DORIS ROWE,

Grievant,

v. **Docket No. 99-20-368**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Doris Rowe, a teacher at Chamberlain Elementary School, filed this grievance against her employer, the Kanawha County Board of Education ("KBOE"), after she was placed on an improvement plan, alleging the improvement plan, evaluation, and the events preceding it were designed to harass, discriminate against, and retaliate against her. Grievant sought as relief to have the improvement plan, written observations, and evaluations conducted from December 1998 to January 1999, vacated and removed from her personnel file; to be returned to her position with "adequate support staff and a schedule that is conducive to the demands and expectations for a Resource Teacher;" to have sick days used "due to the harassment and discrimination which caused the stressful environment" reinstated; and to have the "Area Specialist who participated in this harassment and embarrassment" assigned to a different school.

The following Findings of Fact are made based upon the evidence presented at Levels II and IV. (See footnote 1)

FINDINGS OF FACT

1. During the 1998-99 school year, Grievant was employed by KBOE as a resource room teacher at Chamberlain Elementary School. She has been a teacher for 15 years, with all but one of those years being in special education. She has a Bachelor's degree in elementary education, grades 1-6, and a Master's degree in learning disabilities. She has an endorsement for grades 4-8, and is certified in exceptionalities, such as, behavior disorders, mental impairment, and learning disabilities,

and as a consultant for cooperative discipline.

2. Nancy Pfister, Principal of Chamberlain Elementary School, has been Grievant's supervisor since the 1994-95 school year. She has been Principal of Chamberlain Elementary for 20 years. She has a Master's degree in special education, and was a special education teacher for three years, in addition to serving as a regular education teacher for a period of time.

3. During her entire tenure at Chamberlain Elementary School, Grievant has either been on Phase I or Phase II of a Professional Growth and Development Plan. She has not been on performance evaluation.

4. Grievant was placed on Phase I of a Professional Growth and Development Plan for the 1997-98 school year. Grievant and Principal Pfister together determined Grievant's goals for the school year, and evaluated those goals together. Grievant successfully completely Phase I, having met the goals set, and on April 22, 1998, Principal Pfister recommended that she continue on to Phase II of the Professional Growth and Development Plan.

5. Grievant was on Phase II for the 1998-99 school year. Phase II is a self- evaluation phase. The employee sets her own goals, which she does not have to share with her supervisor, although she would have to share them with the State AccreditationTeam if they asked, and the employee evaluates herself. Observations by the supervisor are not required when an employee is in Phase II, and are not part of the evaluation process.

6. Principal Pfister's area supervisor requires her to observe all teachers at Chamberlain Elementary two times each semester, regardless of whether they are in a professional growth and development phase or the performance evaluation phase.

7. Principal Pfister received training from the State Department of Education's Center for Professional Growth and Development on Policy 5310. She was instructed in this training that an employee can be moved from Phase I or Phase II to performance evaluation any time a deficiency is found during an observation.

8. Linda Palenchar is KBOE's Special Education Specialist. She oversees the special education process in her four assigned schools, including Chamberlain Elementary. She determines eligibility for special education, chairs IEP meetings, provides assistance to teachers and principals, and conducts training. She was a special education teacher for 15 years in Kanawha County, and holds a Master's degree in learning disabilities. She is certified in mental impairments, behavior

disorders, and elementary education.

9. For the school year 1997-98, Chamberlain Elementary School had two resource room teachers, Grievant and Martha Hopper, and between 22 and 30 students. Grievant had case management responsibility for 13 students. Her schedule included a 30 minute block of time, from 2:30 to 3:00 p.m., specifically designated as consultation time, in addition to her planning period, and her time before and after school. Ms. Hopper did not have a consultation period in her schedule.

10. Ms. Hopper had no prior experience or training in special education, and she was not certified in any area of special education, although she had 17 years of teaching experience. She had received a permit to teach in the resource room. 11. In the spring of 1998, Principal Pfister was notified of a staffing reduction at Chamberlain Elementary School for the next school year. Because of reduced enrollment, she would be losing one resource room teacher. After consulting KBOE's personnel office, Principal Pfister recommended that Grievant be transferred because she was less senior than Ms. Hopper. When Grievant was notified of the proposed transfer, she requested a hearing before KBOE. The hearing was held April 30,1998, KBOE did not approve the transfer, and Chamberlain Elementary would continue to have two resource room teachers.

12. At the beginning of the 1998-99 school year, Mrs. Hopper applied for another position at Chamberlain Elementary after a classroom teacher there retired on August 13, 1998, and she received that position prior to the beginning of school. Mrs. Hopper's special education position at Chamberlain Elementary was not filled by KBOE.

13. At the beginning of the 1998-99 school year, Grievant had case management and consultative service responsibility for 28 special education students. That number dropped by three students in October 1998. State Board of Education Policy 2419 states that the maximum caseload for a resource room teacher is 30.

14. Principal Pfister did not consider the impact the significant increase in the number of students for whom Grievant would be responsible would have on her in terms of her responsibilities, obligations, and time demands, and she was not concerned about this. She believed Grievant's responsibilities were the same, although she recognized it was a massive undertaking. She did not see a great difference from the 1997-98 school year to the 1998-99 school year in the time demands on Grievant. She noted Grievant could have applied for other positions, and she was concerned about the responsibilities all the teachers had. In particular, she pointed to her concern for the

kindergarten teacher at Chamberlain who had 10 students and no aide.

15. All 28 students were not in Grievant's classroom at the same time, as they would go to a regular education classroom for part of their education. Three of thestudents did not come to Grievant's classroom at all; she provided consultative services only, unless the need arose for the students to come to her classroom for instruction. The students were classified as learning disabled or mentally impaired.

16. Grievant had 30 minutes before students began arriving in her classroom each day, and she had a 30 minute planning period each day during the day. She did not have a 30 minute consultation period each day as she had the year before due to the instruction requirements of the students.

17. As case manager, Grievant was responsible for completing all paperwork and various legal requirements for these special education students. She was responsible for sending notices to parents when their child's IEP was due, keeping up with annual review dates, attending annual review meetings, developing computerized IEPs during IEP meetings, sending the results of the IEP meeting to parents who were unable to attend their child's IEP meeting and to the special education department, participating in IEP and team meetings, documenting students' IEPs noting when they mastered their objectives, developing “present levels of educational performance” lists, and collaborating and consulting with teachers and other service providers.

18. Grievant was to provide 60 minutes of consultative services a week to two students, and 15 minutes of consultative services a week to each of four other students, for a total of 3 hours each week. The record does not reflect whether she was to provide consultative services to other students. Consultative services is assistance provided by the special education teacher to the regular education teacher for the benefit of the student, and includes discussions with the classroom teacher, selecting, designing, and modifying materials used in the regular education classroom, instructional strategies, management plans, and evaluation procedures, and monitoring and evaluating student progress.

