by the State Board of Education for the preparation of speech-language therapists
- (3) Minimum qualifying score(s) on the area examination(s) required by the State Board of Education[.]

(Supp. 2011) (emphasis added).

Although no other state regulation currently provides a method by which an individual may obtain certification as a speech-language therapist in the public schools without a post-graduate degree, our research shows that prior to 2004 such a method did exist. For example, S.C. Code Regs. 43-62.2 (Supp. 2002) allowed teachers certified in areas other than “exceptional children”¹ certification to obtain additional certification in the area of speech-language therapy if the following qualifications were met:

1. Bachelor’s degree
2. Professional certificate at the early childhood, elementary, middle school, or secondary level
3. Minimum qualifying score(s) on the State Board of Education required specialty-area examination(s)

¹ At that time, certification in the area of “exceptional children” included the following areas: deafness and hearing impairment, emotional disabilities, learning disabilities, mental disabilities, general special education, moderate and severe disabilities, speech language therapist, visual impairment, and orthopedically impaired. S.C. Code Regs. 43-62.2 (Supp. 2002).

4. Endorsement of training institution certifying competence in conducting speech therapy in public school settings
5. Specialized preparation²

S.C. Code Regs. 43-62.2(G) (Supp. 2002).

However, in June of 2004 the requirements for additional certification in one of the “exceptional children” areas were moved to S.C. Code Regs. 43-62(III) and speech-language therapy was deleted entirely from the list of additional areas of certification. See 28 S.C. Register 34 (June 25, 2004) (“Speech-language Therapist is deleted here since it is an advanced certification area and is included in R 43-64(D)”); S.C. Code Regs. 43-62(III)(I) (Supp. 2012) (indicating certification requirements for speech-language therapists are included in Regulation 43-64). Thus, as of June 25, 2004, State Board regulations no longer allowed an individual with a bachelor’s level education to obtain certification as a speech-language therapist.

It is our understanding the State Board made these regulatory changes in 2004 in order to comply with the requirements of the 1997 IDEA and its implementing regulations which imposed strict personnel standards on states receiving funds under Part B of the IDEA. At that time, 20 U.S.C.A. § 1412(a) provided that a state was eligible to receive assistance under Part B if the state had in effect policies and procedures ensuring that it met certain conditions, including:

(15) PERSONNEL STANDARDS.—

(A) IN GENERAL.—The State educational agency has established and maintains standards to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained.

(B) STANDARDS DESCRIBED.—Such standards shall—

(i) be consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(ii) to the extent the standards described in subparagraph (A) are not based on the highest requirements in the State applicable to a specific profession or discipline, the State is taking steps to require retraining or hiring of personnel that meet appropriate professional requirements in the State....

20 U.S.C.A. 1412(a) (Supp. 1997) (emphasis added).

Likewise, the implementing regulations for the IDEA in effect at that time provided the following with regards to personnel standards:

² This section required the completion of a certain number of semester credit hours in different subject areas as well as a certain number of clinical practicum hours under the supervision of a qualified therapist.

(a) Definitions. As used in this part—

(1) Appropriate professional requirements in the State means entry level requirements that—

(i) **Are based on the highest requirements in the State applicable to the profession or discipline** in which a person is providing special education or related services; and

(ii) Establish suitable qualifications for personnel providing special education and related services under Part B of the Act to children with disabilities who are served by State, local, and private agencies (see §300.2);

(2) **Highest requirements in the State applicable to a specific profession or discipline means the highest entry-level academic degree needed for any State-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline;**

....

(b) Policies and procedures. (1)(i) The State must have on file with the Secretary policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(ii) The policies and procedures required in paragraph (b)(1)(i) of this section must provide for the establishment and maintenance of standards that are consistent with any State-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

....

(c) Steps for retraining or hiring personnel. **To the extent that a State's standards for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the State applicable to a specific profession or discipline, the State must provide the steps the State is taking and the procedures for notifying public agencies and personnel of those steps and the timelines it has established for the retraining or hiring of personnel to meet appropriate professional requirements in the State.**

The “highest requirements” in South Carolina applicable to speech-language services comes from the statutory requirements for licensure as a speech-language pathologist. To be licensed by the Board of Examiners in Speech-Language Pathology and Audiology as a speech-language pathologist, and individual must:

(1)(a) **have earned a post-graduate degree in speech language pathology**...from a school or program determined by the board to be equivalent to those accredited by the Council on Professional Standards of the American Speech-Language Hearing Association (ASHA);

(b) passed an exam approved by the board; and

(c) completed supervised professional employment which is a minimum of thirty hours a week of professional employment in speech-language pathology...for at least nine months whether or not for wages or other compensation under the supervision of a speech-language pathologist...licensed under this chapter; or

(2) **meet ASHA's Standards for Certificate of Clinical Competence**, or its equivalent as approved by the board, in speech-language pathology...in effect at the time of application; or

(3) **have a current ASHA Certificate of Clinical Competence** or its equivalent as approved by the board.

