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Letter to Runkel

**Office for Civil Rights, Western Division,
Denver (Montana)**

September 30, 1996

Related Index Numbers

**405.083 Rehabilitation Act (Section 504),
Testing/Grading Accommodations**

**95.005 Comparable Facilities/Programs/Services,
Academic Standards/Grading**

220.020 Graduation, In General

**265.025 Individualized Education Program (IEP),
Participants in/Procedures for IEP Meeting**

Judge / Administrative Officer

David Dunbar, Chief Regional Attorney

Case Summary

What criteria apply to the grading schemes of students with disabilities?

In cases where a student with a disability receives special education accommodations in the regular classroom, it may be permissible for a school district to use modified grading systems if also used for the general student population. However, grades can not be modified and eligibility for honors awards can not be decided on the basis of special education status alone and the student's IEP should discuss any applicable alternative grading. When a student with a disability takes a general education class for no credit, it is permissible to exclude the student from grading and evaluate the student based on IEP objectives. Collaboration of general and special education teachers in grading students with disabilities is allowed. A school district may not identify special education classes on a high school student's transcript in order to indicate that the student has received modifications in the general classroom. However, course designations with more general connotations which do not give rise to a suggestion of special education programs are not violative of Section 504

and Title II of the ADA and this determination largely depends upon how the labels are used in a specific state or region. A school district can use asterisks or other symbols on a transcript to designate a modified curriculum in general education provided the grades and courses of all students are treated in a like manner. A school can disclose the fact that a student has taken special education courses to a post-secondary institution in instances where the parent and the student have knowledge of what information is on the transcript and have given written consent.

Full Text

Appearances:

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This responds to your request that the U.S. Department of Education, Office for Civil Rights (OCR) review the *Special Education Bulletin*, dated July, 1995, distributed by your office to local school districts in the State of Montana. Specifically, you have asked OCR to comment whether the bulletin places greater requirements on local school districts than are contained in the applicable Federal statutes.

We were not provided information concerning which bulletin responses particularly generated these concerns; therefore, we shall respond to each item in the order presented in the bulletin. In general, we are in full agreement with the responses provided in the bulletin. Over-all, the bulletin responses are concise, impress us as being thoughtfully researched and written, and satisfactorily state the requirements contained in Section 504 and Title II, except where otherwise noted in our review comments.

OCR has enforcement authority over the subject matter covered in the bulletin under Section 504 of

the Rehabilitation Act of 1973 (Section 504), and its implementing regulation contained in 34 *Code of Federal Regulations* (CFR), Part 104, for educational institutions that receive Federal funds from the Department. OCR also has been delegated enforcement authority over educational institution "public entities" under Title II of the Americans with Disabilities Act of 1990 (Title II), and its implementing regulation contained in 28 CFR, Part 35. Our comments are therefore exclusively relegated to these two statutes and their implementing regulations.

Your bulletin in part references the Individual with Disabilities in Education Act (IDEA), and its implementing regulation contained at 34 CFR, Part 300. It should be made absolutely clear that OCR has no enforcement authority under IDEA. While we strive to reconcile the requirements of all three statutes and their implementing regulations in order to facilitate the implementation of a Free Appropriate Public Education (FAPE) for all school-age children with disabilities, regardless of the exact disability involved, there are some differences. Where significant, we will point them out.

In Section 504, there are two separate provisions that apply to the bulletin responses. One is § 104.4, which prohibits discrimination on the basis of disability. This provision requires that with respect to grades, class ranking, honor rolls, graduation, and diplomas, students with disabilities must be treated the same as all other students. The other is the part of Section 504 (§§ 104.31-36) that spells out the responsibilities of a preschool, elementary, and secondary school to provide a FAPE to an otherwise qualified school-age child with a disability.

In Title II, there are no specific provisions explicitly referring to pre-school, elementary and secondary school-age children or that mention the provision of FAPE, as there are in IDEA and Section 504. By agreement with the U.S. Department of Justice, the lead enforcement agency for the Americans with Disabilities Act, FAPE issues are covered under the discrimination prohibition

provisions of § 35.130 of Title II.

The bulletin responses cover six pages and 15 individual subjects. We shall not repeat each individual response *verbatim*, but will only summarize where appropriate. Your enclosed bulletin is incorporated into this response for purposes of distribution to other interested parties. Much of the contents of your bulletin is based on opinions previously issued either by OCR, the Office of Special Education and Rehabilitation Services (OSERS), or the Office of Special Education Programs (OSEP), as noted on page six of the bulletin.

Grades

1. May a student with a disability who receives special education accommodations in a general education classroom be given modified grades?

