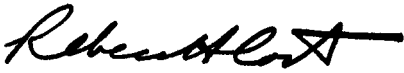
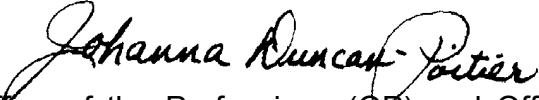




June 2004

TO: District Superintendents
Presidents of Boards of Education
Superintendents of Schools
Organizations, Parents and Individuals Concerned with Special Education
Superintendents of State-Operated and State-Supported Schools
Nonpublic School Administrators and Educators
State and Local Teacher Associations
New York City Board of Education
Executive Directors of Approved Private Schools
Directors of Special Education
Chairpersons of Committees on Special Education
Chairpersons of Committees on Preschool Special Education
Directors of Pupil Personnel Services
Directors of Approved Preschool Programs and Preschool Educators
Municipality Preschool Special Education Coordinators
Early Childhood Direction Centers
Colleges with Special Education Teacher Training
Commissioner's Advisory Panel for Special Education Services
Impartial Hearing Officers
SETRC Project Directors and Professional Development Specialists
Head Start Directors
Chief Elected Officials of Counties
Independent Living Centers

FROM: Rebecca Cort 
Deputy Commissioner, Office of Vocational and Educational Services for
Individuals with Disabilities (VESID)

Johanna Duncan-Poitier 
Deputy Commissioner, Office of the Professions (OP) and Office of Higher
Education (OHE)

SUBJECT: Clarification of the Use of Teachers of the Speech and Hearing Handicapped
Working for §4410 Programs

This policy memorandum is intended to clarify what services can be provided by a teacher of the speech and hearing handicapped (TSHH) to preschool students with disabilities through a special education program approved pursuant to §4410 of the Education Law,

and which services require that the provider be fully licensed as a speech-language pathologist (SLP) pursuant to Article 159 of the Education Law. This clarification is intended to supplement previous policy memoranda issued by the State Education Department in July and November of 1995 related to this matter, and to respond to recent inquiries received by the Department. Copies of the July and November 1995 memoranda are available at <http://www.vesid.nysed.gov/specialed/publications/policy/home.html>.

Section 8202 of the Education Law requires that all persons who practice speech-language pathology be licensed as speech-language pathologists or be otherwise authorized to practice under Article 159. Section 8207(2) provides an exemption that would enable those who are employed by a government or in a school to practice without a license. That section states that the licensure requirement shall not be construed as prohibiting:

Any person employed by the federal, state or local government or by a public or non-public elementary or secondary school or an institution of higher learning from performing the duties of a speech-language pathologist, an audiologist, a teacher of the speech and hearing handicapped, or a teacher of the deaf in the course of such employment.

The central issues addressed below respond to recent inquiries from the field, and are provided in a question and answer format, similar to the Department's November 1995 memorandum.

1. Is it permissible for a teacher of the speech and hearing handicapped (TSHH) who does not hold a professional license as a speech-language pathologist to provide speech-language pathology services to preschool students with disabilities while working for a special education program approved under §4410 of the Education Law?

Yes, under certain circumstances. The intent of the §8207 exemption, as it applies to schools, supports an interpretation that a TSHH who is *employed by* an approved §4410 program may be exempt from licensure under certain conditions. Accordingly, the Department reaffirms the guidance provided in the July and November memoranda on this subject that a TSHH, employed by a center-based §4410 provider who is providing services *in the course of such employment*, is exempt from the licensure requirement set out in Article 159 of the Education Law, but only under the following conditions:

- a) To be a school as intended by the §8207 exemption, the approved §4410 program must be a center-based program, in that it must operate special education classes and/or special education classes in an integrated setting.

- b) The speech-language pathology services must be provided in the course of such employment in the center-based §4410 program. Therefore, to meet the §8207 conditions of an “employee of a school” who provides services “in the course of such employment,” the approved §4410 provider may only employ the TSHH to provide speech-language pathology services to students pursuant to a contract for services between the §4410 provider and the municipality, as defined in §4410. That is, services may only be provided to students enrolled in that §4410 program. This exemption does not allow for any form of subcontracting of services or leasing of employees to other programs, even to other programs that are approved §4410 providers or to any other entity that is eligible for the “school” exemption in §8207.
- c) The §4410 center-based provider must actually employ the TSHH, with all of the commonly accepted indicators of an employment relationship, including adequate supervision and oversight similar to the supervision provided to TSHHs who are employed in traditional school settings. The existence of an employment relationship depends on the factual context of the particular situation or setting. To demonstrate this, the individual must be a W-2 employee such that the employer is subject to federal social security and withholding taxes and other factors must indicate the existence of an employment relationship.