19. All teachers at Chamberlain Elementary were assigned some type of after school duty. Principal Pfister assigned Grievant the duty of escorting a handicappedstudent to meet his parents at the end of each school day. She would go to his classroom and get him at 2:45 p.m. each day, and stay with the student until his parents arrived, which at times was 3:10 to 3:20 p.m. Teachers were

allowed to leave at 3:35 p.m. Principal Pfister believed this student's parents would pick him up by 3:00 p.m., and was not aware that they sometimes arrived later than this.

20. Grievant asked Principal Pfister if the aide assigned to one special education student could help her in the morning or after school with copying, or if she could assist her with other students, and Principal Pfister told her no; the aide would be taking her break in the mornings, and she would be leaving early because she had to assist student M. (See footnote 2) during lunch. The aide did not leave early, however, as she was assigned by Principal Pfister to assist children in getting to their school buses.

21. During two class periods, from 8:40 a.m. to 11:00 a.m., for approximately six weeks beginning in September 1998, Grievant had thirteen students, with the youngest being in fourth grade. The limit is eight students when the youngest is in fourth grade, if there is no aide. Grievant did not have an aide; the aide was assigned to a specific student only. Grievant told Principal Pfister that this was not in compliance with state and federal guidelines. Principal Pfister checked with the State Department of Education and was first told they were in compliance because there was an aide. After a complaint was filed with the State Department of Education, the Department investigated and told Principal Pfister she could not have more than eight students in the class. She later received a variance to allow ten students in the class based upon the circumstances of the student who was performing at the fourth grade level, and the number of students in the two class periods was reduced to ten. 22. Cheryl Belcher, a curriculum specialist for KBOE, was sent by Kathy Hudnall, Director of Special Education, to Chamberlain in October 1998, to review the folders of the special education students and to see whether additional staff was needed, as Grievant had expressed a concern with staffing. She and a co-worker spent two days at Chamberlain compiling information on the needs of each student and the amount of teacher time that would be needed to provide the services. They then grouped the students in a manner which would allow instruction to be delivered to them in compliance with their IEPs while they were in the resource room. She concluded that, with the recommended grouping and scheduling, there was sufficient staff to provide instruction to the students in accordance with their IEPs. She also concluded that the students had not previously been grouped in an efficient manner, and the services on the IEPs could not have been provided.

23. Grievant was absent from school for part of the day on September 1 and 30, 1998, and for

the entire day on October 1, 2, 5, 6, 7, 8, 9, 12, 23, 26, 27, 28, 29, and 30, 1998, on sick leave due to stress. She provided Principal Pfister with a doctor's statement verifying her illness when she returned to work. She did not request any special accommodations due to her illness. A substitute special education teacher was not always provided by KBOE during this period to provide the required services to students.

24. Parents of one or more students in Grievant's classroom complained to Principal Pfister that Grievant's frequent absences “were preventing the students' IEPs from being followed. Sometimes there were substitute teachers, sometimes there were not.” Principal Pfister told the parents “that if a teacher was absent and has sick leave, there was nothing I could do about that.” Level II June 17 hearing, p. 6, Pfister.

25. While Grievant was on sick leave Ms. Hudnall sent a letter to her home telling her she had received a complaint from a parent of a special education student, and Ms. Hudnall would be coming to her classroom. Grievant perceived this to be a negative letter,and she was offended that Ms. Hudnall had sent the letter to her while she was on sick leave.

26. By memorandum dated September 28, 1998, Ms. Palenchar told Grievant to schedule IEP meetings on October 16 for three students whose annual reviews were due by the end of October. Part of this scheduling involved providing the parents ten days' notice of the IEP meetings, by October 6. From September 28 through October 16, Grievant was at school only September 28, 29, and part of the 30th, and then was absent until October 13. She was absent the three work days preceding October 6, which was a Tuesday. Grievant mailed notice to the parents of the IEP meetings, but the parents did not receive notice of the meetings ten days in advance, and two of the parents could not attend on that date due to work obligations. Grievant called two of the parents from her home while she was on sick leave, and asked if they would waive the notice period. The parents told her they would have to talk to Principal Pfister and Ms. Palenchar first.

27. Grievant requested an informal conference on a grievance on September 30, 1998, grieving her assignment of duties, and alleging discrimination and reprisal. She stated she was “being penalized by lack of staffing, no support aide and constant extra duties imposed by Mrs. Pfister.” She also stated that Assistant Superintendent Patricia Petty was not “considering IEP requirements” for students.

28. The informal conference on the grievance was not scheduled until October 13, 1998, due

to Grievant's absences from school. When Grievant arrived for the informal conference, Assistant Superintendent Petty was seated with Principal Pfister. Grievant did not believe it was proper for Assistant Superintendent Petty to attend the informal conference. Grievant commented upon entering the room, “[a] racist [referring to Principal Pfister] sitting beside an Uncle Tom [referring to Assistant Superintendent Petty]. It's a beautiful picture.” Grievant and Assistant Superintendent Petty proceeded to exchange personal insults in a juvenile manner for some period of time. Principal Pfister recordedthe exchange, and Grievant was aware she was recording it. The informal conference was never held.

29. Principal Pfister responded to the September 30th grievance in writing on October 27, 1998, stating, “[a]ll professional educators, including the principal, are assigned supervisory responsibilities during student dismissal time. You have expressed your dissatisfaction at being asked to escort a special education student to the front of the building where he is picked up by a parent. This duty is similar to duties assigned to other teachers and does not constitute reprisal or discrimination. Your teaching load is well within pupil/teacher guidelines and no full-time support aide is warranted. It is your responsibility to case manage students and insure that IEPs are met, I emphatically deny discriminating against you on the basis of your race.”

30. Grievant requested an informal conference on a second grievance on October 14, 1998, stating, “[a]dditional harrassment [sic] from principal through inviting Ms. Petty to informal conference. Retaliation and reprisals reflected in additional responsibilities and duties added, not conforming to staffing letter for 98-99 school year, placing me in a position of endangering my health by stating that I cannot leave my classroom between 7:40 and 12:15 because the aide cannot (can't go to bathroom) be left alone. The principal will not allow the aide to do any work to help me. This has not happened to former white resource teachers. Discrimination on basis of color.” Principal Pfister responded that on the advice of her attorney, “and in accordance with the grievance procedure,” the grievance should be taken to the next level. Principal Pfister's attorney had advised her to take this action after listening to the tape recording she had made of the exchange on October 13, 1998, between Grievant and Assistant Superintendent Petty.