....

S.C. Code Ann. § 40-67-220 (emphasis added).³ As you indicate, ASHA’s Standards for the Certificate of Clinical Competence in Speech-Language Pathology also require an applicant to have at least a master’s degree.⁴

Therefore, in order to meet the “highest requirements in the State” personnel standard mandated by the 1997 IDEA and its implementing regulations, the State Board amended its regulations in 2004 so that speech-language therapists would have to meet the higher education requirements applicable to speech-language pathologists licensed under state law.

The effects of these regulatory changes were not immediate, however. Consistent with the requirements of 20 U.S.C.A. § 1412(a) (Supp. 1997) and 34 C.F.R. § 300.136 (Supp. 1999), the SCDOE filed Policies and Procedures with the USDOE in 2000 and again in 2004 ensuring that it would take steps and establish timelines for the retraining or hiring of personnel necessary to meet the “highest requirements in the state” standard. Page 124 of the 2004 Policies and Procedures states that “[b]y January 1, 2015, all persons providing speech-language services in South Carolina will have a minimum

³ Speech-language therapists certified by the SCDOE and employed only in the public school system are exempt from speech-language pathology licensure requirements. See § 40-67-300(1), (5) (stating chapter generally does not apply to speech-language pathologist employed by political subdivision of State, or to person licensed by State under any other provision of law whose scope of practice overlaps with practice of speech-language pathology).

⁴ See http://www.asha.org/certification/slp_standards/.

of a master's degree in speech-language pathology." In addition, as explained on pages 6-7 of the SCDOE's 2010 Speech-Language Guidelines, the State Board subsequently decided that only two South Carolina institutions could continue to provide bachelor level speech-language programs eligible for certification until 2015:

Columbia College and South Carolina State University have been approved for South Carolina educator certification at the bachelor's level by the South Carolina State Board of Education, and speech-language therapists currently working in South Carolina schools are "grandfathered in" for S.C. educator certification until 2015. After that date, a master's degree in Speech-Language Pathology will be required in all settings in South Carolina.

However, a significant change was made to the personnel standards of the IDEA and its implementing regulations when they were amended in 2004 and 2006, respectively. The 2004 IDEA and the 2006 implementing regulations deleted the "highest requirements in the State" language from the provisions concerning personnel standards. 20 U.S.C.A. § 1412(a) now provides the following with regards to personnel qualifications:

(A) In general

The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(B) Related services personnel and paraprofessionals

The qualifications under subparagraph (A) include qualifications for related services personnel and paraprofessionals that—

(i) are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(ii) ensure that related services personnel who deliver services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

....

20 U.S.C.A. § 1412(a) (Supp. 2004).

Likewise, 34 C.F.R. section 300.156 now provides:

(a) General. The SEA must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and

adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(b) Related services personnel and paraprofessionals. The qualifications under paragraph (a) of this section must include qualifications for related services personnel and paraprofessionals that—

(1) Are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services; and

(2) Ensure that related services personnel who deliver services in their discipline or profession—

(i) Meet the requirements of paragraph (b)(1) of this section; and

(ii) Have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

....

34 C.F.R. § 300.156 (Supp. 2006).

The USDOE has explained the intent behind removing the “highest requirements in the State” language from these provisions as follows:

Comment: Numerous commenters objected to § 300.156(b) and the removal of the requirement in current § 300.136 for State professional requirements to be based on the highest requirements in the State. The commenters stated that the removal of this requirement relaxes the qualification standards for speech-language pathologists and other related services personnel. **Several commenters stated that speech-language professionals should be required to have advanced degrees (i.e., master's level) because a bachelor's degree does not provide adequate preparation.** Many commenters expressed concern that the requirements in § 300.156(b) will lead to a decline in the quality of related services provided to children with disabilities in public schools. Other commenters expressed concern that increasing the standards will exacerbate the shortage of related services personnel experienced by large urban school districts.

Discussion: **We are not changing § 300.156 because it reflects the specific language in section 612(a)(14) of the Act, which was intended to provide greater flexibility to SEAs to establish appropriate personnel standards, including the standards for speech-language pathologists. As indicated in note 97 of the Conf. Rpt., p. 192, section 612(a)(14) of the Act removes the requirement for State professional requirements to be based on the highest requirements in the State because of concerns that the previous law, regarding the qualifications of related services providers, established an**

unreasonable standard for SEAs to meet, and as a result, led to a shortage of related services providers for children with disabilities. We believe that States can exercise the flexibility provided in § 300.156 and section 612(a)(14) of the Act while ensuring appropriate services for children with disabilities without additional regulation.

