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Chief Administrative
Law Judge



STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

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RECEIVED

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Superintendent of Public Instruction
Legal Services

April 12, 2000

Parent


Robert Howman
Director, Special Education
Seattle School District
815 4th Ave N
Seattle, WA 98109

Brenda Little
Deputy General Counsel
Seattle School District
815 4th Ave No
Seattle, WA 98109

In re: Seattle School District - Special Education Cause No.99-104 and 99-114

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. Please review the decision carefully, including the portions relating to tutoring and reevaluation. As you will note, I have retained jurisdiction for a short period of time in order to select an independent evaluator. It is my hope that the level of detail provided in the decision related to the independent evaluation will help prevent misunderstandings and pave the way for a smooth process.

Also, please note that this is a final decision and that an aggrieved party may appeal to either federal or state superior court. An appeal must be filed within 30 days of the date of mailing of this decision pursuant to 20 USC 1415(e) (Individuals with Disabilities Education Act) or RCW 34.05.510-598 (State Administrative Procedure Act).

I will close the file after the selection of the independent evaluator. At that time I will send the file (including the exhibits) for record keeping to the Legal Services office at the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact the Legal Services office at OSPI at (360) 753-2298.

Sincerely,

Handwritten signature of Mary L. Radcliffe in black ink.

Mary L. Radcliffe
Administrative Law Judge

c: Legal Services, OSPI
Deputy Chief ALJ, Jan Grant
Mary Radcliffe, OAH/OSPI Coordinator

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

IN THE MATTER OF:

SEATTLE SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 99-104 AND 99-114

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

A hearing in the above-entitled matter was held before Administrative Law Judge Mary L. Radcliffe in Seattle, Washington, on February 23, 28, and March 3, 2000. The parents, A.G. and A.W., the appellants in cause number 99-104 (hereafter Parents, Mother or Parent, or Father) appeared on their own behalf. The Seattle School District (hereafter District) was represented by Brenda Little, deputy general counsel. The undersigned Administrative Law Judge, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE

On October 12, 1999, the Mother (also referred to as "Parent") filed a request for hearing with the Office of Superintendent of Public Instruction (OSPI). In summary, she requested that the Student be exited from special education. On November 4, 1999, the District filed a request for hearing with OSPI. In summary, it requested permission to reevaluate the Student over the objection of the Mother. The hearing date was continued several times at the request of the Parent in order to have time to conduct an independent educational evaluation (IEE). The Parent canceled the IEE and these matters proceeded to hearing. The record closed on March 13, 2000. The deadline for issuance of a written decision, pursuant to WAC 392-172-356 and orders of continuance, is April 12, 2000.

ISSUES AND REMEDIES

Issues

- a. Whether the District has attempted to conduct evaluation activities without consent of the Parent, and to that end, misrepresented or manipulated information in order to qualify the Student for special education, over the objection of the Parent;
- b. Whether the District has complied with its procedural obligation under the IDEA to include and consider the Parent's views;

c. Whether the District has complied with its obligation to provide the Parent access to the Student's records; and,

d. Whether the District has a good reason to believe that the Student's reevaluation should include new testing, so that either the Parent must consent to the reevaluation or the Parent's lack of consent should be overridden by an order of the hearing officer.

Remedies Requested

e. The Parents request that the Student be exited from special education services and that appropriate District personnel be reprimanded for behavior found to be inappropriate. The Parent also requests the District be required to pay for private tutoring for the Student.

f. The District requests an order to reevaluate the Student, including, if needed, new testing.

See Third Prehearing Order, November 10, 1999. Ex. 8.

FINDINGS OF FACT

Background

1. The Student and her Parents live within the boundaries of the Seattle School District. All of the schools referenced in this decision are District schools. At the time of the hearing the Student is [REDACTED] years old and in her second year in the [REDACTED] grade, at Cooper Elementary School.

2. The Student is a well behaved and personable child who gets along well with other students and teachers. She excels in athletics, especially gymnastics, and drama. The Student has been eligible for special education since October 14, 1996 when the District's multi-disciplinary team (MDT) concluded the Student had a specific learning disability (SLD) and that she would benefit from specialized instruction.

3. The Parents home schooled the Student for kindergarten and first grade. The Mother is the first to agree that their efforts were inadequate. The Student did not learn basic language arts or math skills.

Pathfinder, 19[REDACTED] - 19[REDACTED]

4. The Parents enrolled the Student at Pathfinder Elementary School for the second grade. They elected Pathfinder because of its Native American cultural focus. It was not

their neighborhood school. The Parents provided transportation which involved a 30 minute commute each way.

5. The Student began [REDACTED] grade in the fall 1995. On October 19, 1995, the Student's teacher made the Student a focus of concern and referred her to the Student Intervention Team (SIT) because of the Student's *general learning delays and her need for one to one instruction in most activities*. On November 1, 1995, after a change in her reading group did not address the problem, the teacher and SIT referred the Student for evaluation for special education eligibility.

