


A Legal Memorandum

Quarterly law topics for school leaders.

Legal Issues Relating to School Paraprofessionals



Complaints, hearings, legal opinions, and lawsuits on issues surrounding the training and supervision of paraprofessionals are increasing. Concern over the lack of preparation of paraprofessionals and the sporadic nature of the training that is available to them (Morgan, Hofmeister, & Ashbaker, 1995; Pickett, 1996) have led to the development of training programs in many states, although these paraprofessional training programs are often localized rather than statewide. Some training has also been developed for supervising teachers (e.g., Morgan & Ashbaker, 2001), and a few programs have been developed for teacher and paraprofessional teams (e.g., Ashbaker & Morgan, 2000; Morgan, 2000).

However, the comprehensive system of personnel development needed to ensure proper supervision of paraprofessionals lacks specific guidance for administrators in leading and supporting teacher-paraprofessional instructional teams for maximum effectiveness (Hilton & Gerlach, 1997; Morgan, Ashbaker, & Roberts, 2000). The responsibility of school administrators to oversee the effectiveness of teacher-paraprofessional teams delivering instruction to students is crucial. Failure to carefully examine the profile of a school's paraprofessionals, including the role they serve in relation to teachers and the part they play on the instructional team, could put the school and the school district at risk of legal proceedings.

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History: Paraprofessionals in the Classroom

Use of paraprofessional staff members in U.S. schools began during World War II, when there were shortages of professional teachers. Schools employed paraprofessionals to relieve teachers of some of their less-technical responsibilities. The hiring trend continued, and the U.S. Department of Education estimated that 621,000 instructional aides were employed in the classroom during the 1999–2000 school year (U.S. Department of Education, 1999). Other estimates suggest that almost 1 million paraprofessionals are employed in U.S. schools and predict that this number will increase 38% by 2005 (Bairu, 2001; Moskowitz & Warwick, 1996; Pickett, 1997).

Prior to the 1990s, these employees were called *teacher's aides*, *assistants*, or *classroom helpers*, but as their roles have become more technical, the titles have also taken on greater specificity, such as *teaching assistant*, *tutor*, *learning assistant*, *technician*, and *paraprofessional*.

The No Child Left Behind Act (NCLB) defines

paraprofessional as “an individual who is employed in a preschool, elementary school, or secondary school under the supervision of a certified or licensed teacher, including individuals employed in language instruction educational programs, special education, or migrant education” (NCLB, 2002).

Changing Roles Paraprofessionals

The change in title is a true reflection of the dramatic shift in paraprofessionals' responsibilities. No longer are they merely providing support to teachers by making copies, designing bulletin board displays, and sharpening pencils. Today, paraprofessionals are an integral part of classroom instruction, actively providing direct services for student education programs and performing increasingly specialized and sophisticated tasks for students with even the most-specialized needs.

Unfortunately, sometimes paraprofessionals' skills come into question. When paraprofessionals have not been appropriately trained to know the limits of their roles and the necessity of working under the direction of a teacher—and when teachers are unaware of their responsibility to direct the instructional activities of the paraprofessional—concern escalates regarding their qualifications and the appropriateness of instruction.

A study by Vasa, Steckelberg, and Ulrich-Ronning (1982) found that students in special education were spending up to 80% of their time with a paraprofessional rather than a certified teacher.

This situation has been reflected in several complaints. Most notably, in 2000, a Missouri parent alleged that the district had failed to place her daughter, who had a disability, with students without disabilities to the maximum extent appropriate to her needs. Among other things, the parent complained that her daughter was placed in a trailer with an aide but without a teacher. The Office of Civil Rights (OCR) held for the parent, and the district agreed to review the placement decision, place the student in a regular education environment, and compensate the student for the loss of educational benefits while she was not in a regular classroom (Leeton (MO) R-X School District, 2000).

Title I paraprofessionals came under scrutiny when a 1999 U.S. Department of Education study reported that Title I paraprofessionals said that they typically spent 60% of their time instructing students or assisting teachers in providing

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instruction (Robelen, 1999; Chambers et al., 1999). Another study found that Title I schools hired fewer experienced teachers and more aides than non–Title I schools (“Study Finds,” 2000). Other research (Morgan, Ashbaker, & Allred, 1999; Morgan & Ashbaker, 2001) suggests that these findings are representative of paraprofessionals who work in regular and special education settings.

