

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

IN THE MATTER OF

School District

)
)
) SPECIAL EDUCATION
) CAUSE NO. 99-29

)
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND ORDER

By letter dated March 2, 1999, the parents of the student filed a request for a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 *et seq.* The purpose of the request was to seek compensatory education for the child's schooling for the period from Fall of 1993, (Grade) through Spring 1998 (Grade). The School District ("District") objected to this request for a due process hearing and filed a motion to dismiss the appellants' request.

On May 4, 1999 a telephonic conference was held before Administrative Law Judge William F. Lemke to discuss the District's motion. The parent appeared and represented herself and her child. The District appeared and was represented by William A. Coats. Prior to the conference, the District filed a memorandum of authority with supporting documents in support of its motion to dismiss, while the parent submitted a memorandum of authority with supporting documents opposing the District's motion. During the telephonic conference, both parties presented oral arguments.

The Administrative Law Judge issued a letter order granting the District's Motion to Dismiss on May 7, 1999, and requested the District's attorney to prepare proposed Findings of

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Fact and Conclusions of Law. The record was continued and closed on May 25, 1999, upon the District's submission of proposed Findings of Fact and Conclusions of Law. The 45-day due date was extended to 30 days after the record closed (June 24, 1999).

The Administrative Law Judge, having read the briefs and supporting documents, and having heard the arguments made by the parties, and being otherwise fully advised, hereby makes the following:

FINDINGS OF FACT

1. The involved student is [redacted] years old and resides with his parents in the La Conner School District. The student has a disability consistent with [redacted], a [redacted] on the [redacted] of the [redacted].
2. From [redacted] until January 1998, the student was educated at [redacted] School. From 1992 until December 1997, the parents and district participated in and agreed to yearly Individualized Education Programs (IEPs).
3. In December 1997, because of changes in the student's behavior, the district recommended that the student's placement be changed from [redacted] School to the [redacted] Program. The parents objected to this change in placement and argued that their child should remain at [redacted] School. The parents requested a due process hearing, which was held on March 10, 11 and 12, 1998. After the hearing was held, the Administrative Law Judge issued findings of fact, conclusions of law, and an order. *See In re [redacted] School District, Spec. Educ. Cause No. 98-02 (May 4, 1998).* The order found that a change in placement was warranted and that the [redacted] Program was an appropriate placement.
4. For the extended school year in 1998, the parents asked and the district agreed to send the student to [redacted], a [redacted] school for children with learning differences.

For the 1998-99 school year, the district proposed to send the student to [REDACTED]. The parents agreed and have signed an IEP for this placement. The IEP for 1998-99 is not at issue.

5. By letter dated March 2, 1999 and received March 9, 1999 by the Superintendent of Public Instruction, the parents requested a due process hearing and sought compensatory education from the Fall of 1993 through the Spring of 1998, with a special emphasis upon [REDACTED] grade (1993-94), [REDACTED] grade (1995-96), and [REDACTED] grade (1997-98).

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instructions, as authorized by 20 U.S.C. § 1401 *et seq.* (Individuals with Disabilities Education Act), Chapter 28A.155 of the Revised Code of Washington (RCW), RCW Chapter 34.05, RCW Chapter 34.12, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) 300 *et seq.* and Washington Administrative Code (WAC) Chapter 392-171 and 392-172.

2. The IDEA is designed to ensure that disabled children receive “a free appropriate public education” (“FAPE”) to meet their needs. 20 U.S.C. § 1400(c). To address a disabled child’s needs, a multi-disciplinary team from the child’s school district must develop an IEP. This IEP must be “reasonably calculated to enable the child to receive an educational benefit[.]” *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). Under *Rowley*, the IEP is appropriate if it confers some educational benefit; it does not have to be superior to alternatives. *Rowley*, 458 U.S. at 200. The appropriateness of the IEP can only be measured at “the time it is offered to the student, and not at a later date.” *Carlisle Area School Dist. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995).

3. To determine the appropriateness of an IEP, IDEA establishes a system of procedural protections, including the parents’ right to challenge “any matter relating to” the

evaluation and education of the child. *Id.* § 1415(b)(1)(E). Parents have the right to have their complaints considered in “an impartial due process hearing.” *Id.* § 1415(b)(2).

4. The parents have a duty to request a due process hearing within a reasonable time. See e.g., *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149 (3d Cir. 1994) (denying tuition reimbursement for a delay of more than one year before due process request); *David P. v. Lower Merion Sch. Dist.*, 29 IDELR 23 (E.D. Pa. 1998) (applying a one-year limitation period to requests for compensatory education). The imposition of this duty upon parents is consistent with the IDEA’s goal that “disabled children receive an appropriate education without unnecessary delay.” *David P.*, 29 IDELR at 25.

5. In cases where a child has been denied a FAPE and has lost educational services, the equitable remedy of compensatory education may be awarded. E.g., *Burlington Sch. Comm. v. Massachusetts Dep’t of Ed.*, 471 U.S. 359, 369 (1985); *Meiner v. Missouri*, 800 F.2d 749 (8th Cir. 1986). The majority of courts that have awarded compensatory education, however, have required either egregious conduct by the school district or a gross procedural violation. E.g. *Carlisle Area School v. Scott P.*, 62 F.3d at 536-37; *Garro v. State of Conn.*, 23 F.3d 734 (2nd Cir. 1994); *Mary C. v. Wheaton*, 916 F.2d 69 (2nd Cir. 1990).

