

35 IDELR 35

101 LRP 202

Letter to Anonymous Office of Special Education Programs

N/A

November 9, 2000

Related Index Numbers

470.010 Authority to Set Standards

470.045 Joint SEA/LEA Responsibilities

290.020 State/Local Relations

Judge / Administrative Officer

Kenneth R. Warlick, Director

Ruling

Ruling: Responding to a letter regarding North Carolina's student accountability standards requirements, OSEP commented that nothing in the IDEA prevents a state and/or local agency from determining appropriate guidelines for promotion and retention of students with disabilities.

Meaning

What it means: Although the IDEA is silent on promotion and retention prerequisites, if a student does not receive the IEP services specifically designed to assist him or her in meeting the promotion standards, the child's parents could challenge the lack of services as a denial of FAPE. An impartial hearing officer's remedial order could encompass compensatory services and require a subsequent reconsideration of the retention decision.

Case Summary

Part B of the IDEA does not address standards for retention or promotion of students with disabilities. Rather, the establishment of such standards for all students, including those with disabilities, is a state and/or local function. OSEP stated that it does not view those retention and promotion decisions that are decided separately from placement issues to be the sole basis for a due process hearing. However, DP is appropriate when there are FAPE questions that have a direct impact on

retention/promotion. OSEP emphasized that a placement decision is not synonymous with a decision regarding promotion or retention. As long as there is compliance with the IDEA, a state has flexibility to shape its retention/promotion policies and procedures in the manner it believes best fits the needs of students with disabilities.

Full Text

Dear

Thank you for your letter regarding the student accountability standards requirements in the State of North Carolina and your concern that such requirements may adversely impact the quality of education made available for children with disabilities under Part B of the Individuals with Disabilities Education Act (IDEA). This letter responds to your initial inquiry and your most recent undated correspondence received December 20, 1999. The questions you raise are restated below along with our responses.

1. May an IEP [Individualized Education Program] team determine whether a child should be promoted or retained based on his or her individual needs?

Response: Part B of the IDEA specifically does not address standards for retention or promotion of students with disabilities. Rather, the establishment of standards for promotion and retention for all students, including students with disabilities, is a State and/or local function. Generally, the IDEA would not require that the IEP team make decisions regarding promotion or retention of a child with a disability. However, the IDEA does not prevent a State or local educational agency from assigning this decisionmaking responsibility to the IEP team. It also is important to note that a retention or promotion decision is not synonymous with a placement decision for IDEA purposes.

2. If an IEP team does make such a determination, may a principal unilaterally overrule its decision based on State law?

Response: As stated in the response to question 1, above, because the IDEA does not address promotion and retention standards, there is nothing to require or prevent a State from allowing the principal to unilaterally apply those standards to a child with a disability. However, it is important to note that placement decisions, which are generally separate from promotion or retention decisions, are to be made by a group of persons knowledgeable about the meaning of the evaluation data, and the placement options. 34 CFR 300.552(a)(1). The group also must include the parents unless the agency documents its inability to obtain parental participation. 34 CFR 300.501(c). In addition, when determining the educational placement of a child with a disability, the public agency must ensure that the child is not removed from education in age-appropriate regular classrooms solely because of needed modifications to the general curriculum. 34 CFR 300.552(e).

3. If an IEP team overrules a parent's objections to retention (or promotion), does the parent have the right to request a due process hearing, and would the hearing officer's decision be determinative unless appealed as provided for under IDEA 97? (Would the H.O. [hearing officer] have jurisdiction over a promotion decision for a disabled child?)

Response: Under Part B of IDEA, the parent may request a due process hearing on matters relating to the identification, evaluation or educational placement of their child with a disability, or the provision of a free appropriate public education (FAPE) to their child. In general, the hearing officer has jurisdiction to determine whether, based on the specific facts and circumstances presented, the matters raised relate to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. The hearing officer's decision is final unless it is appealed to a federal or State court of competent jurisdiction in accordance with State law. Generally, hearing officers have broad discretion in fashioning appropriate remedies for violations of Part B of the IDEA.

In general, this office does not view retention

and promotion decisions that are separate from placement decisions as being the sole basis for a due process hearing request. However, there may be FAPE issues that have a direct impact upon retention and promotion decisions, and these issues can be the basis for a hearing request. For example, if a student does not receive the services that are specified on his or her IEP that were designed to assist the student in meeting the promotion standards, the child's parents could challenge the lack of services as a denial of FAPE and a hearing officer's remedial order could encompass the provision of compensatory services and require a subsequent reconsideration of the retention decision.