A federally sponsored study of 720 schools in 180 school districts examined the role of paraprofessionals in Title I classrooms and found that 95% of them spend 60% of their time “teaching without a teacher present” (U.S. Department of Education, 1999). This raised concern that Title I schools used large numbers of unqualified instructional assistants (77,000 paraprofessionals in 1998) instead of teachers and prompted the *Title I Monitor* (“Study Finds,” 2000) to point out that school districts spend about 15% of Title I funds on paraprofessionals, compared with the 45% they spend on teachers. The *Monitor* speculated that one of the reasons for the widespread use of paraprofessionals may be that school districts can hire three aides for the price of one teacher. Because of salary differences, paraprofessionals make up about one-half of all Title I instructional staff members. In 1998, the average paraprofessional salary was \$12,627, while the average Title I teacher earned \$36,427 (“Study Finds,” 2000).

Teachers

Paralleling the changing role of paraprofessionals is the expanding role of teachers; new federal requirements require paraprofessionals to work under the direct supervision of a “highly qualified” teacher. For adults with varied job descriptions, training, and often ages and levels of experience, “sharing” a classroom can significantly affect the teacher’s role. Paralleling the field of business management, David Berliner coined the phrase “teacher as executive” to reflect his observation that a teacher who works in a classroom shared with other adults requires considerable management skills (Berliner, 1983).

However, teachers who are expected to supervise the adults who work in their classrooms receive little or no training (at the preservice or inservice levels) for the additional role (Salzberg & Morgan, 1995). The supervising teacher must familiarize paraprofessionals with classroom procedures and duties and provide on-the-job training and professional development. Classroom teachers are challenged to find time to train and supervise a paraprofessional while continuing to perform their primary responsibility: instructing students effectively. Planning time is rare for

paraprofessionals, and collaborative planning time for teachers and paraprofessionals is even rarer (Ashbaker & Morgan, 1999).

Training and Supervision: Cause for Concern?

The limited education of substantial numbers of paraprofessional staff members who spend large quantities of time with students should cause great concern for school districts and their legal counsel. Their formal qualifications typically consist of only a high school diploma (although they may have substantial classroom experience), yet they deal with the most important aspects of the instructional process—presenting new content and guided practice of skills and knowledge. In a survey of paraprofessionals in the United States and Canada (Morgan, Ashbaker, & Allred, 1999), the paraprofessionals typically reported spending three-quarters of their time with a teacher present; the remaining percentage represents time without a teacher present. According to the Title I study, out of five days each week, paraprofessionals essentially spend the equivalent of three and a half to four days without supervision—with no teacher monitoring the paraprofessional’s teaching or behavior management practices (“Study Finds,” 2000). This absence of role modeling and supervision leaves the paraprofessional and the students vulnerable.

Supervision and training issues have been represented by two recent cases. In a 1996 complaint to the OCR against the Chatham County (GA) School District, parents alleged that a school district had failed to provide a free and appropriate public education (FAPE) to their child; a portion of the complaint focused on a paraprofessional’s improper use of restraints with the student. Because of the complaint, the district conducted an internal investigation and found that the paraprofessional had used improper restraints. The district reprimanded the paraprofessional, retrained her on the appropriate use of restraints in the classroom, and instructed her to refrain from any disciplinary interaction with the student for the remainder of the school year (Chatham County School District, 1996).

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In a more serious example, a 2002 case in Kansas City, MO, involved claims of an inappropriate sexual relationship between a speech/language paraprofessional and a fifth-grade student who was receiving special education services. The relationship reportedly developed after school and the objectionable activities were not on school property. In part, the parent alleged that the district was negligent in the retention and supervision of its employee. However, the court ruled in the district's favor. The judgment summary noted that none of the facts suggested that the district administrators knew or should have known that this paraprofessional presented a risk to the student. The paraprofessional was charged and pled no contest to rape and aggravated criminal sodomy charges and is presently serving a jail sentence (*Kurtz ex rel. Gann v. Unified Sch. Dist. No. 308*).

These instances show that administrators must make provisions for adequate supervision and document all training that paraprofessionals receive to understand the limits of their roles and ensure a clear understanding of their ethical and legal conduct.

New Federal Mandates

Federal legislation is likely to make sweeping reform in the role of the paraprofessional as NCLB and the Individuals with Disabilities Education Act (IDEA)—with its pending reauthorization—define paraprofessionals, legislate training, limit roles, and require supervision.

The changing classroom climate is clearly reflected in the 1997 reauthorization of IDEA and the passage of NCLB. The 1997 reauthorization of IDEA makes the following specific reference to paraprofessionals: “A state may allow paraprofessionals who are *appropriately trained and supervised* [italics added] under state standards to assist in the provision of special education and related services” (Individuals with Disabilities Education Act Amendments).

