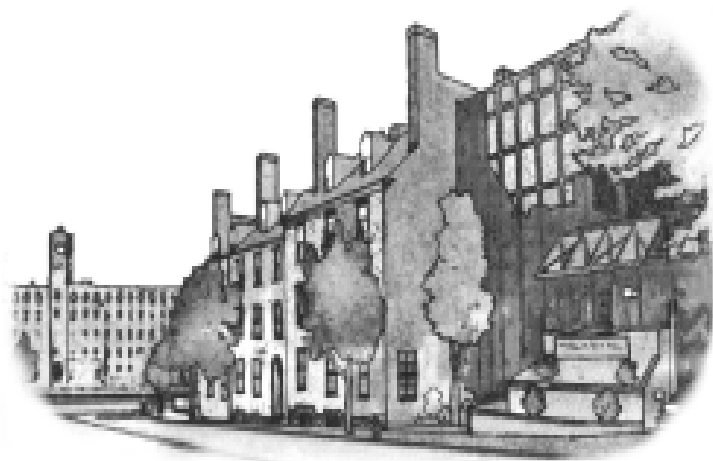


Educating and Grading Students with Educational Disabilities

December 4, 2003



***Wadleigh, Starr & Peters, P.L.L.C.
Serving New Hampshire since 1899***

**By: Dean B. Eggert, Esquire
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101**

**Telephone: 603/669-4140
Facsimile: 603/669-6018
E-Mail: deggert@wadleighlaw.com
Website: www.wadleighlaw.com**

About the Author

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the past 17 years he has gained extensive experience representing school districts in its special education matters at the administrative and appellate levels. He has also provided in-service seminars to school districts on issues of risk management in the field of special education law.

A Word of Caution

This material is designed to provide educators with a general understanding of the law as it pertains to the grading of students. You are strongly encouraged to seek a legal opinion from the School District's legal counsel regarding any specific case.

Grading Students with Educational Disabilities

I. Overview

The purpose of this material is to provide the general educator with a working knowledge of his or her obligations under the IDEA and Section 504 to provide students with disabilities an equal opportunity to learn and receive a passing grade.

II. The Philosophy Behind the IDEA

The key to understanding the IDEA lies in understanding the philosophy behind the IDEA. When Congress adopted the IDEA, it did such with the intent of ameliorating the systemic inequities that existed with regard to the education of individuals with disabilities.

A “Free Appropriate Education at Public Expense”

The fundamental concept behind the IDEA is that every student is entitled to a **free appropriate education at public expense [FAPE]**. The Act does not require a school to maximize the potential of each disabled child commensurate with the opportunity provided non-disabled children. Rather, Congress sought primarily to identify and evaluate disabled children, and to provide them with access to a free public education. A School District satisfies the requirement to provide a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Teachers are a key component to ensuring that the instruction is truly personalized. Without teachers actually implementing the student’s individualized education program [IEP], there is a greatly reduced likelihood of truly affording a FAPE. The “appropriateness” standard is a floor rather than a ceiling.

What is a “FAPE?”

According to the definitions contained in the Act, a “free appropriate public education” consists of educational instruction specially designed to meet the unique needs of the disabled child, supported by such unique needs for the disabled child, supported by such services as are necessary to permit the child “to benefit” from the instruction. These supporting services are usually referred to as “related services.”

The Test for Determining Whether You are Providing a “FAPE”

As a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State’s educational standards, approximate the grade levels used in the State’s regular education, and comport with the child’s **Individualized Educational**

Program [IEP].

Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a “free appropriate public education” as defined by the Act.

A court’s inquiry in suits brought under the IDEA is twofold. First, has the State complied with the procedures set forth in the Act? Second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? The Court’s inquiry is really no different than the inquiry that every teacher should make when providing instruction to a student who has been identified as having an educational disability: **Is what I’m doing reasonably calculated to enable this student to make educational progress?**

Key Concepts:

- Know those students in your class that have been identified as educationally disabled;
- Know the content of the student’s IEP and how the IEP goals and objectives will be integrated into the structure of your classroom and your lesson plan;
- Know the modifications that are required by the IEP and determine how they will be achieved;
- Know how the IEP measures progress and gear your progress reports to touch on those areas which are being measured.
- Watch for, and know how to integrate, a behavioral intervention plan in the context of your classroom.
- Understand how a particular methodology, such as a reading instruction methodology, can be integrated into your classroom curriculum.

III. Reauthorization of the IDEA

With the 1997 reauthorization of the IDEA, Congress set in law the educational concept of inclusion, by requiring that educationally disabled students be included, to the extent possible, in the regular education classroom. The regular education teacher is vital to ensuring that this inclusion requirement is met.

IV. The Educator's Referral Obligations

The IDEA imposes upon all Districts the obligation to promptly find children who may have educational disabilities, and to promptly determine whether or not they have an educational disability through the multi-disciplinary team process. This obligation includes a duty on the part of educators to refer students for evaluation by a multi-disciplinary team. A failure to timely refer and identify a student can translate into a far more difficult task to ensure that the student receives a FAPE.