Additional relevant factors, recited in federal court decisions in determining the existence of an employment relationship, include:

- The degree of the employer’s dominion and control over the autonomy of the employee, such as, is the individual required to follow the instructions of the provider relating to when, where, and how he or she is to work;
- Whether the employer requires the submission of written reports and provides training;
- The degree of oversight the employer has over the employee’s work product, such as, does the employer set the order of work to be performed; and
- Whether the employer establishes the hours of work.

2. May services provided in conformance with the conditions of #1, above, be provided at the “center” only, or may they be also be provided at “off-site” settings?

They may also be provided at off-site settings. A TSHH employed by an approved center-based §4410 program, as defined above, is able to provide speech-language pathology services to students in that program at any site indicated on the student’s Individualized Education Plan (IEP), including, but not limited to an approved or licensed pre-kindergarten, the student’s home, a hospital, or a state or municipal facility. This interpretation is informed by the fact that TSHHs employed by a traditional pre-kindergarten or elementary school may provide such services “off-

site,” with attendant oversight and supervision by those designated within the school system. Accordingly, there is an expectation that employees of §4410 programs eligible for the §8207 exemption will have similar degrees of training, supervision, and oversight.

3. Are employees of §4410 programs that are approved to provide only Special Education Itinerant Teacher services (SEIT) and/or multidisciplinary evaluations under §200.16 of the Regulations of the Commissioner of Education exempt from Article 159 licensure under §8207 of the Education Law?

- a) No. The exemption applies only to those individuals employed by approved programs providing special education classes or special classes in an integrated setting. Accordingly, §4410 programs approved to provide SEIT and/or multidisciplinary evaluations, are not eligible for this exemption since they are not “center”-based programs, and are not “schools” as interpreted under §8207(2) of the Education Law.
- b) However, the Department reaffirms the guidance provided in the November 1995 memorandum relating to TSHHs contracting to provide services. That guidance held that it is permissible for TSHHs to provide specialized instruction (special education speech and language instruction, where the goals and objectives will focus on communication development to promote the child’s learning) through contractual arrangement between the §4410 SEIT only provider and a municipality that administers a SEIT program. In contrast, it is not permissible for a TSHH who is not also licensed as a speech-language pathologist under Article 159 of the Education Law to provide, as an independent contractor, speech-language pathology as a related service (where the goals and objectives will focus on preventing, correcting or remediating a communication disorder).

The TSHH who contracts to provide specialized instruction services as described above cannot provide services identified as related services under the relevant IEP. The distinctions between specialized instruction and related services, which involve the provision of speech-language pathology services for which a license is required, are further described in Part 200.1 of the Regulations of the Commissioner, relevant sections of which are reflected below:

(qq) Related services means developmental, corrective, and other supportive services as are required to assist a student with a disability and includes speech-language pathology, audiology services, psychological services, physical therapy, occupational therapy, counseling services, including rehabilitation counseling services, orientation and mobility services, medical services as defined in this section, parent counseling and training, school health services, school

social work, assistive technology services, other appropriate developmental or corrective support services, appropriate access to recreation and other appropriate support services.

(ww) Special education means specially designed individualized or group instruction or special services or programs, as defined in subdivision 2 of §4401 of the Education Law...

For additional information, please contact VESID's Special Education Quality Assurance Office (see attached listing of regional offices) or the State Board for Speech-Language Pathology and Audiology, at (518) 474-3817 x 100, SPEECHBD@mail.nysed.gov.

Att: Special Education Quality Assurance Offices

VESID SPECIAL EDUCATION QUALITY ASSURANCE

WESTERN REGIONAL OFFICE

NYS Education Department
VESID Special Education Quality Assurance
2A Richmond Avenue
Batavia, NY 14020
(585) 344-2002, ext. 420
(585) 344-2442 (fax)

HUDSON VALLEY REGIONAL OFFICE

NYS Education Department
VESID Special Education Quality Assurance
1950 Edgewater Street
Yorktown Heights, NY 10598
(914) 245-0010
(914) 245-2952 (fax)

CENTRAL REGIONAL OFFICE

NYS Education Department
VESID Special Education Quality Assurance
State Office Building
333 East Washington Street, Suite 527
Syracuse, NY 13202
(315) 428-3287
(315) 428-3286 (fax)

LONG ISLAND REGIONAL OFFICE

NYS Education Department
VESID Special Education Quality Assurance
The Kellum Educational Center
887 Kellum Street
Lindenhurst, NY 11757
(631) 884-8530
(631) 884-8540 (fax)

EASTERN REGIONAL OFFICE

NYS Education Department
VESID Special Education Quality Assurance
Room 1623 One Commerce Plaza
Albany, NY 12234
(518) 486-6366
(518) 486-7693 (fax)

NEW YORK CITY OFFICE

NYS Education Department
VESID Special Education Quality Assurance
55 Hanson Place, Room 545
Brooklyn, NY 11217-1580
(718) 722-4544
(718) 722-2032 (fax)