You may want to contact the Exceptional Children Division of the North Carolina Department of Public Instruction (NCDPI) for more information regarding the filing of a request for a due process hearing or of a State complaint. The address is:

E. Lowell Harris, Director
Exceptional Children Division
Department of Public Instruction
301 N. Wilmington Street,
Education Building, #570
Raleigh, NC 27601-2825
Telephone: (919) 715-1565

4. Is there an inherent conflict between the state's requirements that the child's advocates be required to demonstrate that the child has made "adequate progress to meet requirements at upper grade levels" and the bulk of IDEA caselaw that suggests that it would be the school's burden of responsibility to show that the child could not receive FAPE in the LRE? (Does "LRE" imply being grouped with age appropriate peers in order to facilitate social development is a legitimate factor to be considered in the placement of a disabled child?)

Response: As set out in response to questions 1 and 2, above, a placement decision is not synonymous with a decision regarding promotion or retention. As long as there is compliance with the requirements of

the IDEA, the State has the flexibility to shape its policies and procedures in a manner it believes best serve the needs of the children in the State.

5. Is the requirement mandating a "functional curriculum" for every disabled child exempted from the promotion standard conflict with the IDEA'97 requirement that individual decisions must be based on the individual's needs developed in the assessment process?

Response: The IDEA requires that each child's IEP include a statement of the special education, related services and supplementary aids and services to be provided to the child or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals, to be involved and progress in the general curriculum, to participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and nondisabled children. 34 CFR 300.347.

The term "functional curriculum" is not defined in the North Carolina Accountability Standards document you reference in your letters and is not part of the definitions common to the IDEA. As set out in the North Carolina Accountability Standards document, the IEP team is responsible for determining whether a student with a disability can "participate in the State Standard Course of Study." Therefore, the document appears to be consistent with the IDEA requirement that the IEP team make the determination regarding the extent of participation in the general curriculum.

6. Would it not be a violation of the IDEA '97 to discriminate against children with disabilities who are exempted from the promotion standards as a consequence of their disability by simultaneously excluding them from support services ("interventions/remediation and other opportunities, benefits, and resources") available to all students who are NOT disabled?

Response: As set out in response to question 5,

above, the IEP must include a statement of the special education, related services and supplementary aids and services to be provided to the child or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided. This requires an individualized determination and not one that is dependent upon what nondisabled students may or may not receive.

However, allegations of discrimination, or denials of benefits or services on the basis of disability, generally fall within the jurisdiction of the Department's Office for Civil Rights (OCR). OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) which applies to programs and activities that receive Federal financial assistance and Title II of the Americans with Disabilities Act of 1990 (Title II) as it relates to state and local government services, regardless of whether they receive Federal funds. Both Section 504 and Title II prohibit discrimination against persons with disabilities solely on the basis of their disability, and require the provision of appropriate educational services to elementary and secondary school students with disabilities. If you have specific information related to an allegation of discrimination, or a denial of specific services or benefits on the basis of disability, then you should contact the regional Office for Civil Rights at the following address:

Alice Wender, Director
Office for Civil Rights
District of Columbia Office
U.S. Department of Education
1100 Pennsylvania Avenue, NW, Rm. 316
P.O. Box 14620
Washington, D.C. 20044-4620
Telephone: (202) 208-2525;

Enclosed also for your review is some information that also may be helpful to you; materials issued by the National Information Center for Children and Youth with Disabilities (NICHCY) concerning special education resources specific to

North Carolina and the name and address of the Parent Training Information Center in your State. NICHCY is a national information clearinghouse that provides free information to assist parents, educators, and others in helping children with disabilities become participating members of the school and community. The Parent Training and Information Centers were established to make parent-to-parent training and information services available to parents of children with disabilities across the country. The purpose of these services is to enable families to participate more fully in the educational needs of their children. Another invaluable source of information is the U.S. Department of Education Individuals with Disabilities Education Act (IDEA)'97 Homepage at <http://www.ed.gov/offices/OSERS/IDEA/index.html>. We hope you find this information to be of assistance.

If there are further questions or concerns, please contact Linda Whitsett of my staff at (202) 205-8013. Thank you for writing.

39 IDELR 180

103 LRP 31951

Wachusett Public School District
Massachusetts State Educational Agency
03-5677

July 18, 2003

Related Index Numbers

160.030 Matters Subject to Hearing

Judge / Administrative Officer

Joan D. Beron, Hearing Officer

Ruling

Although promotion and retention issues are generally not subject to DP, a mother was entitled to a hearing when she claimed promotion of her son from kindergarten to first grade would be detrimental to him due to his disability, an impartial hearing officer ruled.

Meaning

A parent may be entitled to DP, when she would not otherwise, if she raises issues of FAPE connected to regular education decisions, including promotion from grade to grade.