V. Reporting Obligations

A district can only document educational progress through the reports of its teachers and the evaluative process. Be careful in selecting descriptors that accurately report a student's progress, or lack thereof. Exercise care to ensure that your progress reports are grounded in fact. Refrain from issuing opinions in areas that are outside of your areas of expertise, such as rendering ad hoc psychiatric or medical diagnoses.

Often an IEP will call for a particular method of progress reporting. This can range in frequency from daily to quarterly. It is critical to the success of the IEP that you carefully adhere to the reporting regimen called for in the IEP.

VI. The Educator's Role on the Multi-disciplinary Team

A. "Joining the Team"

The IDEA requires that the IEP team for each child with a disability include, among others, at least one regular education teacher of the child. This teacher(s) is to participate in the development, review, and revision of the child's IEP, including determination of appropriate "positive behavioral interventions and strategies," and of supplemental aids and services, program modifications, and support for school personnel.

(Authority: 20 U.S.C. 1414(d)(1)(B); 20 U.S.C. §1414(d)(3)(c)).

B. Case Studies

In the case of Board of Ed. of the City School District of NY, 24 IDELR 199, February 2, 1996, an IEP team for a mentally retarded student recommended, after an evaluation, that the student's classification be changed to autistic and that he be placed in a special education classroom with speech and language therapy, occupational therapy, and an aide. The student's teacher was delayed in attending the IEP team meeting where this decision was reached, and the parent left the meeting before the teacher arrived. The parent later enrolled the student in a private school and sought an order that the district's recommended placement was inappropriate. The hearing officer declared the district's placement recommendation a nullity, because the IEP team was

not validly composed due to the teacher's absence from the meeting. See also, Board of Education of Valley Stream 13 Union Free School District, 25 IDELR 1027, April 9, 1997 (school's failure to include student's teacher in IEP team meeting was fatal flaw to IEP developed, regardless of whether or not team's recommended placement may have been otherwise appropriate).

Key Concepts:

- Your attendance at a meeting is vital. Without your presence the legal structure of the team has been compromised.
- You have the right and obligation to understand how an IEP impacts your teaching.
- Frequently the regular educator has the most practical suggestions for how to modify the curriculum or the classroom setting. You should be aware of the fact that your input is considered as significant as the input from any other team member.

VII. The Educator's Responsibility for IEP Implementation

As mentioned in the Overview, the IDEA requires that each District provide a free appropriate public education to all children with disabilities residing in the District. This duty includes developing and **implementing** an individualized education program for each such child.

(Authority: 20 U.S.C. §1412(a)(1)(A); 20 U.S.C. §1412(4)).

A. Failure to Fully Implement

It is the failure on the part of a District to implement its own plan that frequently causes the most problems. Two case studies in point

1. Arlington (TX) Indep. School District, February 9, 1999, 31 IDELR 87

Facts: A student with ADD was the subject of a Section 504 Plan. Parents complained that classroom teacher failed to implement the student's Section 504 Plan because teacher did not provide all of the modifications described in the Plan.

Ruling: Computer course teacher failed to comply with requirements of Section 504 because she did not provide all of the modifications in the 504 accommodation plan, despite her testimony that she "accepted late assignments, given student special instructions, and extended deadlines beyond what was allowed for other modified students."

Key Concept:

- You cannot selectively implement an IEP.

2. Maryland-Montgomery County Public School, August 12, 1999, 31 IDELR 70

Facts: A student with a mild learning disability had attended district schools for 7th, 8th and part of 9th grade year. In the 9th grade year, parents removed student to 8th grade curriculum in private school, claiming that school failed to implement IEP and failed to provide an adequate IEP. School had used methods such as counselor involvement, parent conferences, consultations with specialists and colleagues, adjusted workload, preferential seating, student conference, modifying methods and materials.

Ruling: School failed to meet goals of student's 7th and 8th grade IEPs, which called for specified hours of weekly SPED services and thereby deprived student of appropriate education for two years. School's 7th, 8th, and 9th grade IEP's were inadequate, because they were based on student's emotional problems, and not on consideration of how she learned. Parents entitled to private school tuition reimbursement, plus transportation and related costs, and two academic years of compensatory education.

Note: Hearing Officer stressed that it was clearly unrealistic to set same exact goals for 9th grade IEP which were never met in 7th and 8th grade IEPs. Officer discredited testimony of student's classroom teachers that they believed the student was learning, given her poor grades and test scores.

Key Concepts:

- Repetitive IEP goals are a "red flag" in many cases.
- Progress is still measured the "old fashioned way," by whether the student makes the grades and test scores, and not simply by the perception of a teacher that a student has progressed.

B. The Dangers of Unilateral Changes to an IEP: A case in point

The IEP is a document that may only be modified in a Team setting. Educators do not have the latitude to unilaterally alter an IEP.