31. Grievant filed a grievance on October 16, 1998, stating “I am filing this grievance as a result of additional duties and responsibilities that Mrs. Pfister continues to add to my schedule that prevent me from expected case management work. My scheduleincluding planning time mirrors the schedule

of regular ed teachers who do not case manage students. With the number of students that I have, and assignments, spending 2-3 hours after school caused me to be ill." Principal Pfister again refused to conduct a Level I conference with Grievant about this grievance, waiving the grievance to Level II, because her personal attorney told her to do so.

32. By memorandum dated October 16, 1998, Principal Pfister reprimanded Grievant for her failure to send the notices of the October 16, 1998 IEP meetings to the parents of the three students in a timely manner, and reminded her of her case management responsibilities. She directed Grievant to contact Ms. Palenchar immediately to reschedule the IEP meetings.

33. Grievant rescheduled the IEP meetings which had been missed on October 16, for October 30, 1998, and mailed notice of the meetings to the parents on October 26, 1998. Grievant did not contact Ms. Palenchar prior to rescheduling these meetings as Principal Pfister had directed her to do. Ms. Palenchar told Grievant she could not schedule IEP meetings; Ms. Palenchar had to schedule them; and the IEP meetings were not held by the end of October as required.

34. Ms. Palenchar communicated with Grievant only when she felt it was necessary due to a confrontation she had with Grievant during the 1997-98 school year. Ms. Palenchar excluded Grievant from some meetings involving students during the Spring of 1998, and had also been disrupting Grievant's classroom. Grievant told Principal Pfister about these problems, but Principal Pfister offered her no help. Grievant filed a grievance about Ms. Palenchar's actions during the spring of 1998.

35. When Grievant returned from sick leave, a substitute special education teacher was assigned to assist a few of the special education students in the mornings for two weeks, to make up for services they had missed while Grievant was on sick leave. Inthe afternoons she assisted Mrs. Hopper in her first grade classroom with discipline problems she was having. She did not provide assistance directly to Grievant.

36. On November 12, 1998, Principal Pfister prepared a notice of an IEP meeting for one student, and sent it to the student's parents, because Grievant was absent at the time. She put a copy of the notice in Grievant's mailbox, and added the meeting date to the calendar which is distributed to teachers. Grievant did not receive the notice, and no one spoke to her about attending the meeting. Grievant did not attend the IEP meeting.

37. Principal Pfister observed Grievant's classroom instruction on December 3, 1998, and

completed a Teacher Observation/Data Collection form ("observation form"). She did not observe her instruction prior to that date due to limited opportunities because of Grievant's absences. She noted on the observation form that the lesson plans for the week of November 30 through December 3, 1998, supported the students' IEPs. She observed some problems in instructional management, in that those students who had the same objectives could receive instruction as a small group, and Grievant could have stations for the students and arrange station activities so there would be more time on task. She also believed it was a problem that student M., a child with Down's Syndrome, was seated at a table away from the other students with his aide. M.'s mother had previously expressed a concern to Principal Pfister that M. was not being included in activities in Grievant's room. Principal Pfister did not note this concern with M. on the observation form, but discussed it with Grievant when she met with her later that day to discuss her observation. M.'s IEP stated he was to be part of a small group and included with the group. Also not noted on the observation form was her finding, upon checking the records after the observation, that Grievant was not maintaining IEP documentation. She noted that one parent wanted more communication about her child's progress. Finally, she noted that Grievant's case management responsibilities were not always completed in a timely fashion, and that two parents had complained, referring to their complaint that neither hadreceived ten days' notice of the IEP meeting. Grievant refused to sign the observation form. She told Principal Pfister she would write an addendum.

38. Grievant prepared one list of spelling words for one student which included two groupings of letters which were not words. Grievant used these "nonsense words" to reinforce patterns to assist the student in learning the rule for two vowels used together in a word. She had learned this method in her reading disabilities training, and believed this was an appropriate learning method. Principal Pfister was familiar with using nonsense words to teach rhyming words, but not to teach spelling. Grievant produced an article at the Level IV hearing from Reading Reflex Strategies, a resource she used in her classroom, which discussed using nonsense words as spelling words. The student's parent complained to the State Department of Education about this one word list. In a report issued on December 15, 1998, in response to the complaint, the State Department of Education found that the use of nonsense words on the spelling list did not address the requirements of the student's November 13, 1998 IEP, and therefore, spelling objectives had not been implemented and a violation occurred.

39. The State Department of Education in its December 15, 1998 report stated that Grievant's lesson “plans are inconsistent and do not coincide with the short term objectives listed within the student's IEP. Additionally, no progress data (e.g. skills checklist as listed on the student's 1998-99 IEPs) was submitted to the [Office of Special Education] to evidence whether or not the annual goals/objectives are being addressed and/or the student is making progress toward attaining those annual goals/objectives. Additionally, interviews indicate the special educator failed to provide this information when requested by the Principal. Therefore, the district was unable to confirm the implementation of the student's IEP by the special educator and a violation occurred.”

40. On January 12, 1999, Principal Pfister observed Grievant's classroom instruction. She completed an observation form the following day. She was required toobserve Grievant's instruction a second time during the semester, and she wanted to see whether the weaknesses she had observed on December 3, 1998, had been corrected. She noted that student M. “was not included in any group instruction during the observation period. He needs to be seated at a desk as his peers are and instruction must be modified to include him in large group activities.” M. was sitting at a table with the aide, just as he was on December 3, 1998. The observation form states, “[l]esson plans are inconsistent and do not include areas addressed in State standards. . . . M.'s lesson should have been divided into at least four fifteen minute activities. An hour is too long to expect him to use the calculator to complete a page of addition problems.” The lesson plans were dated for the previous week, they did not list short-term goals, only long-term goals, and did not list materials and activities or groups. They listed mainly what was on the IEPs. Principal Pfister further noted, “[s]tudent progress is not shared with all parents as required by the IEP and collaboration does not occur with all regular education teachers,” and “[p]olicies concerning case management duties are not followed. Some interaction with educational personnel occurs but not with all regular education teachers of resource students. Reports are not always turned in on time.” The comment concerning case management duties referred to Grievant's failure to send notices to parents of IEP meetings in the fall of 1998 and her failure to be prepared for IEP meetings. One report not timely returned to Principal Pfister by Grievant was a form which Grievant was to sign indicating she had posted “Title IX notification” in her classroom. The observation form contains other comments which indicated Grievant was doing a good job in some areas, and some comments which Principal Pfister stated were neither positive nor negative, but were simply what she observed. Principal Pfister met with

Grievant on January 13, 1999, to discuss the observation form. Grievant refused to sign the observation form.