We agree with your conclusion, and particularly with the discussion that the student's individualized education program (IEP) should discuss any grading modifications that may apply, particularly with respect to subjects completed in a general education setting.

As a general observation, it would be suspect if a school district discounted special education courses or otherwise depreciated special education course grades on a categorical basis. Districts may indicate course modifications made or alternative grades awarded in any subject or course, with qualifications, as explained further throughout this correspondence.

In summary, school districts cannot modify grades or determine eligibility for honors awards on the basis of the student's special education status, alone. To do so raises a strong inference that children with disabilities, who usually are the students classified as "special education students," are being treated differently on the basis of their disabilities. Alternate grading systems may be appropriate, as you suggest, if they are available to all students, not just students with disabilities.

2. May a student with a disability enrolled in a general education class for reasons other than mastery of the course content (example, learning social skills) be excluded from the class grading and evaluated on specific objectives on the IEP?

We agree with your response that classes taken for no credit as part of the IEP may solely be graded based upon criteria outlined in the particular student's IEP.

3. Can a general education teacher and a special education teacher assign the grade for a student with a disability in a general education classroom?

A collaborative grading effort between two or more educators is entirely appropriate in such circumstances. Again, this should be discussed in the IEP.

4. May classes be identified as special education classes on the high school student's transcript to indicate that the student has had a modified curriculum in general class?

This is an emphatic no, as you indicate in bold letters in your response. However, we must point out that there is yet no definitive standards enunciated in any court or OCR decision to indicate exactly what terms are permissible to use and what are not.

We generally agree with the examples contained in your response. It is much better to use terms such as "basic, level 1, practical," etc., as opposed to "special education." The former may be terms also applicable to remedial courses taken by persons without disabilities for a variety of reasons. This will always be a factual determination made in each individual set of circumstances.

Other examples of permissible transcript "labeling" or designations used may include "I.S. [independent study]" or "modified curriculum," if these terms are also used in other courses besides special education, such as the gifted and talented

program.

Examples of transcript labels that should be carefully reviewed are "L.C. [learning center]," "H.B. [homebound instruction]," "resource room," "P.E. requirement waived---medical," "PF [peer facilitator used]," or "S.O.S. (special opportunity school." We understand that these terms are often used on transcripts of "at risk" students who may not have disabilities, or at least have not been identified as such.

To summarize, if the course designation suggests that it only is used in special education programs involving students with disabilities covered by Section 504 or Title II, it may be a violation. If it has a more general connotation, it may not be violative. The response to this question may largely depend on regional as well as state-wide usage practices.

5. May asterisks or other symbols or codes be written on a high school student transcript to indicate that the student has had a modified curriculum in a general education?

The bulletin response indicating that modifications or exceptions to the grading scale may be identified on the academic transcript as long as grades and courses of all students, and not just students with disabilities, are similarly treated is generally correct. For example, if the modification code system covers enhanced or greater difficulty course-work completed by gifted and talented program students as well as students taking remedial courses, it may not necessarily violate Section 504 or Title II to also include special education courses. The key will be to determine if the modification identification tends to focus on students with disabilities as a category. If it does, it strongly suggests that it may be prohibited under Section 504 or Title II.

Further, since academic transcripts should not be released to prospective employers or postsecondary educational institutions without the permission of the student, the school district should take steps to notify

each student of what his or her academic transcript contains in the way of such modification notations, if any, before releasing it to another party.

6. May a student with a disability or parent, when appropriate, disclose the student's participation in special education services to a post-secondary educational institution?

Your affirmative response frames this question, we believe, in an acceptable context. Voluntary disclosure can assist the student, but the, parent or student must know what is on the transcript and give written consent "specific to the information sent."

Grades, Class Ranking and Honor Roll

1. Must grades earned in special education classes or in general education classes with the support of special education services be included in districtwide GPA standings? (This leads to a ranking of students by GPA for honor roll and college scholarship purposes.)

The short answer is that grades earned by students with disabilities cannot categorically be disregarded or excluded, even if earned with the support of special education services. If a school district wishes to establish standards for eligibility for class ranking or honors, it may do so, as long as it does not arbitrarily discount or exclude grades earned by students with disabilities.

One method for doing this is to develop and implement an uncomplicated system of weighted grades. This is usually done by assigning points to a letter grade based on the degree of difficulty of subject matter completed. This system will stand scrutiny under Section 504 and Title II as long as it can be demonstrated that the weighting system is based on objective rating criteria. To work, the system must be fair and simple to understand.