Penn-Tyrone Area School District, March 22, 1999, 31 IDELR 20

Facts: An eight-year-old student with mental retardation and speech and language impairment had attended District's alternative school since kindergarten. The state Special Education Bureau found that the school was not age appropriate. The District then prepared a new IEP, without convening the team and without parental participation, which transferred student to another alternate regular school. District claimed it did not include parents because it knew they opposed transfer and that "no meaningful benefit" would be obtained from holding an IEP team meeting.

Ruling: Court declared the IEP a "nullity". District had to convene IEP team and start anew.

Key Concept:

- Never unilaterally deviate from an IEP without first convening a team meeting to modify the IEP.

C. Flexibility in Methodology: A case study of a "right way"

A District does have flexibility in the methodology it uses to reach an IEP's goals and objectives. However, it is important that the methodology be consistent throughout the educational program.

Tex. El Paso Indep. School District, December 29, 1998, 31 IDELR 25

Facts: Eighteen-year-old student had ADD, learning disability and speech impairment. Parents made unilateral private school placement because of dissatisfaction with student's IEP.

Ruling: For the school district, because:

- (1) IEP was crafted with parental involvement, provided goals, and objectives, and used proper assessment methods;
- (2) District's academic assessments met Rowley standard and yielded reliable information;
- (3) Officer rejected parents' contentions that the IEP's goals and objectives were required to contain all or most of the grade-level objectives for every essential element, the IDEA does not require the IEP to be a detailed instructional plan, but rather must provide only general direction;
- (4) District not required to adopt parent's preferred methodology for teaching;
- (5) Evidence established student had some benefit from District placement; and

(6) In addition to using adequate assessment instruments, the District considered input from student's mother and teachers concerning her academic progress and therefore did not use any sole criterion to measure student's program.

Note: This decision is consistent with a long line of cases giving district's discretion to use particular methodologies or personnel, as long as choices are "reasonably calculated to provide educational benefit."

VIII. The Impact of IDEA Requirements on Grading

The IDEA does not specifically address the issue of grading students with educational disabilities. However, the incorporation of the inclusionary model in the 1997 reauthorization of the IDEA, has a profound impact on the question of how to provide an appropriate education for special education students, while at the same time maintaining high academic standards for all students.

The 1997 reauthorization now requires a justification from the IEP Team as to why a student is not participating in the general education class and curriculum. To the extent possible, educators are required to afford special education students opportunity to participate in the general curriculum. This mandate must be implemented under pressure from the standards-based school reform movement (e.g. "No Child Left Behind Act") that seeks to improve academic excellence for all students.

Along with the inclusionary model comes the requirement, as of July 1, 1998, that students with disabilities are to be included in statewide assessments. In summary, the IDEA reauthorization creates a general presumption that students with disabilities will not only "participate" in the general curriculum to the maximum extent possible, but will also be held to standards of accountability. This presumption is bolstered by the Congressional criticism that the "implementation of IDEA in the past has been impeded by low expectations . . ." 20 U.S.C. §1401(b)(44).

Grading also has implications on whether or not a student advances to the next grade level. The Federal Regulations address the need for students to meet standards in order to move to the next grade level. 34 CFR Part 300, Appendix A to Part 300, Federal Register, Vol. 64, No. 48, page 12472, states that:

*"Public Agencies often require all children, including children with disabilities, to demonstrate mastery in a given area of the general curriculum before allowing them to progress to the next level or grade in that area. Thus, in order to ensure that each student with a disability can effectively demonstrate competencies in an applicable area of general curriculum, it is important for the IEP Team to consider the **accommodations** and **modifications** that the child needs to assist him or her in demonstrating progress in the area."*

IX. The Impact of Section 504 on Grading Requirements

While the IDEA provisions indirectly impact grading, Section 504's nondiscrimination provisions directly impact the grading of students. Section 504 protects all students, including educationally disabled students. It prohibits discrimination against a student with a disability on the basis of that disability, providing that:

“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.” 29 U.S.C. §794(a).

The goal of Section 504 is to provide equality in opportunity. The hallmark of Section 504 is **accommodation**. The Section 504 Plan seeks to offer reasonable accommodations in order to provide equality in opportunity. Section 504 does **NOT** require that an educational institution lower its educational standards. However, Section 504 does require that with respect to grades, class ranking, honor rolls, graduation and diplomas, students with disabilities must be treated the same as all other students. See 34 CFR Part 104, §104.4. Section 504 also requires that the District provide a free appropriate education at public expense [FAPE] to an otherwise qualified individual with a disability. Id. at Sections 104.31-104.36.

A failure to offer accommodations can result in allegations of discrimination. For example, in the case of Prince George's County (MD) Pub. Schs., 34 IDELR ¶ 95 (OCR Opinion 2000), a father filed a complaint alleging that the district discriminated against his daughter on the basis of disability by failing to provide her with accommodations necessary for her to take the Maryland Writing Test, a requirement to receive a diploma. After investigation by OCR, the district agreed to allow the student to have unlimited time in which to take the writing test and to take the test using her Dynavox. The Office for Civil Rights clearly interprets Section 504 as requiring test accommodations for disabled students.