6. On November 1, 1995, the school psychologist sent the Parents a notice of the focus of concern referral. The notice informs the Parents that if testing is requested the District will seek the Parents' consent. The notice provides that a summary of safeguards and due process rights is enclosed but the Parent reports that she did not receive it. There were numerous conversations between the Parents and the school staff about the need to evaluate the Student: The Mother was *against evaluation and special education services* but wanted the Student's learning delays addressed. The District wanted to evaluate the Student to determine the scope of her learning delays so that it could develop an appropriate program.

7. On January 25, 1996, the Mother signed the consent to evaluate. She was not coerced and agreed because the teacher convinced her it was the right thing to do for the Student. At the Mother's request, and as indicated on the consent to evaluate form, the Student was receiving tutoring, which all agreed would continue to the end of the school year.

8. The evaluation was completed October 14, 1996. (It is unknown why the evaluation took nine months to complete. It is not an issue in this hearing.) The evaluation activities included the school psychologist's administration of the Stanford-Binet intelligence test in the fall 1996, and the special education teacher's administration of the Woodcock Johnson Revised (WJR) and Woodcock-McGrew-Werder Mini-Battery of Achievement (MBA) achievement tests in spring 1996. The WJR and MBA were both administered to reduce any effects of test bias. The tests were appropriate for the Student's age and grade level. No reasons were presented at the hearing which would lead a qualified school psychologist to believe that the results lacked validity. The test protocols were followed and the results valid. The Parent's fear that the achievement tests were too hard for the Student or were given at inappropriate stages of the Student's learning is not supported by the record. It is the purpose of the achievement test to ascertain a current level of performance.

9. The school psychologist interpreted the scores of the intelligence and achievement tests. The Student's overall IQ tested in the low average range. The Student's overall score is misleading because there was a significant interarea variability between scores: the Student's strongest area was quantitative reasoning (average) and her weakest area was short-term memory (below average). This combination of scores suggests that the

Student does not remember information that is not meaningful to her. This is consistent with current teacher observations and the Student's testimony, that she does not always remember from one day to the next things she has been taught, especially in math.

10. On the academic achievement tests the Student scored in the middle kindergarten level in basic reading, reading comprehension, and written language, and at beginning kindergarten level in math calculation and reasoning. Also as part of the evaluation the District nurse gave the Student a health examination and found the Student to be in good health. The multi-disciplinary team (MDT) ruled out the Student's home schooling as a primary factor causing her academic deficits because such delays are usually remedied in a short time and such was not the case with the Student. The MDT also ruled out health, cultural, economic, environmental and behavior factors, as the main cause of the academic deficits. The MDT qualified the Student for special education in the category of Specific Learning Disability based on the significant discrepancy between her intellectual ability and actual achievement.

11. On October 14, 1996, the District sent to the Parents a "Parent Notice: Initial Eligibility for Special Education." In conversation with the teacher about the results of the test, the Parent asked, but was not allowed, to see the tests. Although they discussed the evaluation, the teacher did not provide the Parent a copy of the summary analysis evaluation.

12. An IEP meeting was held on November 6, 1996. Both Parents attended. The Student's father agreed with and signed the IEP. The Mother disagreed with the IEP because she did not agree that the Student needed special education services. The Mother signed her agreement as a member of the IEP team because of the pressure by District staff and their statements that special education services under an IEP was the only way to provide help to the Student.

13. The IEP also contains a consent provision for an initial IEP. It states:

PARENT/GUARDIAN AGREEMENT: This Individualized Education Program (IEP) was prepared and reviewed with me in understandable language. Opportunity has been given to me to provide input into the development of this IEP. I also understand that this program is reviewed annually and that I may request a reevaluation or change of educational program for my child. My signature below is provided as consent for the placement described in this IEP. I understand my consent is required for initial placement and can be revoked at any time prior to the initiation of services.

14. The Mother signed the consent for initial IEP services on November 8, 1996. The Mother reports she felt coerced to sign the consent on the same basis as she signed the IEP on November 6, and that the principal had ordered her to come to the school to sign the IEP.

15. Fall 1996 was difficult for the Parent because she felt that the school principal and staff would not listen to her opinion that the Student did not belong in special education yet needed extra help. The Mother felt that staff tricked her into attending meetings by saying the purpose of the meeting was to discuss issues but the meeting was really to get her consent to the evaluation results and the proposed IEP. Because of an argument that escalated between the principal and the Mother, the principal did not allow the Mother on the school grounds for an unknown period of time. When a new principal arrived (David Paul), he gradually allowed the Mother on school grounds. Also during this time, the Student missed a lot of school which the Mother attributed to the stress of the situation.

16. The following school year, on November 11, 1997, by telephone, the Student's teacher scheduled an IEP meeting with the Parent for November 20, 1997. The teacher completed a Notice of IEP Meeting but it is unknown if it was mailed or received. On the day of the meeting, the Parent canceled her participation. The IEP meeting proceeded without the Parent and a new IEP was developed.