Case Summary

The parent of a kindergartner with developmental delays and a speech impairment requested DP after the district insisted on advancing her son to first grade. The IHO determined she was entitled to present her case, as she raised issues of FAPE. The district argued her claim should be dismissed because grade retention and promotion were a regular education decisions not subject to DP. The IHO did not dispute that position, and even noted that OSEP concluded the IDEA did not address the issue. In this case, however, the mother's argument, that "it would be a disservice to [the student] to place him in first grade, where his disabilities will prevent him from progressing effectively," raised an issue of FAPE. Therefore, the IHO denied the district's motion to dismiss.

Full Text

Ruling

This ruling is issued pursuant to Wachusett's July 7, 2003 Motion to Dismiss parent's hearing request. Parent filed an opposition on July 15, 2003. After consideration of both the motion and opposition, Wachusett's motion for dismissal is denied.

Both BSEA Rules and the Standard Adjudicatory Rules of Practice and Procedure governing BSEA proceedings provide that a Hearing Officer may allow a motion to dismiss if the moving party fails to state a claim upon which relief may be granted; *see* BSEA Rule 16B3, 801 CMR 1.01(7)(g)(3). Similarly, the federal courts have concluded that a motion to dismiss under Federal Rule of Civil Procedure 12 (b)(6) may be allowed if the court finds "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v Gibson*, 355 US 41, 45-46 (1957); *Roeder v Alpha Indus.*, 814 F. 2d 22, 25 (1st Cir. 1987).

Here Wachusett has asserted that the decision whether to promote or retain a student is a regular education decision and as such the Hearing Officer has no jurisdiction to address this issue; *see* School Brief at 1-2.

A parent or school district may request a due process hearing on matters relating to the identification, evaluation or educational placement of a child with a disability or provision of a free appropriate public education for a child. Issues solely concerning a decision to promote or retain a student is a regular education decision which would not be subject to a due process proceeding before the BSEA; *see* Greater Fall River Regional Vocational School District, 7 MSER 275 (2001). The United States Office of Special Education Programs (hereafter, OSEP) has also concluded in one of its letters that the federal special education statute does not address standards for retention or promotion, essentially leaving it to individual states to determine how this issue should be addressed; Letter to Anonymous, 35 IDELR 35 (OSEP 2000).

However, OSEP has also stated:

"In general, this office does not view retention and promotion decisions that are separate from placement decisions as being the sole basis for a due process hearing request. However, there may be FAPE issues that have a direct impact upon retention and promotion decisions, and these issues can be the basis for a hearing request ...", Letter to Anonymous, *see also Laura v Boston Public Schools*, 39 IDELR 20 (2003).

Mother has indicated in her opposition that "[Miles] needs retention in kindergarten specifically because of his disabilities-developmental delay and speech impairment." ... "It would be a disservice to [Miles] to place him in first grade, where his disabilities will prevent him from progressing effectively."

Mother has thus stated a FAPE issue that may have a direct impact upon the retention and promotion decisions. She is entitled to present this claim at hearing.

Wachusett's Motion to Dismiss is DENIED. The BSEA will contact the Parties to set up further proceedings in this matter.

¹Miles is a pseudonym used for confidentiality and classification purposes.

Cases Cited

814 F.2d 22

39 IDELR 20

40 IDELR 182

104 LRP 1248

Letter to Davis-Wellington

Office of Special Education Programs

N/A

August 19, 2003

Related Index Numbers

185.065 State Law Considerations

220.005 Criteria

Judge / Administrative Officer

Patricia J. Guard for Stephanie S. Lee, Director

Ruling

States or LEAs set the standards for whether a child with a disability is promoted or retained, but the LEA may assign the decision-making responsibility to an IEP team. OSEP also explained that if passing a state test is a requirement for obtaining a standard high school diploma, students with disabilities must be provided accommodations. If they are not and the student was denied FAPE, the student can retake the assessment with accommodations. In contrast, the student may receive compensatory education if a district denied FAPE in the general curriculum by providing inadequate supplementary aids and services.

Meaning

The IDEA does not require an IEP team to make the decision to promote or retain a child with a disability. Nor does the decision to promote or retain a child constitute a placement decision under the IDEA.

Case Summary

OSEP explained that setting standards for promoting a student with disabilities is a state or local function. While the IDEA does not require an IEP team to make that decision, a state or LEA could assign to the IEP team the decision-making responsibility of whether a student with a disability should be promoted or retained. And it clarified that retention or promotion is not an IDEA placement decision. OSEP also noted that a state may implement

a requirement that students pass a state examination to receive a standard high school diploma. But if a student with a disability is denied FAPE because accommodations were not provided, the "student must be given the opportunity to retake the assessment with appropriate accommodations, in order to determine whether he or she can pass and receive a regular high school diploma." If a student is denied FAPE because of the insufficient "provision of supplementary aids and services and appropriate supports to allow involvement and progress in the general curriculum, the student may be entitled to compensatory services that allow for involvement and progress in the general curriculum." Assessment guidelines should offer the widest possible range of accommodations so students with disabilities for whom the assessment is appropriate can participate. And OSEP explained whether an evaluation is untimely and has denied FAPE must be made on a case-by-case basis.