X. “No Child Left Behind” and Its Impact on Grading

The implementation of the No Child Left Behind Act will have an impact on those individuals providing services under the Individuals with Disabilities Education Act. The accountability standard set forth in the Act indicate that “Adequate Yearly Progress” [“AYP”] must include the achievement of students with disabilities.” The No Child Left Behind Act of 2001 [“NCLBA”] maintains the same general accountability structure as the 1994 Elementary and Secondary Education Act [“ESEA”] reauthorization. However, the No Child Left Behind Act includes the following significant changes in the area of accountability:

- Annual assessments cover all students in grades 3 through 8 including

students with disabilities;

- Students with disabilities must be assessed in reading and math in grades 3 through 8 and science by the 2007-08 school year;
- AYP requirements are strengthened by specifying a minimally acceptable rate of progress to ensure that all groups of students - disaggregated by poverty, race and ethnicity, disability and limited English proficiency - reach proficiency within twelve years; and
- The Act requires that 95% of students with disabilities in a school participate in state assessments with “appropriate accommodations” or alternative assessments provided in the same manner as are provided under the IDEA.

The NCLBA creates a natural tension between the grading of educationally disabled students in a manner that reflects their IEP progress and the assessment of student achievement based on an external standard. It is apparent that certain students with educational disabilities will make adequate progress under their IEP, but may fall short of the NCLBA’s “Adequate Yearly Progress” standard.

XI. Understanding Accommodation and Modification

These two concepts, **accommodation** and **modification**, have direct implications for how we grade and evaluate special education students. Therefore, it is important for the educator to understand the difference between an accommodation and a modification.

A. Accommodation defined

An **accommodation** is a change in the course, standard, test preparation, location, timing, scheduling, expectations, student response, and/or other attribute which provides access for a student with a disability to participate in a course, standard or test which **does not fundamentally alter or lower** the standard or expectation of the course, standard or test.” See Guidelines for the Promotion and Retention of Special Education Students, California Dept. of Education, <http://www.cde.ca.gov/spbranch>, (8/23/2000).

Simply put, **accommodations** are “outside the body,” that is, physical or environmental changes around the student. Teachers usually refer to accommodations as good teaching strategies.

Some examples of accommodations are as follows:

Pacing: extending/adjusting time; allowing frequent breaks; varying activity often; omitting assignments that require timed situations.

Environment: leaving class for academic assistance; preferential seating; altering physical room arrangement; defining limits (physical/behavioral); reducing/minimizing distractions (visual, auditory, both); cooling off period; sign language interpreter.

Presentation of Material: emphasizing teaching approach (visual, auditory, tactile, multi); individual/small group instruction; taping lectures for replay; demonstrating/modeling; using manipulatives/hands-on activities; pre-teaching vocabulary; utilizing advance organizers; providing visual cues.

Materials and Equipment/Assistive Technology: taping texts; highlighting material; supplementing material/laminating material; note taking assistance/copies from others; typing teacher's material rather than using handwriting on board; color overlays; using calculator, computer, word processor; using Braille text; using large print books; using decoder for television and film; having access to any special equipment.

Grading: giving credit for projects; giving credit for class participation.

Assignments: giving directions in small, distinct steps; allowing copying from paper/book; using written back-up for oral directions; adjusting length of assignment; changing format of assignment (matching, multiple choice, fill-in-blank, etc.); breaking assignment into series of smaller assignments; reducing paper/pencil tasks; reading directions/assignments to students; giving oral/visual cues or prompts; allowing recording/dictated/typed answers; maintaining assignment notebook; avoiding penalizing for spelling errors on every paper.

Reinforcement and Follow-Through: using positive reinforcement; using concrete reinforcement; checking often for understanding/review; providing peer tutoring; requesting parent reinforcement; having student repeat/explain the directions; making/using vocabulary files; teaching study skills; using study sheets/guides; reinforcing long-term assignment timelines; repeating review/drill; using behavioral contracts/check cards; giving weekly progress reports; providing before and/or after school tutoring; conferring with student (daily, bi-weekly, weekly, etc.).

Testing Adaptations: reading tests verbatim to the student (in person or recorded); shortening length of test; changing test format (essay vs. fill-in blank vs. multiple choice, etc.); adjusting time for test completion; permitting oral answers; scribing test answers for student; permitting open book/notes exams; permitting testing in isolated/different location.

See ["To Accommodate, To Modify, and to Know the Difference,"](http://www.newhorizons.org/spneeds_hayes.html) Hayes, Nakonia, www.newhorizons.org/spneeds_hayes.html

B. Modifications Defined

A **modification** is a change in the course, standard, test preparation, location, timing, scheduling, expectations, student response, and or other attribute which provide access for a student with a disability to participate in a course, standard or test, but which **does fundamentally alter or lower** the standard or expectation of the course, standard or test. Id.

Simply put, **modifications** involve structural, cognitive change in the level of the material. The following are examples of modifications:

Presentation of Subject Matter: utilizing specialized curriculum written at a lower level of understanding.

Materials and Equipment/Assistive Technology: adapting or simplifying texts for lower level of understanding; modifying content areas by simplifying vocabulary, concepts and principles.