41. Principal Pfister removed Grievant from Phase II, and placed her on performance evaluation after January 12, 1999. 42. Principal Pfister completed a performance evaluation of Grievant on January 13, 1999, based upon her two observations and complaints that had been filed during the period from August 1998 through January 12, 1999. The evaluation rated Grievant's performance unsatisfactory in the areas Programs of Study, Instructional Management System, Student Progress, Communication, and Professional Work Habits. The only area in which Grievant's performance was rated satisfactory was Classroom Climate, even though Principal Pfister had concerns with M. not being included in group activities. Under Programs of Study Principal Pfister wrote, “[t]he IEPs of all students are not being followed. Complaints filed by parents with the WV Dept. of Education state that the teacher has failed to implement the goals and objectives of the named students' IEP. Appropriate instructional strategies that parallel each child's IEP are not employed.” Principal Pfister had studied the IEPs of the children and had come to the conclusion that the instructional strategies did not parallel the IEPs. Under Instructional Management System she wrote, “[l]esson plans are inconsistent and need attention. They do not address all areas required by state standards. The instructional activity was introduced prior to students beginning their independent work during the observation periods. Students appear to understand the language which is used to present the strategies. Examples and demonstrations illustrate the concepts and skills but an increase in concrete activities would benefit these students. All tasks assigned are not developmentally appropriate and are not aligned with the goals on all IEPs. As a result, formal complaints were filed by parents. Students are encouraged to express their ideas clearly. Incorporation of higher level thinking skills was not observed during either formal observation. Consistency in developing productive work habits and study skills is not always practiced.” The comments to Student Progress are, “[a]ccurate and complete student records are not maintained and a corrective action was mandated by the WV Dept. of Education. Although the teacher may monitor student progress, feedback is not given to all parents and to all regular education teachers of resourcestudents.” Principal Pfister commented on Communication, “[s]tudent progress is not communicated according to policy nor is it regularly communicated to parents and co- workers. The failure to communicate as determined by each IEP is a violation of state and federal law.” Finally, the

comments to Professional Work Habits were, “[e]stablished laws and regulations are not followed and appropriate interaction with other educational personnel does not occur. Punctuality with reports and records remains a problem. All Case Management responsibilities are not performed.” When Principal Pfister met with Grievant on January 13, 1999, to discuss the January 12 observation form, she told her for the first time that she was placing her on performance evaluation, and then discussed the performance evaluation she had completed with her, and told her she was going to be placed on an improvement plan. Grievant did not sign the evaluation.

43. Grievant did not document in student M.C.'s folder that she had developed a plan to teach him self-monitoring, or that she had provided 15 minutes per week of consultative services, both of which were required by his IEP. Such documentation was to be maintained in his folder, and Grievant was responsible for this documentation

44. Grievant did not include work samples in student R.H.'s folder to demonstrate that his short-term goals were being met or were being worked on, as is required. Grievant was responsible for this documentation.

45. Grievant's lesson plans did not reflect that she was addressing reading comprehension for student A.A. as was required by the IEP.

46. Grievant did not document that she was addressing the area of written expression for student A.B., as was required by the IEP.

47. Grievant's lesson plans did not reflect that she was addressing the use of pneumonic devices as a spelling strategy for student N.P., or that she was addressing writing objectives, as required by the IEP. 48. Grievant did not document that she was providing small group instruction, role reading, sequence events, comprehension questions, spelling words from his instructional materials, and recall addition and subtraction in math to student M., all of which was required by his IEP. Grievant was responsible for such documentation in M.'s folder, and for including work samples. Grievant did not send monthly progress reports to M.'s mother as required by his IEP.

49. Grievant's lesson plans did not reflect that she was addressing student N.'s reading objective, as set forth in his IEP, nor did she include work samples in his folder to show this objective was being met as she was required to do.

50. Grievant's lesson plans did not reflect that she was addressing all areas she was required to address by student D.M.'s IEP, nor did she include work samples for all areas along with the

appropriate documentation in the student's folder as she was required to do.

51. Grievant did not document in student M.M.'s folder that she was being instructed in the writing process and strategies for comprehension as required by the IEP.

52. Grievant did not document in student Q.S.'s folder that he was being instructed in all areas required by his IEP.

53. Grievant's lesson plans did not reflect that student K.W. was being instructed in fractions, as required by the IEP.

54. Student H.S.'s folder did not reflect that there were monthly team meetings, and there was no portfolio and no work samples in the folder, all of which was required by the IEP. All of this was Grievant's responsibility.

55. Grievant did not document that manipulatives were being used to develop numbers and counting concepts with student C.S., as was required by his IEP. 56. Grievant did not include the daily checklist student J.S. was to have with his IEP documentation to demonstrate when mastery of the skill occurred. This checklist was required to be included with the documentation in his folder.

57. Grievant did not include work samples in student T.P.'s folder, as was required.

58. Grievant had never received an unsatisfactory evaluation before the 1998-99 school year.

DISCUSSION

"Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving her case by a preponderance of the evidence. Baker v. Fayette County Bd. of Educ., Docket No. 94-10- 427 (Jan. 24, 1995). (See footnote 3) Further, this Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981); Thomas v. Greenbrier Bd. of Educ., Docket No. 13-87-313-4 (Feb. 22, 1988); Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1 (May 5, 1987), aff'dKanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." Beckley v. Lincoln County Bd. of Educ., Docket No. 99-22-168 (Aug. 31, 1999).

Grievant argued that she could not be observed, evaluated, or placed upon an improvement plan during the 1998-99 school year, because during that school year she was on what is referred to as “Phase II,” rather than being in an evaluation phase. Grievant pointed to State Board of Education Policy 5310, which provides that a teacher with over seven years of experience who is on Phase II is in a period of self evaluation. Accordingly, Grievant argued, she was not subject to evaluation by her supervisor at that point.

In support of her position, Grievant presented the testimony of Bob Brown, National Representative for the American Federation of Teachers. Mr. Brown served on the committee in 1991 which drafted Policy 5310. He testified that other members of the committee were representatives from the West Virginia Education Association, the Principal's Association, the School Board Association, the Superintendent's Association, and the State Department of Education. He stated the group met every two weeks to a month for about a year. He testified when the committee reached a consensus on the provisions, the document was presented to the State Department of Education, which in turn presented it to the State Board of Education, which adopted the policy effective July 1992.

