



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

November 9, 2000

(Address blacked out)

Dear (Name blacked out):

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 decision-making 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 child 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.

Sincerely,



Kenneth R. Warlick
Director
Office of Special Education
Programs

Enclosures