6. The parents’ current request for a due process hearing would require relitigation of factual issues which were litigated and determined in the prior due process hearing, Special Education Cause No. 98-02. The parents’ present assertions of problems which form the bases of their request for compensatory education are inconsistent with findings of fact and conclusions of law adopted in the prior due process hearing. Specifically, the findings in that case discussed the student’s educational background and discussed in detail the 1997-98 school year at [REDACTED] School. In Finding No. 9, the ALJ found:

9. [The student’s teacher] has worked with the Student since he first attended at [REDACTED]. His behaviors over the school years have fluctuated. The parties are in agreement that the Student has benefited from his educational program and has progressed from [REDACTED] through [REDACTED] grade. During

those years, the Student's behaviors did not present a danger to himself or to others. The Student made reasonable academic and behavioral/social progress during [REDACTED] through [REDACTED] grade. While there were some behavioral problems, the [REDACTED] staff, along with the Student's Parents, were able to work effectively with the Student.

This finding was consistent with a finding proposed by the parents, which stated:

4. [The student] has made reasonable progress in his placement at [REDACTED] School. While there have been behavioral problems, the staff, together with [the student's] parents, have been able to work effectively with [the student] so he has benefited from his educational program and progressed from year to year. [The student's] [REDACTED] grade year was particularly successful. [The student's] behaviors did not present a danger to himself or others, and he made reasonable academic and socio-behavioral progress.

Additionally, the ALJ concluded with regard to the student's last year at [REDACTED]

10. The Student has not derived educational benefit from his placement in the local school throughout the [REDACTED] grade. Although he did benefit in the prior years, the Student has grown and changed as he matured, and what worked previously is no longer working successfully. It does not appear that it is possible to provide the Student with appropriate aids and services within [REDACTED] resource room for the foregoing reasons. Significant amounts of disruption from other students, aides, and program changes would increase if the Student were to move to the [REDACTED] school.

If the parents had wished to request compensatory education, the time to make that request was during the previous due process hearing. Piecemeal or separate adjudication of issues regarding the same factual pattern is not appropriate. The findings and conclusions cited above are inconsistent with the claims that the parents are now making and are precluded under the doctrine of res judicata. *See e.g., Drinker v. Colonial School Dist.*, 888 F.Supp. 674 (D.C. Pa. 1995), *aff'd* 78 F.3d 859 (3d Cir. 1996); *Dallas Indep. Sch. Dist.*, 29 IDELR 930 (Tex. 1998). While the ALJ concluded that the student had not derived educational benefit from his placement in the local school throughout the [REDACTED] grade, the factual pattern which resulted in this conclusion and the district's proposed change in placement, is consistent with the district making every effort to provide a new program which would provide educational benefit for the student. Thus

the parents' current request for a due process hearing, as it applies to both the 1997-98 school year and prior years where the parents previously agreed the student made progress, is dismissed.

7. In addition, the factual pattern involved in the current request is not appropriate for an award of compensatory education. The award of compensatory education generally requires either a flagrant failure by the district to comply with the IDEA, or a gross procedural violation by the district. The alleged procedural violations complained of by the parents, even when viewed in a light most favorable to the parents, do not constitute problems that would merit the award of compensatory education.

8. The parents' request is untimely for the events that occurred in the period from 1993 to 1997. Neither the IDEA nor state law contain a limitations period for when parents may demand a due process hearing for a district's alleged failure to provide a FAPE. However, in interpreting these laws, courts have imposed reasonable time limitations on the subject matter to be considered in a due process hearing. *E.g. Nieuwenhuis v. Delavan-Darien School Dist.*, 27 IDELR 839 (E.D. Wisc. 1998). *See also, Bernardsville*, 42 F.3d at 158 (parents must request a due process hearing within a "reasonable time", and defining a reasonable time to be under one year); *David P.*, 29 IDELR at 25 (one year period is reasonable).

9. A reasonable period for ending the right to challenge a prior IEP is at the time the parties agree to a new IEP. *See Nieuwenhuis*, 27 IDELR at 845; *Washington Sch. Dist.*, 28 IDELR 211, 214 (Penn. 1997). This standard is reasonable because the adoption of a new IEP allows both parents and school officials the opportunity to correct any deficiencies in the prior IEP. The remedy of compensatory education is equitable in nature and thus subject to equitable defenses. *Burlington*, 471 U.S. at 374; *Parents of Student W v. Puyallup Sch. Dist.*, 31 F.3d 1489 (9th Cir. 1994). Parents who fail to object to an IEP and then agree to a new IEP have waived their right to appeal the prior IEP. Under this and other doctrines such as laches regarding the

adjudication of equitable issues, consideration of problems which occurred prior to the student's [REDACTED] grade year is now untimely.

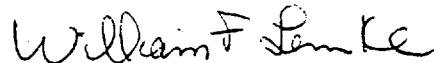
10. The parents have not identified a specific need that would be met by an award of compensatory education. The student is presently in a placement agreed to by both the district and the parents, and the current IEP is not at issue. The student is already eligible for an extended school year, and there are limitations on his time and ability to participate in additional programs. Under these circumstances, an award of compensatory education would be in the nature of punishing the district for alleged past conduct. This purpose is not appropriate nor warranted by the factual pattern presented in this matter.

ORDER

1. The District's Motion to Dismiss the due process hearing request of the appellants is granted;

2. The parents request for a due process hearing is denied.

DATED at Seattle, Washington this 28th day of May, 1999.



William F. Lemke
Administrative Law Judge
Office of Administrative Hearings