Mr. Brown testified that the committee members did not think it made sense for career educators who had received satisfactory evaluations for two years to be observed and/or evaluated every year. The committee also wanted to treat career educators as professionals, and save administrators time by eliminating the observation and evaluation process for some employees. He pointed to the language in the Policy which provides that at the completion of Phase I, “[t]he supervisor will recommend either that the employeecontinue to Phase II or return to the performance evaluation,” and stated, “implicit is that you were not a part of the performance evaluation as was known because the only way you returned to do that would be if you did not comply with the professional growth and development plan that you developed with your supervisor.” He testified Phase II is a self- evaluation period; “in Phase II, not only was there no evaluation by the supervisor, but in Phase II for that one year, the records of your self-evaluation you kept.” He stated the employee identifies his own deficiencies in Phase II, and “[t]he performance evaluation, per se, was neither a part of Phase I nor Phase II.” He further explained that observations were designed to be a part of the evaluation process, and “[t]hey were not designed to be a freestanding tool;” however, he acknowledged that the Policy does not prohibit observations during Phase I or Phase II. He testified that if a problem

develops while an employee is in Phase II, the employee nonetheless automatically cycles back to Phase I for the next year, and the supervisor and the employee sit down and develop a new set of goals and objectives. If a problem develops while the employee is in Phase I, the recourse is to send the employee back to a performance evaluation phase the next year. He stated, "[t]hat was by design. That was to avoid rash decisions. We're talking about career educators here who have had two satisfactory evaluations to even get to Phase I. That was specifically done by design to avoid rash decisions on career educators."

KBOE argued that Policy 5310 does not prohibit an administrator from completing a performance evaluation for an employee on Phase II, when that employee is not properly performing her job. KBOE pointed out that if Grievant's argument is correct, an employee whose performance is deficient in the fall of the year when she is on Phase II, could not be evaluated and put on an improvement plan to correct the deficiencies for over a year; that is, until she had completed Phase II that school year, and Phase I the following school year. KBOE called Gail Looney, Executive Director for the West Virginia Center for Professional Development since 1991, as a witness. She testified that the Center is responsible for providing instruction to administrators who evaluate school personnel. She was also involved in the drafting of Policy 5310, and in developing the training modules. It was her understanding that a teacher on Phase I or Phase II could be observed and evaluated, based upon the language of Policy 5310 that the supervisor has responsibility for evaluating all professional staff. She stated that once a deficiency is observed, the supervisor will move the teacher to performance evaluation, and the supervisor is to advise the teacher that there will be observations and an evaluation. She testified that an employee can be evaluated, following the proper procedures, anytime there is a need. She testified that a teacher in Phase II cannot be moved to performance evaluation if no deficiencies are noted on an observation form.

Policy 5310, 126 C.S.R. 142, promulgated by the State Board of Education, states in the heading that it is a "Legislative-Procedural Rule," and at § 1, "[t]hese legislative rules establish the process for evaluation of the employment performance of professional personnel which shall be applied uniformly statewide."

> It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981). Additionally, where the plain language of a policy does not compel a different result,

> deference must be extended to the agency in interpreting its own policies. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA- 420 (May 7, 1998). See generally Blankenship, supra; Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

Jones v. W. Va. Dep't of Educ., Docket No. 00-DOE-108 (May 23, 2000). While the intent of the committee which developed Policy 5310 is interesting, it is not binding, nor can it be used to assist in the interpretation of Policy 5310. The committee had no power to adopt this Policy, nor do committee members now have the authority to interpret it. The committee simply drafted the Policy for the State Board of Education, which could have changed it in any way it deemed appropriate prior to adopting it. It is the intent of the State Board of Education which may be given deference in interpreting any provisions of Policy 5310 which are not clear.

Policy 5310 (See footnote 4) outlines the “Evaluation Process for Classroom Teachers” in § 10, providing as follows:

> 10.1
> For employees with zero to two years of experience, a minimum of two written evaluations per year is required.
>
> 10.2
> For employees with three to six years of experience, a minimum of one written evaluation per year is required.
>
> 10.3
> For the employees beginning their seventh year, a two year professional growth and development cycle will be utilized in lieu of the performance evaluation. The cycle will alternate between two phases, phase I and phase II, provided: a) the employee's performance was rated satisfactory during the previous two consecutive evaluations, b) the employee develops a professional growth and development plan, and c) the employee remains in the same or similar position for two consecutive evaluations. If all provisos are not met, the employee shall receive one performance evaluation per year.

Phase I

During the first year of the professional growth and development cycle,

> the employee and the immediate supervisor shall mutually develop a growth and development plan including goals and objectives focusing on one area of the teacher performance criteria. at the completion of Phase I, the immediate supervisor and the employee will develop a narrative report on the employee's progress in relation to the professional growth and development plan. Thesupervisor will recommend either that the employee continue to Phase II or return to the performance evaluation.

Phase II

> During the second year of the professional growth and development cycle, the employee shall develop and implement an individual professional growth and development plan that contains clearly stated goals. The employee self-evaluates the progress made. The employee develops and retains all records and data.

Policy 5310 provides with regard to implementing improvement plans:

> 11.1
> An improvement plan shall be developed by the supervisor and employee when an employee's performance is unsatisfactory in any area of responsibility as contained in Section 13 of the policy.

Section 13 outlines the responsibilities of teachers which shall be included in teacher job descriptions. They are implementing programs of study, fostering a classroom climate conducive to learning, utilizing instructional management systems models which increase student learning, monitoring student progress towards mastery of instructional objectives and goals, communicating within the educational community, and meeting professional responsibilities.

Policy 5310 clearly states that a two year professional growth and development cycle “will be used” for employees of Grievant's tenure, if the provisos of § 10.3 are met. If the provisos are not met, then “the employee shall receive one performance evaluation per year.” It is quite clear that Policy 5310 does not allow a performance evaluation for an employee who is on Phase I or Phase II. However, Policy 5310 does not address what happens if an employee is not meeting her teaching responsibilities while she is in the two year professional growth and development cycle.

Policy 5310 was promulgated under the authority of W. Va. Code § 18A-2-12. That Code § does not address Phase I or Phase II, envisioning that employees be evaluated. It reads as follows:

> (a) The state board of education shall adopt a written system for the evaluation of

the employment performance of personnel, which system shallbe applied uniformly by county boards of education in the evaluation of the employment performance of personnel employed by the board.

(b) The system adopted by the state board of education for evaluating the employment performance of professional personnel shall be in accordance with the provisions of this section. Professional personnel means professional personnel as defined in section one, article one of this chapter. In developing the professional personnel performance evaluation system, and amendments thereto, the state board shall consult with the professional development project of the center for professional development created in section three, article three-a of this chapter. The center shall actively participate with the state board in developing written standards for evaluation which clearly specify satisfactory performance and the criteria to be used to determine whether the performance of each professional personnel meets such standards.