During the 1999 U.S. Department of Education Office of Special Education Programs (OSEP) training sessions on IDEA, the National Information Center for Children and Youth with Disabilities (1999) informed states that employing paraprofessionals and assistants was contingent on state law and regulation. OSEP gave states the option of determining whether paraprofessionals can assist in providing special education and related services under Part B of IDEA and, if so, to what extent. States were therefore given the flexibility to determine the scope

of a paraprofessional's responsibilities (U.S. Department of Education, 1999). However, the *21st Annual Report to Congress* revealed that fewer than half of the state departments of education, including those in the District of Columbia and the territories, have standards or guidelines for the employment, roles and duties, placement, supervision, or training of paraprofessionals (U.S. Department of Education, 1999).

In a due process hearing conducted in Minnesota in 2001, a student claimed that the district had ignored Minnesota statutes regarding paraprofessional training and that it had failed to develop a comprehensive system of personnel development as referred to in IDEA. The independent hearing officer (IHO) determined that there was one issue to be resolved: whether the district's paraprofessionals lacked proper training resulting in the student being deprived of FAPE.

The IHO rejected the parents' and student's contention that the district was required to establish personnel development procedures, noting that IDEA only imposed such an obligation on state education authorities. He found that the record contained ample evidence that the district had provided sufficient training to the paraprofessionals before they began working with the student and had followed up with additional training when it became available. Even though the individualized education program (IEP) team was not required to convene in order to change the paraprofessional assigned to the student, the district scheduled a meeting in response to the parents' request. The IHO found that the district's paraprofessionals were properly trained and supervised and had not deprived the student of FAPE (Independent School District No. 11, 2001).

The hearing was appealed and the Hearing Review Officer upheld the decision and stated the following opinion regarding paraprofessional training:

Minn. Stat. § 125A.08(b) requires the school district to ensure, for paraprofessionals employed to work in programs for students with disabilities, that:

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1) before or immediately upon employment, each paraprofessional develop sufficient knowledge and skills in emergency procedures, building orientation, roles and responsibilities, confidentiality, vulnerable ability, and reportability, among other things, to begin meeting the needs of the students with whom they work; and 2) annual training opportunities are available to enable the paraprofessional to further develop the knowledge and skills that are specific to the students with whom they work. The plain language of the statute requires training so paraprofessionals can begin meeting the student's needs and contemplates additional, later, training to further develop skills. Neither state nor federal law dictates the type or amount of training staff must have in the use...with a student. The IHO did not ignore the language of Minn. Stat. § 125A (b) regarding paraprofessional training and did not err in finding that, as of the date of the hearing request, the Andover paraprofessionals were trained. (Independent School District No. 11, 2001)

Title I involves similar paraprofessional issues. Until 2002, Title I regulations specified that all paraprofessionals serving as instructional aides must have at least a high school diploma unless they have a language proficiency that supports English language instruction.

Discrimination was alleged in 1997 in the DeKalb County (GA) School District when students received instruction in English as a Second Language (ESL) and English for Speakers of Other Languages (ESOL) from a noncertified teacher. The OCR examined the district's ESL and ESOL programs and concluded that they were being taught by certified classroom teachers. Although paraprofessionals had been assigned to some of the disputed classes, it was determined that they only assisted the teacher in the instructional process and that they were supervised by the teacher. Because the paraprofessionals did not have full responsibility for teaching the classes, it was ruled that no violation had occurred (DeKalb County School District, 1997).

Christopher Cross, chair of the U.S. Department of Education advisory board, told the Senate's 1999 Elementary and Secondary Education Act reauthorization (now NCLB) committee that standards for Title I paraprofessionals are lacking. He added that teachers' aide positions were originally intended as interim positions for people on their way to teacher licensure, but because of the lack of incentives that would make teacher training affordable to paraprofessionals, this is rarely the case ("Jeffords Frustrated," 1999).

When President Bush signed NCLB into law in January 2002, provisions for paraprofessionals were similar to the IDEA requirements, with additional training mandates. NCLB requires all Title I paraprofessionals with instructional duties who were hired after January 8, 2002, to have completed two years of higher education and obtained at least an associate's degree or have a passing score on a rigorous state or local assessment to demonstrate their knowledge of and ability to assist in instructing reading, writing, and mathematics.

Paraprofessionals hired before January 8, 2002, must meet these requirements by 2006. Exceptions are made for paraprofessionals who translate or work with parents. Nonetheless, regardless of hire date, all paraprofessionals must have a high school diploma or its equivalent, and no paraprofessional may provide instruction unless he or she is working under the direct supervision of a highly qualified teacher (NCLB, 2002).