Full Text

Ms. Beth Davis-Wellington Children's Advocacy Network

P.O. Box 831325

Miami, Florida 44283-1325

Dear Ms. Davis-Wellington:

Thank you for your letter on behalf of the Children's Advocacy Network of Florida regarding concerns over the education of children in Florida. Specifically you raised several questions that related to the Florida Statutes, F.S. 1008,2002 as follows:

1. Can the State take the decision of whether to promote a child with a disability out of the hands of the IEP [individualized education program] team?

Part B of the Individuals with Disabilities Education Act (IDEA) does not specifically address standards for retention or promotion of students with disabilities. Rather, the establishment of standards for promotion and retention for all students, including students with disabilities, is a State and/or local function. Generally, the IDEA would not require that the IEP team make decisions regarding promotion or

retention of a child with a disability. However, the IDEA does not prevent a State or local educational agency from assigning this decision-making responsibility to the IEP team. It is also important to note that a retention or promotion decision is not synonymous with a placement decision for IDEA purposes.

2. For students with or without disabilities, does the use of one measure, the FCAT, in determining whether a student will graduate with a regular diploma violate these students' right to a free appropriate public education (FAPE) under IDEA? Does the use of the FCAT to determine graduation violate any other provision of IDEA?

Florida's requirement mandating that students pass the FCAT in order to graduate with the standard high school diploma is not inconsistent with the IDEA. Neither Part B of the IDEA nor its implementing regulations specifically address the establishment of proficiency standards for a regular high school diploma. However, the IDEA does address factors that are directly related to a student's ability to pass the State-wide assessment. These primarily include: 1) individual accommodations needed for the child to participate in State-wide assessments of student achievement, consistent with appropriate State guidelines; and 2) supplementary aids and services and appropriate supports to allow the student's involvement and progress in the general curriculum. If there has been a denial of FAPE with regard to the provision of accommodations in assessments, then the student must be given the opportunity to retake the assessment with appropriate accommodations, in order to determine whether he or she can pass and receive a regular high school diploma. If there has been a denial of FAPE with regard to the provision of supplementary aids and services and appropriate supports to allow involvement and progress in the general curriculum, then the student may be entitled to appropriate compensatory services that allow for involvement and progress in the general curriculum. Because States are responsible for ensuring that appropriate

accommodations are provided in the administration of State-wide assessments, it is crucial to ensure that guidelines for these assessments offer the widest possible range of accommodations, so that students with disabilities for whom the regular assessment is appropriate, are able to participate. In fact, the regulations for Title I require that the State's assessment system be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities. 34 CFR 200.2(b)(2). It is also important to provide the training and technical assistance necessary for public agency staff to properly implement such guidelines.

3. Does the lack of a timeline for evaluations and the serious wait for evaluations in the most populated parts of Florida deny students with disabilities their right to a free appropriate public education under IDEA since those students are unable to be considered eligible for services until an evaluation is completed and appropriate meetings are held?

Although Part B of IDEA does not set forth specific standards for the timing of initial evaluations, States must ensure that the right of each student with a disability to receive a free appropriate public education is not denied or delayed due to school district's failure to conduct an initial evaluation within a reasonable period of time. The determination of whether a school district has failed to conduct a timely evaluation of a child with a disability in accordance with Part B and applicable State standards and, as a result, has denied the child FAPE must be made on a case-by-case basis.

Two Federal laws that are also relevant to your inquiry are Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans With Disabilities Act of 1990 (Title II). Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department, and Title II prohibits discrimination on the basis of disability by public entities, including public elementary and secondary school systems, regardless of receipt of Federal funds. The Department's Office for Civil Rights (OCR) enforces

Section 504 and Title II, as it applies to public elementary and secondary school systems.

It is our understanding that the Department's OCR Atlanta Office is currently investigating several allegations involving the FCAT and students with disabilities pursuant to Section 504 and Title II. If you have any questions with respect to Section 504 and Title II or the OCR FCAT cases, please contact the OCR Atlanta office at the following address and telephone number:

Mr. Gary S. Walker, Director
Office For Civil Rights, Atlanta Office
U.S. Department of Education
61 Forsyth Street, S.W., Suite 19T70
Atlanta, Georgia 30303-3104
Phone: (404) 562-6350
Fax: (404) 562-6455
TDD: (404) 331-7236

We hope that this information will be helpful. If you have further questions regarding Part B requirements, please do not hesitate to contact Ms. Sheila Fnedman, the Florida State Contact, at (202) 205-9055.