The performance evaluation system shall contain, but shall not be limited to the following information:

(1) The professional personnel positions to be evaluated, whether they be teachers, substitute teachers, administrators, principals, or others;

(2) The frequency and duration of the evaluations, which shall be on a regular basis and of such frequency and duration as to insure the collection of a sufficient amount of data from which reliable conclusions and findings may be drawn;

(3) The purposes of the evaluation, which shall serve as a basis for the improvement of the performance of the personnel in their assigned duties, serve as an indicator of satisfactory performance for individual professional personnel and serve as documentation for a dismissal on the grounds of unsatisfactory performance, and serve as a basis for programs to increase the professional growth and development of professional personnel;

(4) The standards for satisfactory performance for professional personnel and the criteria to be used to determine whether the performance of each professional meets such standards and other criteria for evaluation for each professional position evaluated; and

(5) Provisions for a written improvement plan, which shall be specific as to what improvements, if any, are needed in the performance of the professional and shall clearly set forth recommendations for improvements, including recommendations for additional education and training during the professional's recertification process.

> A professional whose performance is deemed to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.
>
> No person may evaluate professional personnel for the purposes of this section unless such person has an administrative certificate issued by the state superintendent and has successfully completed education and training in evaluation skills through the center for professional development, or equivalent education training approved by the state board, which will enable the person to make fair, professional, and credible evaluations of the personnel whom the person is responsible for evaluating. After the first day of July, one thousand nine hundred ninety-four, no person may be issued an administrative certificate or have an administrative certificate renewed unless the state board determines that such person has successfully completed education and training in evaluation skills through the center for professional development, or equivalent education and training approved by the state board.
>
> Any professional personnel whose performance evaluation includes a written improvement plan shall be given an opportunity to improve his or her performance through the implementation of the plan. If the next performance evaluation shows that the professional is now performing satisfactorily, no further action shall be taken concerning the original performance evaluation. If such evaluation shows that the professional is still not performing satisfactorily, the evaluator shall either make additional recommendations for improvement or may recommend the dismissal of such professional in accordance with the provisions of section eight of this article.

The undersigned concludes that, because Policy 5310 does not address the procedure to be followed if a teacher is not meeting her responsibilities when she is in Phase II, the Policy does not preclude a supervisor who discovers deficiencies from notifying the employee of those deficiencies, returning the employee to performance evaluation, and implementing an improvement plan, if necessary, to assist the employee in correcting the problem. (See footnote 5)

Grievant denied that she had deficiencies, and disagreed with the evaluation. As noted above, generally, this Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate "such an arbitrary abuse on the partof a school official to show the primary purpose of the polic[ies] has been confounded." Kinder, supra. See Higgins, supra; Thomas, supra; Brown, supra. An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in State Department of Education Policies 5300 and 5310 and W. Va. Code §18A-2-12. See Brown, supra; Wilt v. Flanigan, 170 W. Va. 385, 294 S.E.2d 189 (1982). The

mere fact that a grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988).

Grievant believed her lesson plans were consistent, and she stated she had always followed the students' IEPs carefully. Principal Pfister, and the State Department of Education found otherwise. Grievant presented nothing other than her testimony to support her assertions.

Grievant denied that she was not trying to communicate with parents, noting that two of the parents attended a county-wide parent/teacher conference on November 17, 1998, and neither came to her classroom, even though one of the parents had returned the notice to her indicating she would attend. As to the lack of progress reports, Grievant stated the special education students were receiving progress reports as often as other students, and there was no county-wide documentation form at that time. The lack of a county-wide form does not relieve Grievant of her duties. She stated she did not document any progress for one student because the student had not made any progress, and she did not need to document until it was time to do so.

Grievant also denied that student M. worked on one assignment for an hour, referring to Principal Pfister's statement in this regard on the December 3, 1998 observation as not true. She testified M. went to the bathroom several times, and went to the listening center, in addition to working on math as Principal Pfister stated. The undersigned cannot assign a lot of credibility to Grievant's testimony. During the course of the Level IV hearing Grievant testified that she did not recall what Assistant Superintendent Petty said to her on October 13, 1998, when Grievant had appeared for the informal conference. She stated, “[a]t that particular moment, it was a very emotional time for me, based on harassment that I had encountered, based on the harassment that my husband and my family had encountered, and based on the medication that the doctor had me on.” May 4, 2000, transcript at page 236. At page 249 of that same transcript, counsel for KBOE began asking Grievant about the medication she had been taking, and she denied she had said she was on medication. Finally, at page 253, counsel for KBOE asked, “Well, is it your testimony that you were on _ that the reason you don't remember whether or not or have some problem in recalling that what was said in that meeting was because of medication that you were taking on October 13th or on medication that you had been taking sometime since then?” Grievant responded:

> If I said that, that was not what I meant. I'd like to retract it. I don't think that's _ maybe that's what I said, but that's not what I meant. I thought you asked me if I remembered

> what was in this document. What I wanted to say was I cannot possibly remember with or without medication from October 13, 1998 based on what I have gone through, what I went through before October 13, 1998 and what I have gone through because of the circumstance without reading through it. Even reading through it, I could not tell you if this is an accurate transcript of the tape that Mrs. Petty made on that particular day. What I intended to say is between that time and this time, because of the stress of the meetings, the stress of the harassment, the stress and emotional problems that I have encountered with the termination and suspension from my job without any real cause (See footnote 6) , the stress of having to sacrifice time with my husband and family, that I can't possibly just look at this and tell you if it's accurate or not.

While it is certainly understandable that Grievant would not recall with great clarity something which occurred nearly two years before, she clearly testified under oath that she was taking medication and then just a few minutes later denied this statement, and was perfectly willing to revise her testimony. The undersigned concludes from the statementsmade by Grievant, and her demeanor, that she was in fact taking medication on October 13, 1998, that she did not intend to disclose that she was taking medication, that she did not wish to disclose what medication she was taking, and that when she realized she had let this information slip out, she did not hesitate to lie. This casts doubt on all of her testimony. Further, if she was under so much stress that she could not recall what occurred on October 13, 1998, how could she accurately recall that M. had performed tasks other than math for an hour, and had gone to the bathroom several times, whether her lesson plans were consistent, and whether she had followed the students' IEPs?

Another example of Grievant's lack of credibility was her testimony that on October 13, 1998, she and Assistant Superintendent Petty, “exchanged words in a conversation.” She declined to characterize the exchange as heated. She testified she did not know what caused the exchange. She later stated that Assistant Superintendent Petty “began to sling [personal] insults” about Grievant's family, and she responded to those remarks. It is quite clear that Grievant's derogatory comments began the hostility, and that Grievant was a willing participant in the mud slinging that followed, as was Assistant Superintendent Petty. While Grievant may have certainly forgotten exactly what insults were exchanged, it is hard to imagine that she would forget calling her supervisor a racist and the Assistant Superintendent Petty an Uncle Tom upon entering the room, and that she would remember the exchange as simply “a conversation.”