Grading: modifying weights of examinations.

Assignments: lowering reading level of assignment; adapting worksheets, packets with simplified vocabulary.

Testing Adaptations: reducing reading level of test. Id.

Decisions regarding the “accommodations and modifications that the child needs to assist him or her in demonstrating progress,” must be made on an **individual** basis by the IEP Team. A failure to make proper accommodations and modifications sets the student up for failure in the general curriculum. A failure to make proper modifications and accommodations enhances the risk of behavioral issues with the student.

XII. The Basic Rules

There are some basic rules that the educator should apply to the grading of a special education student. These rules are as follows:

A. All Students Are Entitled to a Grade

If a student is to receive truly an equal opportunity, he or she should be given the opportunity to receive a grade. If the IEP does not reference any grade modifications, the assumption by the Office for Civil Rights is that the student will be graded in accord with the school’s general grading standards. Thus, there should be no informal grade modifications outside of those established through the IEP team process. Simply put, students with disabilities should receive grades and credit in the same manner as other

students when they complete the same courses as other students.

B. All Students with Disabilities Are Entitled to Grades That Reflect the Level of Work They Are Capable of Completing, Consistent with the IEP Authorized Accommodations and Modifications to the Core Curriculum

This rule is true regardless of whether or not the student is receiving services in a regular or special class. This basic rule only works effectively if the IEP Team sets academic standards that will balance the student's exceptional needs with challenging academic levels.

C. High, Low or Modified Grades May Be Given to Students with Disabilities as Long as Those Grades Are Available to All Students

A student's grade may not be modified solely on the basis of his or her special education status. To do such is to create a discriminatory classification. It is permissible to give modified grades, so long as the modified grades are available to all students, not just students in special education.

Any modification should be reflected in the IEP and should be directly related to the student's disability. If the modification is so extreme that it significantly alters the assignment or assessment, then it should be identified as an alternative assignment or assessment. Any such alternative assignments or assessments should be stated in the IEP and should relate directly to the student's disability.

When an IEP Team determines that a student with a more severe disability can not attain the school's content standards for a given course despite accommodations and modifications, then it is proper for progress toward IEP goals to be considered an appropriate measurement for grading.

D. Modified Grades May Be Identified as Such on Report Card or Transcript as Long as the Student's Special Education Status Remains Confidential

As a general rule, modified grades may be reflected as such on the report card or transcript provided:

- The decision to provide the modified grade is made on an individual basis;
- The decision provide the modified grade is reflected in the IEP;
- The modified grade is available to all students (special education, general and gifted); and

- ❑ The decision to allow the modified grade is not made on the basis of the student's status as a special education student.

E. Classes Should Not Be Identified as Special Education Classes on a Report Card or Transcript

The Office for Civil Rights [OCR] strongly discourages the use of transcript labels that identify a course as a special education course. OCR encourages the use of more generic descriptors, such as "Basic," "Level One," or "Practical," in describing courses that are targeted to special education students.

F. General Education Teachers Should Collaborate with Special Education Teachers

When both the general educator and the special educator are providing instruction to a student with disabilities, it is advisable that the teachers collaboratively reach an appropriate grade. This requires that the general educator and special educator develop a mutual grading arrangement in the context of an IEP meeting and that the arrangement is indicated in the IEP.

G. Students with Disabilities May Not Be Excluded from Recognition on the Honor Roll or Other Such Academic Honors on the Basis of Their Status

Students must be given an equal opportunity to participate in courses at all levels for which they are qualified or meet course requirements. A District may establish a neutral system of weighted grades, or "core course" criteria for honor roll, as long as the standards are founded on legitimate educational standards. The practical result may be that certain students with disabilities will be unable to perform at the levels required for these honors.

H. Pass/Fail Grades Should Only Be Awarded If They Are Allowed as a Legitimate Modified Grade in the IEP or Are Available to All Students in the Course

The grading matrix for a special education student should not differ from other students unless the difference is the result of a legitimate modification in the IEP. An example of an inappropriate grading practice would be for all special education children to receive a pass/fail grade in a course when the non-identified students receive a letter grade.

I. An Appropriate Grading Policy must Be Simple to Understand, Provide Adequate Notice to Parents and Students, and Provide Informed Choice as to Whether to Accept Accommodations Which Affect Grading

Communication with parents regarding grades is vital. The time to do such is during the IEP Team meeting. Parents are entitled to notice of the District's grading policy and an explanation of the grading policy. Parents of special education students should be offered an informed choice as to whether or not to accept accommodations and/or modifications that will affect grading. They should also be made aware of the adverse impact that a lack of accommodation or modification may have on promotion.

XIII. Teacher Comments

Beyond simply providing a letter grade, teacher comments on progress reports or report cards can be the impetus for complaints by parents and students. Comments are often necessary to convey specific information regarding a student's progress, or lack of progress, as well as to document a student's classroom behavior. However, teachers should use caution to assure that all comments are made timely and accurately, and should maintain records throughout the marking period. This will go far toward refuting any contention that a student is being discriminated against because of behavior related to his or her disability.

