Liability For Educational Decisions: Student Grading and Placement in the Age Of COVID-19

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Porzio Client Alert

The disruptive impact of the COVID-19 pandemic has impacted all areas of society including education. School districts throughout the State of New Jersey ceased physical operations in the middle of March pursuant to a declaration of public health emergency by Governor Murphy. Schools then moved, with little advance notice and preparation, to an entirely on-line learning modality that will continue through, at least, the end of the school year. The legislature by statute (P.L.2020, c.27) has deemed a day of "virtual" learning to be equivalent to a day of classroom instruction for purposes of meeting the State's 180 minimum school day obligation. However, the most serious issue that districts will face does not concern operational obligations but the efficacy of their learning programs.

Due to the extended closure, school leaders across the State are faced with huge holes in the curriculum, including, but not limited, to students unable to complete evaluation projects and being identified in need of remediation in order to enter school in September on grade level but without the availability of needed interventions. In addition, research reports have indicated that many students will regress academically as a result of moving precipitously to an on-line learning modality and these students and their needs must be identified. On the other end of the spectrum, parents are demanding that their child receive an "A" by default (given the changes in instructional delivery methods, course content, projects and evaluation) or to be automatically placed in an enrichment program.

These serious educational challenges bring serious legal liability considerations. Decisions regarding student grades, promotion, and placement are governed by state and federal laws and regulations; board policy, and district administrative practices. Students and their parents have clear expectations, based on the established criteria and past practice, regarding how these decisions will apply to their situation. However, given the new educational environment, these laws and practices established well before the current pandemic may now be difficult to meet, creating the risk of liability for districts. This article will examine legal liability issues concerning these high stakes decisions in the age of COVID-19.

Promotion and Placement

Given the sequential nature of the New Jersey Student Learning Standards, students should learn core competencies in one grade level before beginning the next grade level. Therefore, determining readiness for promotion by identifying the learning standards that may have been missed or insufficiently addressed due to the disrupted three months of the school year is essential for student success. These placement decisions are made more difficult by the suspension of the State testing program and the unavailability of district benchmark and interim assessments resulting in less data being available to support these decisions.

In the area of student promotion, State law provides great flexibility to school boards and administrators. Unlike in many other states that have established uniform statewide cut-off criteria or assessment scores to be used to determine student eligibility for promotion or retention, New Jersey has devolved this authority to the local level. Statutes not only provide

that districts have the right to establish their own policies but they must adopt specific criteria for promotion, remediation and grade retention (see N.J.S.A. 18A:35-4.9 and N.J.S.A. 18A:4-24). This authority has also been interpreted to give school districts authority to test children for grade placement. These required policies must also establish processes regarding parental notification of progress to permit parents to become informed partners in decision making and supports.

Boards of education have in turn adopted broad policies typically linking promotion to attainment of the New Jersey Student Learning Standards, course progression and attendance, as well as social and emotional development. Board policy will also specify notification requirements, typically quarterly reports regarding the student's progress towards meeting the promotion standards.

The concern that arises from the pandemic response is whether schools will be able to fulfill the board and administrative expectations for identifying student learning gaps and readiness for promotion, as well as needed intervention, support and monitoring. The obligation to notify parents regarding learning deficiencies may also be problematic in terms of the manner, method and timing of the notification.

The first step for addressing the potential legal liability is for the district to immediately review its policies and administrative regulations (guidance documents) concerning promotion, progress, support and notification. Given that many of these policies were likely adopted many years, if not decades, ago taking time to ensure that the board and administrative team are familiar with the requirements is very important.

The next step is to determine if these expectations are capable of being implemented in the current environment. It is important to note that the declared state of emergency and executive orders do not provide school districts with the flexibility to disregard law and policy. A district can, however, change existing policy, for example, holding a special meeting. Notification to parents and the school community of any adopted changes should then immediately occur. One of the greatest legal dangers to school districts is evidence that they did not follow their own policies and procedures in making these serious decisions.

If existing policy and administrative regulations/guidance do not need to change, a district should focus on ensuring that decisions made by principals and staff properly reflect the established criteria, are supported by the factual record, and are consistent regarding similarly situated students (non-discriminatory). Deviations from past practice should be noted and addressed. Promotion decisions will normally be upheld if they are based upon legitimate and reasonable educational-policy rationales and grounded in the academic needs of the student.