Grievant admitted she was not providing the amount of consultative services required by the students' IEP's. Although she testified she could not recall the whether she provided any consultative services to some students, she stated she did not provide the 60 minutes of consultative services per

week required by student Q.S.'s IEP. She stated she had no time for such services, and her consultation with regular education teachers consisted of talking to them if she happened to see them in the workroom or lounge when she was making copies, or on her way to the bathroom. She also stated, however, thatshe stayed at school until 6:00 or 7:00 p.m. to consult or collaborate; apparently, however, she did nothing to arrange meetings with the regular education teachers during this time. Grievant stated it was just as much the responsibility of the regular education teacher as it was hers to make sure consultative services were provided.

While Grievant certainly had little time during the school day to provide the three hours a week of consultative services she was required to provide, she did not demonstrate she was unable to schedule time with other teachers in the school either before or after school. Obviously, some of these services were going to have to be provided after teachers were officially dismissed at 3:35 p.m. Had Grievant attempted to provide these services after this time and the other teachers were unwilling to meet with her after regular school hours, then she could not be held accountable for her failure to provide these services. Grievant produced no such evidence. Whether the other teachers were to make sure consultative services were provided or not, this does not absolve Grievant of her duty to provide these services. Certainly, Grievant was going to have to work very hard, and work long hours in order to perform her job duties. It certainly cannot be an easy task to manage the caseload she had; but it was her job. If she was not capable of performing her duties due to her illness, she needed to have her doctor provide the appropriate documentation, and ask for accommodation for her illness.

Grievant pointed out that during the time period in which notices of IEP meetings were to go out to parents for an October 16, 1998 IEP meeting, she was off work on sick leave. She testified that during this same time period Principal Pfister had sent a notice out for an itinerant case manager. Grievant disputed that it was her responsibility to make sure notices of IEP meetings were sent to parents in a timely manner, stating she was part of the special education, and it was a team responsibility. She believed both Principal Pfister and Ms. Palenchar were aware she was on sick leave. It certainly seems unfair to hold Grievant completely accountable for not sending out these notices while she was sick. However, Grievant does bear at least some responsibility in this regard. As a professional, she should have known when the notices needed to go out, and she should have made arrangements with Principal Pfister or Ms. Palenchar to get the notices sent. It appears,

however, that Grievant made little effort to communicate with Ms. Palenchar, just as Ms. Palenchar did not communicate with her unless necessary. Grievant had burnt her bridges with Ms. Palenchar, and was not going to get any sympathy or help from her. It should further be pointed out that Grievant did not grieve the reprimand she received for not sending these notices in a timely manner, and she cannot now contest whether that reprimand was appropriate. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); See Stamper v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Womack v. Dep't of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994).

Grievant also argued she was the victim of retaliation, racial discrimination, and harassment. Grievant is an African American. Grievant contended that Principal Pfister was displeased with Grievant because she had challenged her proposed transfer the preceding school year, and KBOE had decided after her transfer hearing not to transfer her. She asserted that Principal Pfister and other KBOE administrators had then sought to hamper her ability to complete her duties, rather than helping her when she asked for assistance. She noted she had good evaluations prior to the 1998-99 school year. She believed there was a pattern of harassment and retaliatory conduct by Principal Pfister.

Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

> 5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra.

Grievant did not demonstrate reprisal, as that term is defined by the grievance procedure. Although she had filed a grievance in the past, she did not claim reprisal for filing a grievance. Her claim was that the reprisal resulted from her success in her transfer hearing before the board of education. This was not a grievance, and is not covered by the statutory definition of reprisal. See Butler v. Gilmer County Bd. of Educ., Docket No. 98-11-214 (Sept. 28, 1998). Further, Grievant did not demonstrate a causal connection between her challenge to being transferred and her placement on an improvement plan.

Grievant testified she had no major problems in terms of communication or obtaining support from Principal Pfister until after the transfer hearing. She explained she had come into the school year expecting that there would be two resource room teachers, and when she tried to talk to Principal Pfister about the needs of the 28 students, she got little or no response. In fact, she testified that anytime she tried to talk to Principal Pfister she would get two or three words in response, and felt like Principal Pfister did not want to communicate or work with her, and she was being ignored. Grievant testified she believed that the retaliatory conduct included parents coming to her classroom unannounced. She testified she felt they had been told to do so, because they came in with pencil and paper, which she found unusual, and they told her Principal Pfister told them they could come in anytime. She also believed parents had been given permission to “insult her intelligence,” inasmuch as one parent had criticized her instruction during an IEP meeting, and no one had suggested to her that this was inappropriate.

Principal Pfister denied that she had any ill feelings toward Grievant because she contested her transfer, and had not been transferred. She testified that when she received information that she was losing a position, she assumed Mrs. Hopper would have to be placed on the transfer list; however, she noted a discrepancy in Mrs. Hopper's seniority information and called the personnel office. Mrs. Hopper had more seniority than Grievant, and she was told by the personnel director that Grievant

would have to be placed on transfer, not Mrs. Hopper; and that was the reason for her decision.

Principal Pfister testified that parents are allowed to go into a classroom if they sign in at the office first, and that they have been invited to do so, and that she had heard Grievant invite parents to observe her classroom. She specifically remembered Grievant stating in an IEP meeting that she had no objection to M.'s mother “popping in” periodically to observe M. M.'s mother testified that Grievant had told her she was welcome in her class anytime, and she did not need to call in advance.

Grievant has not demonstrated that she was retaliated against for contesting her transfer. It is much more likely that Principal Pfister did not offer Grievant undying support because Grievant was difficult and rude. It also appears likely, based upon Grievant's description of events during the Level IV hearing, that either Grievant did not perceive events in the same way Principal Pfister and others did, or she did not describe events to others accurately. This may have also contributed to the communication problem with Principal Pfister. W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Robert Ridinger, et al., v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Steele, supra.

W. Va. Code § 18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96- BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495(Jan. 29, 1999). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

Grievant did not demonstrate that she was treated differently from any other similarly situated employee. As a classroom teacher, Grievant was subject to teacher observations by her supervisor just as any other teacher, and she was required to meet her responsibilities as a teacher.

Grievant argued that the assignment of additional duties when she was calling for help was harassment and discrimination. The only additional duty the undersigned finds in the record that Grievant was assigned was escorting one student to meet his parents after school. While Grievant testified that the parents were sometimes late, she did not know how often they arrived after 3:00 p.m., and she never told Principal Pfister of this problem. Principal Pfister had assigned Grievant the minor task of spending, at the most, 15 minutes waiting with this child each day.

Grievant argued Principal Pfister's observations were indicia of harassment. The act of observing, in and of itself, was something Principal Pfister had done in prior years, and something she was required to do. She observed all the teachers in her building. Grievant has not demonstrated that the comments on the observations were inaccurate.

Grievant argued that Principal Pfister's failure to respond to her grievances was indicia of retaliation and discrimination. Principal Pfister responded to all the grievances. She denied one, and told Grievant she should take the others (except this one) on to Level II. It is understandable that Principal Pfister would not want to conduct an informal conference or Level I conference with Grievant after Grievant called her a racist. This is not retaliation or discrimination. It is good common sense, and Grievant needs to take some responsibility for the consequences of her actions.