In the recent case of Coventry (R.I.) Public School, February 16, 1999, 31 IDELR 60, an English teacher wrote the following comment on a student's report card: "behavior needs improvement". The parent complained that the comment was made solely because of parent filing a complaint, since all of the student's previous comment reports had been good. OCR found that the teacher's comments were not made in retaliation for the parent's action in filing a complaint. The hearing officer relied upon the teacher's testimony that the comment was warranted based on student's misbehavior on several prior occasions. In particular, the officer noted that there were at least two indications of some misconduct contained in the teacher's prior reports.

XIV. Promotion

In the special education context, disputes have often arisen over the subject of promotion, in particular, over the practice known as "social promotion". Parents and students have frequently argued on both sides of the equation; that is, they may argue for promotion when the district does not believe that the student has earned it, and they may argue against promotion when the district believes that promotion is in the student's best interest, whether because of academic or social factors, or a combination thereof. The key here is for the district, via the classroom teachers, to provide the student with the opportunity to earn promotion, and to carefully consider and document the reasons behind the district's decision to recommend for or against promotion. Even if the district gives in to pressure from a parent in determining whether or not to

promote, the basis for the district's recommendation should be carefully documented.

Hernando (FL) County School, February 12, 1999, 31 IDELR 89, is a case demonstrating this debate and showing how a district acted properly under the circumstances. This case involved a student with diabetes and asthma. After an evaluation, the district determined that he did not have a specific learning disability. In his fourth grade year, the student had a Section 504 plan, which focused on the effects the student's disabilities had on his academic performance. The district recommended against promotion to 5th grade because of academic deficiencies, but relented upon the parent's insistence. In the 6th grade, the student had thirty-six unexcused absences and failed five classes. The school refused to promote the student to 7th grade. His parent contended that the absences were due to the student's diabetes, and that failure to promote was therefore discriminatory. The hearing officer ruled that the district did not discriminate based on disability when it failed to promote. The officer determined, based upon the student's record and teacher testimony, that the decision was based on the student's failure to master the subject matter. Given the accommodations that the district had provided, including a liberal policy for allowing the student to make-up missed work, the student's performance was not hampered by any failure of the district to accommodate his needs.

XV. The Impact of Failing Grades

Failing grades are frequently considered an indicator that the district has failed to provide a student with a free appropriate education at public expense. In Board of Education of Hendrick Hudson School District v. Rowley, 458 US 176, 204 (1982) the Supreme Court observed that an IEP must be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." One can anticipate that parents and student advocates will construe a failing grade as indicative of a student's failure to meet their IEP objectives. Therefore, if an educator dispenses a failing grade for any reason other than a student's failure to meet their IEP goals and objectives, it is incumbent upon that educator to provide an explanation in the accompanying progress report. Absent such, school districts are exposed to the rational argument that failing grades are indicative of the IEP's failure rather than the student's failure.

XVI. Peer Grading

The question of peer grading was favorably resolved by the United States Supreme Court in the case of Owasso Independent School District v. Falvo, on February 19, 2002. The parents brought a civil rights action against a school district alleging that the practice employed by pre-secondary school teachers of allowing students both to grade one another's work and to call out their own grades in class violated the Family Educational Rights and Privacy Act [FERPA]. The Supreme Court concluded that FERPA is not violated by peer grading since the student papers are not, at the peer grading stage "maintained" within the meaning of FERPA nor is the student grader "a person acting for" the school.

XVII. Maintaining Professionalism and Reducing Risks under the IDEA

A. Claims of Retaliation

Parents have frequently complained that school personnel have taken adverse action against a student in response to a parent's decision to assert his or her rights under the IDEA or other legislation affording rights to parents of disabled students. This concept has become known as "retaliation" in the case law. While it would be a rare case for an educator to intentionally take adverse action against a student in retaliation for assertion of his or her legal rights, the focus is not simply the educator's intent, but rather, how the educator's action is perceived in hindsight. OCR has developed a five-part test to determine whether a district has engaged in prohibited retaliation. It may be useful for you to consider the steps of this test before taking action with respect to a student who is involved in due process proceedings or whose parents have filed a complaint with OCR.

The five questions you should consider are:

- (1) Has the parent/student engaged in a protected activity?

(initiated due process proceedings, filed suit in court, filed a complaint with OCR)
- (2) Is the district or its agents aware of the protected activity?

(how and when did district receive notice, is there a rumor or verified action)
- (3) Will the adverse action against the student occur at the same time as, or after, the parent/student engaged in the protected activity?
- (4) Will a neutral third-party decide there is a causal relationship or connection between the protected activity and the adverse action?
- (5) Can the district offer legitimate, nondiscriminatory reasons for the adverse action, which a neutral third-party will not consider to be pretextual?