The good news for districts is that the commissioner has consistently ruled that board policy, as well as a board's interpretation and application of policy, is entitled to a presumption of validity and should not be disturbed unless the implementation of the policy is definitively demonstrated to be the result of bad faith, or the actions were deemed to be arbitrary, capricious, or without a reasonable basis.[1]

Grading

Local Boards of Education are also given broad discretion in terms of grading policies and decisions. It is well settled that grading decisions are the prerogative of local school boards. Grading policies need not be formally codified although they must be reasonable and applied in a nondiscriminatory manner.[2]

Districts should review their grading policies and regulations/guidance documents to ensure that they can still be implemented fairly given the pandemic and movement to on-line learning. Changes to existing policy, procedures or past practice should be immediately communicated to parents and the school community. For example, many grading policies require that students be informed at the outset of any course what the performance criteria will be and the proficiencies expected of them. If the course requirements are no longer possible (for example, evaluation techniques such as tests, projects or experiments that can no longer be performed), students should be notified of the change immediately. In these

circumstances, students may be required to demonstrate proficiency through alternative means as long as adequate notice and the opportunity to learn has been provided.

Teachers and school level administrators should be careful to apply the new expectations in a non-punitive and non-discriminatory manner.[3] The failure by a student to complete the work assigned should be properly documented along with outreach and efforts to support the student in completing the project. Attendance and participation should also be properly tracked. Robust parent communication regarding progress toward meeting these new expectations is also important.

Educational Malpractice

Although most suits regarding grading and promotion decisions will come in the form of a petition before the Commissioner of Education to overturn a particular decision, districts may also face the prospect of a suit for damages.

For example, some teachers will be tempted to issue passing (or inflated) grades to all students in order to avoid confrontation with parents, controversy, or to ensure that their decisions will not be scrutinized or challenged. Unfortunately, this course of action brings with it other concerns. If a school passes or promotes a student who clearly has not met the competencies required by district policy, a parent may file suit under a theory of professional negligence. The good news for educators is that courts almost always dismiss lawsuits against schools based on an alleged failure to educate. Most lawyers deem educational practice claims to be almost impossible to win given that in order to be successful, the parent (on behalf of the student) would need to prove that:

- the defendant owed the plaintiff a "duty of care";
- the defendant violated that duty;
- the negligence caused the plaintiff harm; and
- as a result, the plaintiff suffered an injury.

The first element, the existence of a duty, arguably can be established in the obligation of schools to provide students with adequate instruction as well as accurate and timely feedback regarding academic skill levels. School districts also have a duty not to mislead students as to whether they are meeting grade level or course expectations, or regarding the need for remedial instruction. However, the other elements will be much more difficult to prove. Most educational malpractice cases will fail due to a difficulty with establishing a breach of that duty (that some identifiable standard of care was not met) given the multitude of influences on the student's academic progression outside the classroom and before enrollment in the school.[4]

For this reason, many lawsuits against schools are not proceeding under a theory of educational malpractice, but are focusing instead on specific actions or inactions on the part of teachers, counselors and administrators as proof of other more easily proven causes of action. The remedy under these theories of legal action could be such things as an order of compensatory instruction.

Conclusion

Districts must provide students with grades that accurately reflect course outcomes and must also determine a student's placement for the 2020-21 school year, readiness for promotion, and need for remediation. In order to accomplish this, given the disruption caused by the pandemic, districts must immediately undertake a review of the current policy and practice expectations for these decisions. Districts should ensure that appropriate changes are made based on a solid rationale, communicated immediately to the school community, and implemented fairly and consistently.

Endnotes

[1]See R.W. on behalf of minor children: A.W., J.W., O.W. and L.W. v. Board of Education of The Township of Washington, Gloucester County, OAL No. EDU 8748-09, Agency No. 133-6/09; Thomas v. Morris Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). G.M. v. Roselle Park Borough Bd. of Educ., 95 N.J.A.R. 2d (EDU) 107, 109.

[2] See M.M. v. Demers, et al., 92 N.J.A.R. 2d (EDU) 525, 526; Tarlarsky v. Edison Twp. Bd. of Educ., 1977 S.L.D. 862).

[3] See L.M., on behalf of minor children, J.M. and J.M. v. Board of Education of the Township of Allamuchy, Warren County (Commissioner of Education Final Decision, OAL Dkt. No. EDU 17944-18, Agency Dkt. No. 271-11/18).

[4] See, for example, Donahue v. Capiague Union Free School Dist., 391 N.E.2d 1352, N.Y. App. (1979) where the court dismissed a suit in which a high school graduate argued that the school failed to provide him with an adequate education and promoted him through graduation even though he was functionally illiterate and was not able to even complete a job application.