Grievant argued that Assistant Superintendent Petty's actions in directing Principal Pfister to assign Grievant additional duties, and in attending the informal conference onOctober 13, were improper and evidenced a concerted effort to harass, intimidate, and retaliate against Grievant. The

undersigned finds no evidence that Assistant Superintendent Petty directed Principal Pfister to assign Grievant additional duties. Assistant Superintendent Petty did not testify as to why she attended the informal conference, but such an act is not harassment or retaliation, and it is obvious Grievant was not intimidated.

Grievant pointed to her previous unblemished record as evidence of harassment and discrimination, noting that her excellence in teaching could not possibly have deteriorated so much in one semester. While Grievant was perfectly capable of performing her duties under less stressful conditions, it is clear that Grievant was unable to handle her higher caseload during the 1998-99 school year. At the beginning of the school year, Grievant had too many students during two class periods, and her students' schedules were not aligned in a manner which would allow her to provide all the required services. These were problems with delivering appropriate instruction. They had no bearing on Grievant's ability to provide consultative services, prepare appropriate lesson plans, provide progress reports, or document IEP files; and these problems were corrected. Grievant has not demonstrated that the demands upon her were excessive, according to law.

Finally, Grievant argued that she was harassed and discriminated against because her requests for help were ignored, and that Ms. Palenchar's act of informing supervisory personnel when Grievant did not perform her duties, without telling Grievant she was doing so, was improper and evidenced a lack of support and retaliation. Grievant presented no evidence that Ms. Palenchar was supposed to advise Grievant when she reported Grievant's actions to others in authority. While it is clear that Principal Pfister and Ms. Palenchar made little effort to assist Grievant, or to empathize with her, even when she was on sick leave for an extended period of time, they did not continually disturb, irritate,or annoy Grievant, except to try to get her to perform her assigned duties. She did get a response to her request for help, as Ms. Belcher was sent to investigate whether there was a staffing problem. It seems likely that Grievant had alienated those who could have offered her support. This lack of concern for Grievant's inability to perform her lawful duties, while perhaps contrary to the demeanor expected by the profession, is not harassment. Unfortunately, it was the children who suffered the most.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. As a grievance about an employee's evaluation and placement on an improvement plan is not a disciplinary grievance, a grievant has the burden of proving his case by a preponderance of the evidence. Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995).

2. Policy 5310 does not preclude a supervisor who discovers deficiencies while a teacher is in Phase II, from notifying the teacher of those deficiencies, returning her to performance evaluation, and implementing an improvement plan, if necessary, to assist the teacher in correcting the problem.

3. Generally, this Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate "such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded." Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 286 S.E.2d 682 (W. Va. 1981); Thomas v. Greenbrier Bd. of Educ., Docket No. 13-87-313-4 (Feb. 22, 1988); Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990).

4. The mere fact that a grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriatemotive or conduct on the part of the evaluator. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988).

5. Grievant did not meet the standard set for satisfactory performance as stated by Policy 5310: "Performance is consistently adequate and acceptable."

6. Grievant did not establish a violation of W. Va. Code § 18A-2-12, State Board of Education Policy 5310, or a violation of KBOE's policies pertaining to performance evaluations.

7. Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

> 3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
>
> 4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or
>
> 5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra.

8. Grievant did not demonstrate reprisal, as that term is defined by the grievance procedure. Although she had filed a grievance in the past, she did not claimreprisal for filing a grievance. Her claim was that the reprisal resulted from her success in her transfer hearing before the board of education. This was not a grievance, and is not covered by the statutory definition of reprisal. See Butler v. Gilmer County Bd. of Educ., Docket No. 98-11-214 (Sept. 28, 1998). Further, Grievant did not demonstrate a causal connection between her challenge to being transferred and her placement on an improvement plan.

9. W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Robert Ridinger, et al., v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

10. Grievant did not demonstrate that she was treated differently from any other similarly situated employee. As a classroom teacher, Grievant was subject to teacher observations by her supervisor just as any other teacher, and she was required to meet her responsibilities as a teacher.

11. W. Va. Code § 18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to thedemeanor expected by law, policy and profession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96- BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

12. Grievant was not harassed.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: March 30, 2001

Footnote: 1

An informal conference was requested by Grievant on February 9, 1999, and after the conference was held, Grievant's supervisor responded on April 12, 1999. This grievance was filed on May 3, 1999, and was denied at Level I on May 13, 1999. Grievant appealed to Level II. Seven days of hearing were held at Level II, on June 11, 14, 17, 22, and 30, and July 6, and 8, 1999. A Level II decision denying the grievance was issued on August 9, 1999. Grievant appealed to Level III. KBOE waived participation in Level III on August 19, 1999, and Grievant appealed to Level IV on August 26, 1999. After several continuances, four days of hearing were held at Level IV, on April 17, May 4, September 12, and September 20, 2000. Grievant was represented by David M. Fryson, Esquire, and Respondent was represented by James W. Withrow, Esquire. This grievance became mature for decision on December 12, 2000, upon receipt of Grievant's reply brief. KBOEdeclined to submit a reply brief.

Footnote: 2

Consistent with this Grievance Board's practice, students will be referred to only by their initials.

Footnote: 3

Grievant argued for the first time in her post-hearing written argument that her placement on an improvement plan was a disciplinary act, and Respondent had the burden of proof. The undersigned explained to the parties at the beginning of the Level IV hearing that the burden of proof was upon Grievant; there was no objection voiced; and Grievant proceeded to present her evidence first. This Grievance Board does not consider arguments raised for the first time in post-hearing written argument, because the other party was not placed on notice of the argument and did not have the opportunity to present evidence on the issue. This argument would be rejected in any case, as it has been determined that the placement of a teacher on an improvement plan is not a disciplinary act, as is noted above. W. Va. Code § 18A-2-12 and Policy 5310 provide that an improvement plan is required in order to give the employee an opportunity to improve; it is not a punishment.

Footnote: 4

It should be noted that changes have been made to Policy 5310 since the 1998-99 school year.

Footnote: 5

While Grievant did not argue this, the undersigned questions the manner in which Grievant was notified that she would be placed on performance evaluation. It appears, and this was supported by the testimony of Ms. Looney, that the employee should be notified that she will be evaluated before the evaluation is completed. In this case, Principal Pfister told Grievant on January 13, 1999, when she went over the observation form, that she would be placed on performance evaluation, then proceeded to review the evaluation she had already completed with Grievant, and then told her she would be placed on an improvement plan.

Footnote: 6

The parties did not explain what Grievant meant by this statement.