B. Avoiding Allegations of Retaliation: Six Examples

1. Barring Parent Participation

In the case of Spencer County (KY) School District, December 31, 1998, 31 IDELR 38, the parent of home-schooled child, who was receiving some special reading

and writing instruction at a district school, alleged that district retaliated against her for filing a complaint, by banning her from the school and refusing to let her volunteer in her son's class. The school principal had denied the parent's request to volunteer in her son's classroom, because he had received complaints from school staff regarding the parent's failure to adhere to student confidentiality rules. Under the five part test for retaliation, the hearing officer found no causal relationship existed between the principal's action and the filing of the complaint. The school had documented the complaints regarding the parent's conduct, so there was sufficient evidence to establish that the school's action was consistent with school's rules, and that the school acted for legitimate, non-discriminatory, non-pretextual reasons.

2. Using Confidential Information

In another recent case, Forest Grove (OR) School District 15, October 9, 1998, 31 IDELR 15, the parent of a child suffering from post-traumatic stress disorder claimed a district retaliated against her for insisting that teachers follow her daughter's Section 504 Plan. The parent claimed that a principal canceled a parent-requested meeting with teachers and that the superintendent used sensitive information about the student's hospitalization and emotional condition to intimidate the parent. The hearing officer determined that the district did not retaliate against the parent, because the principal had provided an acceptable reason for canceling the meeting, relating to the inability of all necessary parties to attend. Also, the superintendent testified that his reasons for questioning the parent about the student's hospitalization and recovery were not for the purpose of discouraging parent from pursuing the student's rights, or in retaliation against the parent. His actions were justified by his desire to see that school staff was informed sufficiently to provide the student the services she would need upon return to school.

3. Engaging in Student Discipline; Failing to Qualify the Student for Honor Roll

In Barker (New York) Central School District, April 24, 2001, 35 IDELR 253 the parent alleged that the student's discipline and her subsequent arrest were related to the parent's protected activity of filing a complaint with OCR. Additionally, the parent alleged that the district's determination that the student was not qualified for honor roll status was in retaliation to her complaint. OCR considered both of the allegations and rejected both allegations as unsubstantiated. First, OCR reviewed the District's policies and procedures and criteria for participation in its honor roll program. OCR found that while the student's academic record was good her failure to receive passing grades in physical education class disqualified her from the district's honor roll criteria. Based on that evidence OCR found that the district's determination that the student was not qualified for honor roll status was consistent with the district's stated policies and procedures. On that basis OCR concluded that the evidence was insufficient to support a finding of retaliation.

The student had also made complaints that she wanted three district personnel dead and warned that when she was gone the place was going to be “blown up.” As a result, the student was arrested. The student also received an out-of-school suspension for five (5) days. OCR concluded that there was insufficient evidence to support the allegation that the student's discipline and her arrest were related to the complainant's engaging in the protected activity of filing a complaint with OCR. Instead, the district found the disciplinary episode to have been credibly accounted by the district and OCR concluded that the district's reason for disciplining the student was not a pre-text for discrimination.

4. Towing Student Vehicles

In a local case, Salem (NH) School District, April 16, 2001 35 IDELR 260 a parent alleged that the District failed to properly prepare and implement her son's IEP resulting in his failing grades and ultimate loss of the opportunity to play hockey. OCR rejected this allegation finding that the district followed its policies and procedures for evaluating the student and providing him with FAPE and further finding that the student did meet the age and attendance requirements for athletic eligibility. The parent also alleged that the student was harassed because his car was towed while illegally parked without a permit. The Office for Civil Rights found no evidence that the student's car was towed as a way to harass him based on his disability. The parent also alleged that the presence of a school resource officer at team meetings was intended to intimidate the student. OCR found that the school resource officer's occasional participation did not create a hostile environment based on the student's disability.

5. Engaging in Bus Suspensions

In Conecuh County (Al) School District, 35 IDELR 193 (OCR 2001) the parent alleged that the district discriminated against a student by suspending that student from the school bus for the first semester. OCR found that the student violated school bus rules by standing up, yelling out the bus window and using profanity toward the bus driver. OCR found that while the student had a learning disability in reading the IEP did not list bus transportation as a service to be provided in accord with the student's IEP. The conduct of the student was perceived by OCR to have been warranting punishment and that since riding the bus was considered a privilege by the district, OCR found there was insufficient evidence to support a finding that the district failed to adhere to the provisions of Section 504.

6. Reporting Abuse and Neglect

In Citrus County (Fl.) School District, 35 IDELR 192 (OCR 2001) a parent met with the superintendent of schools and requested an investigation as to why her child's IEP was not being followed. The district looked into the matter and assured the parent that her child's IEP was indeed being followed. Shortly thereafter certain personnel of the district became aware of facts which they considered to constitute abuse and

neglect. On that basis, the personnel called a child services hotline and reported the conditions in the parent's home. The parent filed a complaint with OCR alleging that the abuse and neglect report was retaliatory in nature.

While OCR noted the close proximity between the parental complaint and the reporting of the abuse and neglect, OCR then concluded that the evidence was insufficient to show that the complainant was treated any differently after she engaged in the protected activity. OCR considered the reason why the parent was reported to the Division of Children Services and found that the teachers made their reports on the basis of what they observed in the parents' home. Of particular note was that none of the teachers were directed by district administrators to make their report. On that basis OCR determined the district provided legitimate non-discriminatory reasons for its actions and rejected the parents' complaint.