For example, an "A" earned in advanced algebra may be rated worth 5 points in a student's over-all honors competition compared with another "A" in basic arithmetic given a weight of only one point. One

obvious advantage of this system is that it should not discourage brighter students from taking more challenging courses. A "B" or even a "C" earned in a tougher course can still be worth more points for purposes of academic comparisons than an "A" in a less challenging subject. If such a system is utilized, the school district will have the responsibility to justify the various weights assigned, if challenged.

Another possibility is to establish a list of "core courses" which must be completed in order to be eligible for honors, class ranking or participation in certain activities. As stated in your bulletin response, the fact that all students may not be able to perform at higher academic levels is not determinative, as long as all students and not only those with disabilities are similarly affected, and all are eligible to take these subjects, if desired.

2. May a school district implement a weighted grading system that arbitrarily assigns lower grade weights to all special education courses?

The clear answer here is no, as stated in your response. If a weighting system is used, each subject or course must be analyzed separately and assigned a degree of difficulty factor based on its individual contents. In most situations, the faculty or administrative decision should be accorded great deference if any challenge develops, particularly if the school district can produce a record explaining the process and criteria used to assign various weights to each course or subject.

Graduation

1. Is an Individualized Education Program meeting required before a student with disabilities graduates from high school?

The affirmative response given in the bulletin is presumably based on IDEA and Montana state statutes. There is no specific requirement on this procedure contained in either Section 504 or Title II. IDEA, on the other hand, covers this subject in detail.

2. Are procedural safeguards required when a student with disabilities graduates from high school?

Clearly, the graduation of a special education student receiving an education in accordance with an IEP constitutes a "significant change in placement." Under Section 504 and Title II, the student's most recent IEP should anticipate the student's graduation by describing the criteria that must be met by the student in order to do so. If this criteria is achieved, however, there is no explicit Section 504 or Title II requirement that expressly provides that a formal determination must be made on this point by an evaluation team, along with providing the parents notice of procedural safeguards.

We believe, however, that as a recommendation, it has great merit. Our observation assumes, to some extent, that there is no question that as a result of a previous evaluation team meeting, the parents are cognizant of their Section 504 procedural safeguards, or "due process" rights, and giving them notice of these rights again would not be required, although it would certainly be acceptable to do so.

3. May a student who has graduated from public high school receive special education services under IDEA until the age of 21?

The response primarily addresses the requirements under IDEA. Under Section 504 or Title II, the school district has the responsibility of providing a qualified student a FAPE until the student is graduated or achieves the maximum age for eligibility for public education in that state, whichever happens first.

4. May an IEP team plan a special education program for a student with disabilities to graduate when the student is age 21?

Under Section 504 or Title II, a student who has met graduation requirements, irrespective of age, cannot be treated differently on the basis of disability. A qualified student with a disability is eligible to

participate in whatever graduation ceremony a student of similar age without disabilities would be eligible to participate.

Section 504 or Title II does not address participation of a student with disabilities in a separate graduation service or activity. Section 104.34 (c), *Comparable facilities*, may apply, if a separate service or activity is undertaken by the school district. Eligible students with disabilities cannot be precluded, in any event, from participation in the school district's main graduation ceremony, if the student wishes to do so.

Diploma

1. Are all special education students who are enrolled in public school eligible to receive a diploma?

The affirmative bulletin response cites IDEA and the Administrative Rules of Montana (ARM) as the legal basis for this decision. Section 504 and Title II interpretations reach the same result.

2. May a school district use different wording on the diploma received by a student with a disability?

We agree with the bulletin response that the diploma awarded to each student must be similar in all "significant respects." Variation in wording may not necessarily be a violation of Section 504 or Title II, so long as the variation is not based on disability as a category of students.

If different diploma wording is used, the bulletin response is correct that the requirements for being awarded a particular diploma must be based upon objective criteria and each possibility must be available to all students on a nondiscriminatory basis.

If the school district wishes, each diploma may contain language that refers to the individual's academic transcript for the exact courses or subjects completed.

Because of the infinite number of wording variations possible to use on a diploma, we recommend that an opinion be obtained in advance

from either the Office of Public Instruction or OCR.

3. May requirements for granting a diploma be waived for students with disabilities?

The succinct answer to this question is yes. There are no restrictions in either Section 504 or Title II that would prohibit a school district from modifying or adjusting graduation requirements, consistent with the student's IEP.

Because of the wide-spread interest demonstrated in the subject matter of your bulletin, we are sharing its contents and our comments with other school districts who have inquired on these subjects.

If you wish to discuss this material further, please contact me at (303) 844-4821, or you may contact Robert Leatherman, Attorney-advisor, at (303) 844-5295.

David Dunbar

Chief Regional Attorney

Regulations Cited

34 C.F.R. 104.4

34 C.F.R. 104.31-104.36

34 C.F.R. 104.34(c)

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