71 Fed. Reg. 46540-01 (Aug. 14, 2006) (emphasis added).

In light of the USDOE's interpretation of these changes, it is clear that the current IDEA and its implementing regulations do not require states to establish personnel standards by which individuals providing speech-language services in public schools must have, at a minimum, a master's degree. Instead, these provisions now afford states flexibility in establishing the qualifications of individuals providing speech-language services in the public schools. As is the policy of this Office, we defer to the USDOE's interpretation of these statutes and regulations. See Op. S.C. Att'y Gen., 2009 WL 2406409 (July 24, 2009) (stating that "as a matter of policy, this Office does not opine on questions of federal law" and "defers [such matters] to the federal agency charged with the interpretation of the federal statute or regulation in question"). Thus, we conclude federal law does not require individuals providing speech-language services in the public school of this state to have a master's degree.

With all of the above information in mind, we now turn to your specific question as to whether the SCDOE is required to enforce the master's degree requirement of S.C. Code Regs. 43-64(II)(C) for certification as a speech-language therapist and, consequently, whether the SCDOE properly certified individuals as such who have no more than a bachelor's level education.

We note that only a court, and not an opinion of this Office, can enforce an agency regulation. We recognize that administrative agencies are generally required to follow their own regulations. See Triska v. Dep't of Health & Env'tl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987) ("DHEC must ... follow its own regulations and the provisions of the Administrative Procedures Act ... in carrying out the legitimate purposes of the agency"). However, as explained in 73 C.J.S. Public Administrative Law and Procedure § 180, courts generally leave the determination of whether to enforce an agency regulation to the agency's discretion:

A court is required to enforce a regulation where compliance therewith is mandated by the constitution or law but not otherwise.

An agency's decision whether or not to take enforcement action has traditionally been committed to the agency discretion, and therefore should be presumed immune from judicial review. The presumption may be rebutted, however, where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.

See also United States v. Wilson, 614 F.2d 1224, 1227 (9th Cir. 1980) ("A court is not required to enforce an agency regulation unless compliance with the regulation is mandated by the Constitution or federal law"); State v. Gardner, 95 N.M. 171, 173, 619 P.2d 847, 849 (N.M. Ct. App. 1980) ("A New Mexico court has the duty to enforce an agency regulation when compliance with the regulation is mandated by the federal or state Constitutions or state law"); Heckler v. Chaney, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce ... is a decision generally committed to an agency's absolute discretion").

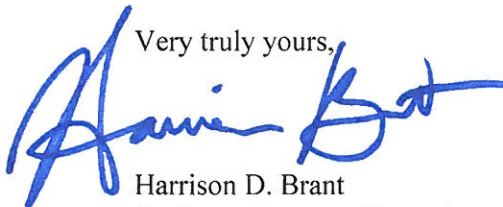
Accordingly, a court will only enforce a regulation if compliance with the regulation is mandated by federal or state law.

Based on the authorities cited above, we do not believe a court would enforce the master's degree requirement of S.C. Code Regs. 43-64(II)(C) and, consequently, would not find that the SCDOE improperly certified individuals as speech-language therapists who have only a bachelor's level education. As previously discussed, the IDEA and its implementing regulations no longer require states to establish personnel standards for individuals providing speech-language services which meet the "highest requirements in the State" applicable to the profession. Consistent with the interpretation of the USDOE, the current IDEA and its implementing regulations do not require individuals providing speech-language services to have, at a minimum, a master's degree, and states are afforded flexibility in determining the appropriate personnel standards for individuals providing such services. We are likewise unaware of any state law requiring speech-language therapists in the public schools to have, at a minimum, a master's degree. Therefore, because compliance with the master's degree requirement of S.C. Code Regs. 43-64(II)(C) is not mandated by federal or state law, we do not believe a court would be required to enforce it.

Furthermore, as the administrative agency statutorily empowered to prescribe and enforce rules for the certification of teachers as well as grant or revoke their certificates, we believe a court would give considerable deference to the State Board's discretion in exercising such powers and enforcing the certification requirements it has prescribed. In this particular case, this means a court would likely defer to the State Board's decision to continue allowing individuals completing approved bachelor's level programs to provide speech-language services in the public schools until 2015. Accordingly, we do not believe a court would find that the SCDOE improperly certified such individuals who do not have at least a master's degree to provide speech-language services in the public schools.

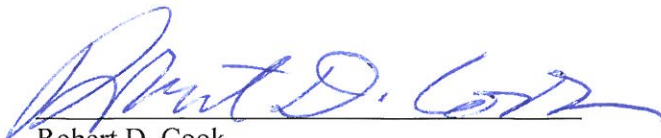
Of course, the General Assembly could, if it so desired, impose the requirement of a master's degree upon individuals providing speech-language services in the public schools. However, under current law, we find that a court is not likely to find that such a requirement presently exists.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General