C. The Duty to Prevent Disability-Based Harassment

Section 504 prohibits discrimination against individuals on the basis of disability. Federal Regulations, provide that “no qualified handicapped person shall, on the basis of handicap, be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from federal financial assistance.” See 34 CFR Section 104.4.

1. Reducing Risk Through Application of the Two-Part Test

In determining whether a school district has subjected a student to discrimination-based harassment resulting in a hostile environment, the Office for Civil Rights determines the following:

- Whether there was conduct by the district based on disability that was hostile, intimidating, abusive, degrading or threatening;
- Whether a hostile environment was created.

According to the Office for Civil Rights a hostile environment exists when there is a disability based harassing conduct that:

- Sufficiently severe;
- Persistent; or
- Pervasive; as to
- Limit a student to participate in or benefit from educational programs or services.

In the case of San Juan (Ca.) Unified School District, 36 IDELR 135 (OCR 2001) provides some guidance as to measures a district can take to avoid claims to reduce its risk of disability-based harassment. In this particular case, the parent alleged that a teacher allowed other children in her son's special education classroom to ridicule and

humiliate him. The district entered into a voluntary resolution agreement where it agreed to develop and distribute a policy prohibiting disability harassment and affirming the district's commitment to providing an educational environment free from disability discrimination including harassment. The district also agreed to provide training to administrators, teachers and staff which was designed to instruct employees to recognize, respond to and prevent disability harassment in the educational environment. The district further agreed to provide the Office for Civil Rights a plan to furnish age appropriate training to students in the school system concerning disability harassment as well as specific training for administrators, teachers and staff who are involved in the provision of services to students with disabilities which would include information to increase awareness of social and behavioral issues associated with specific disabilities.

This voluntary consent agreement in the San Juan case provides guidance as to how a district can reduce the risk of disability-based harassment. Educators and districts should consider the following:

- Review of their policies to ensure that they explicitly prohibit disability harassment and affirm the district's commitment to provide an educational environment free from disability discrimination including harassment;
- Training to administrators, teachers and staff on how to recognize, respond to and prevent disability harassment;
- Age appropriate training to students concerning disability harassment.

D. Duty to Communicate with Parent/Guardian

Often problems arise with special education students because parents or guardians had were not fully informed by school personnel, or did not receive timely notice of an event or issue related to the student's academic progress or behavior. Open lines of communication on a regular basis are the best strategy for avoiding complaints or litigation.

An example of how one school district erred is demonstrated by the case of North East Indep. School District (TX), September 25, 1998, 31 IDELR 101. A student with autism and speech impairment had been in the district's preschool program for children with learning disabilities. His parents unilaterally withdrew him from the district before his first grade year and placed him in private school, because of their complaints about the district program's class size and lack of teacher training. In his kindergarten year, the student had been placed in a general classroom with therapy, a personal assistant, and an at-home trainer, but his behavior deteriorated and punitive measures were used. Based on student's behavior and the conclusions of a private psychologist, the school proposed placing the student in a resource room. Parents objected to the proposed placement and the district's proposed first grade IEP. Parents further claimed that the district withheld important information regarding behavioral interventions,

thereby denying them effective participation in the IEP process.

The hearing officer ruled that the parents were denied meaningful input into the IEP process, because the district failed to provide the parents with information about the punitive behavior management strategies used during the kindergarten year, which violated the parent's procedural rights. The parents were awarded compensatory education and partial reimbursement of private school tuition. The hearing officer also stressed that parent participation involves the opportunity to have meaningful input into the IEP process

The case of City of E. Chicago School (Ind.), November 6, 1998, 31 IDELR 45, is another illustration of the consequences for failing to keep a parent/guardian informed. The guardian of a mentally handicapped student complained that the school had not provided the guardian with progress reports on a regular basis. The student's IEP specifically required progress reports at certain intervals. The hearing officer ruled that the school's failure to provide the reports violated the requirements of the IDEA. As an additional precaution, the district was also ordered to meet with the guardian at the conclusion of each grading period to report on student's progress and goal attainment.

Key Concepts:

- The regular education teacher should carefully adhere to any notice or communication requirements provided for in a student's IEP.
- School personnel should be vigilant about providing notice for both procedural, (e.g., notice of a meeting), and substantive, (e.g., notice of a child's pattern of misbehavior) matters.
- In hindsight, more information will always be seen as better than less information, so err on the side of inclusion when determining how much information to communicate to a parent.
- Timeliness is key to adequate communication: meet all procedural deadlines for notice and promptly communicate any issues that arise.

XVIII. Conclusion

The statutory requirement of inclusion dictates that each and every educator become an integral part of the special education process. When all is said and done, the measure of the educator will be taken not by their ability to comply with the letter of the law, but instead will be taken by the answers to the following questions:

- Have you **communicated** well with the parents/guardian and student?
- Have you shown **consideration** for the student's special needs and abilities?
- Have you demonstrated that you **care**?