Parents of a student in the Hingham Public Schools of Massachusetts in 2000 asked the hearing officer (HO) to require that the school hire an appropriate aide with "professional credentials," as required by the student's IEP. The student's doctor had informed the district that the student required an aide with a master's degree and experience. The district claimed that the aide they provided to the student was committed to her job and related well to the student. In the proceeding it was noted, however, that this aide did not have a degree or teaching experience. The HO held for the parents regarding compliance with the IEP but expressed the opinion that the student did not require an aide with professional credentials as long as the teacher had experience and closely supervised the student (Hingham Public Schools, 2000).

In another situation, a family in Michigan filed a due process complaint in 1992 that protested the reassignment of a paraprofessional who had been working with their child in special education. The parents alleged that the new aide was not as qualified as the former and, because of a strong bond between the student and former aide, the change would have an adverse effect.

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The impartial due process hearing officer ruled that the new aide was duly qualified but also found that a substantial emotional bond *had* developed between the student and the former aide and that the student's subsequent emotional distress hampered his educational progress. Therefore, the officer found for the district but required that it provide counseling services to help the student deal with the transition between aides (Ludington Area Schools, 1992).

In another example, the parents of a student with a disability and the Gerber (CA) Union Elementary School District entered into an interim agreement that provided for the student to receive the services of a full-time, one-to-one aide who was specifically named in the agreement. Later, the district contended that the named aide had provided less than adequate language arts instruction. The district thus reduced the time that the aide spent with the student and further assigned another (trained) adult to be with the student at all times. The parents contended that the district unilaterally changed the student's educational program and requested a "stay put" order to compel the district to reinstate the aide named in the agreement. The hearing determined that the district has the responsibility and authority to change staff in its effort to provide appropriate services (Gerber Union Elementary School District, 1997).

In this case, a procedural error occurred when the interim agreement stated that the student would receive the services of a specified aide. The contention arose when the district reassigned that aide. Specifying a service rather than a person would better describe the educational program goals and prevent person-specific provisions.

The paraprofessional qualification measures—along with the provision that Title I funds may be used for ongoing training and professional development to help paraprofessionals meet the statutory requirements—may help alleviate problems. But is it too little, too late? Questions, cases, and rulings related to paraprofessionals are showing up in due process hearings, ED Office of Civil Rights complaints, and other places in the court system.

Summary

This sampling of IDEA '97 due process complaints, OCR grievances, and legal cases from the late 1990s to the present provides insight into initial attempts to clarify the intent

of federal requirements and into the potential significance of the phrase "appropriately trained and supervised" as it applies to school paraprofessionals. Since the 1997 reauthorization of IDEA, there has been a dramatic increase in the attention given to paraprofessionals and the services they offer. It is anticipated that NCLB will significantly increase judicial interest and involvement in paraprofessional training and supervision. The teacher-paraprofessional team represent service delivery at its most fundamental level, and the effectiveness of this instructional team is therefore most crucial to student success.

Implications

As district administrators, school leaders, and teachers participate in preparing paraprofessionals for their roles and responsibilities as part of the instructional team, they help to keep paraprofessionals and students from being educationally and legally

vulnerable. We offer the following suggestions:

- Paraprofessionals must be informed of the scope of their responsibilities—including the limitations—and given a written job description.
- You may have to begin the training process yet again at the beginning of each school year, because the opportunities for training and supervision with feedback are limited when paraprofessionals are assigned to different teachers, often at short notice. An infrastructure to provide regular, ongoing, and documented training will reduce legal vulnerability.
- Separate training for teachers and paraprofessionals is not ideal. Training is most often delivered to paraprofessionals alone, without including supervising teachers or informing the teachers of its content and nature, although there is a trend toward limited training for teachers as supervisors.
- Although supervisory skills of the teacher may not have been developed in preservice teacher education programs, administrators and teachers can prepare to supervise paraprofessionals by allocating adequate time to developing plans for working with paraprofessionals, delegating or assigning tasks, assessing skills and performance, and providing on-the-job training.

An infrastructure to provide regular, ongoing, and documented training will reduce legal vulnerability.

- You must carefully document all activities related to paraprofessional training and supervision. Such documentation need not be extensive or time-consuming, but teachers and paraprofessionals should be encouraged to keep notes of training provided and received and of team collaborations.

These organizational precautions are likely to improve services to students, while reducing vulnerability to complaints, hearings, and lawsuits. Many teachers provide ongoing informal training to their paraprofessionals; many administrators provide time and opportunities for teachers and paraprofessionals to collaborate and increase their skills. For those who currently do not, the new mandates of NCLB should provide considerable motivation to establish such good practices in their schools. Whichever may be the case, administrators must be able to show—through documentation—that they have facilitated ongoing training for paraprofessionals and have provided adequate supervision so schools can provide free and appropriate educational opportunities for all

students, rather than expending valuable resources on legal proceedings. **LM**

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