17. On April 27, 1998, near the conclusion of the student's fourth grade year, the Student's teacher administered the Woodcock-McGrew-Werder Mini-Battery of Achievement to the Student. He did not give notice to, or obtain consent of the Parent. Had he done so, the Parent would have objected. The results showed the Student had made progress from a kindergarten to second grade level. The teacher did not report these scores to the Parents but did tell them that the Student was still significantly behind her peers.

18. The 1998-99 school year was the Student's [REDACTED] grade year. At the beginning of November 19[REDACTED], the Parent sent letters to the teacher and the school psychologist removing the Student from special education. On November 17, 1998, the teacher sent, and the Parent received, a Notice of IEP Meeting for November 30. The Notice included a copy of the Parent's procedural due process rights. On the day of the meeting, the Parent canceled her attendance and asked to reschedule. The IEP team met without the Parent and completed and signed a new IEP. On the same day, teacher completed a Notice of Action of the District's intent to review the Student's progress in order to update the Student's IEP in spite of the Mother's request to exit the Student from special education. The Parent did not receive the Notice nor a copy of the IEP.

19. In total, the Student attended Pathfinder from fall 19[REDACTED] to December 19[REDACTED]. During this time neither the Mother nor District staff changed their opinions about whether the Student needed special education. In spite of many conversations, the Mother continued to feel that the staff was not considering her point of view because the staff would not agree with her opinion.

20. Because of the strife between staff and the Mother, the Father was frequently responsible for the Student's transportation and communication with staff. On occasion, staff spoke to the Father about the Mother in a negative way. The Father characterized

the relationship between Pathfinder staff and the Mother as a mutual conflict in which no one would try to meet half way. The Father did not experience any difficulty in his relationship with Pathfinder staff which he attributes to his easy going personality.

21. (a) The District and the Parent provided documentary evidence of notices addressed to the Parents over the course of the years at Pathfinder. The notices routinely state that a copy of the IDEA procedural safeguards is enclosed. The District did not provide any testimony or other evidence to support its assertion that the notices and procedural safeguards were mailed and/or received by the Parents except in those circumstances specifically described in these Findings of Fact.

(b) The Parent asserts that she received notices of meetings that included lists of staff people who would be attending a proposed meeting. (These notices are not in evidence.) She also testified that the District knew that if it gave her notice of an IEP meeting she would not attend, which is why, she asserts, that Pathfinder staff lied to her about the purpose of meetings, so that she would attend. The undersigned concludes that more probably than not, the Parent did not receive some of the written notices from Pathfinder staff. However, the Parent was aware of the District's proposed actions, with the exception of the April 1998 achievement testing conducted by the Student's teacher.

(c) The Parent testified that she did not receive a copy of her procedural due process safeguards until fall 1998. The District did not rebut this testimony. Although the Parent's testimony is confusing and sometimes contradictory about which notices she received, she remained clear that she did not receive notice of her procedural due process hearing rights until fall 1998. Based on the weight of the evidence, the undersigned concludes that the Parent's testimony regarding receipt of procedural safeguards is the more probable and that she did not receive them until fall 1998.

Concord Elementary

22. On or about December 2, 1998, the Mother removed the Student from Pathfinder and enrolled her in their neighborhood school, Concord Elementary. It is unknown whether the Student entered Concord as a fourth or fifth grader as she was in a combination fourth and fifth grade class. The Parent moved the Student so as to avoid Pathfinder's pressure to provide the Student with special education services. The Parent quickly learned that the Concord principal had talked with Pathfinder staff and concurred with Pathfinder's opinion that the Student needed special education services. In response, on December 9, 1998, the Mother wrote to the Concord principal that the Student was academically delayed because of home-schooling; that the Student was misplaced in special education; and, the Student was neither retarded, nor had a learning disability, social or behavior problems. The Student finished her 1998 school year at Concord. It is unknown if she received services under an IEP.

23. During the Student's time at Concord she tried out for, and got, a sought after lead role in the school's seven week production of *Oliver*. She worked hard, was the first to memorize her lines (which were extensive) and was focused and committed to her role. The play was a success and the Student's performances notable. The drama teacher, who directed and produced the play, was very impressed with the Student's capability.

Summer School

24. The Parents accepted the District's offer of summer school for 1999. They elected and enrolled the Student in the [REDACTED] Program sponsored by the District. The Student did well and the Parents noticed her improved self esteem. The summer school curriculum was not academic in nature. It was designed to encourage [REDACTED] to see school as a positive environment.

Cooper Elementary, [REDACTED]

25. The Parent enrolled the Student in Cooper Elementary for the [REDACTED] in order to avoid the Concord staff pressure to allow special education services. The [REDACTED] school year was a second fifth grade year for the Student. This is the program the Student is attending during the course of the hearing. Cooper staff have not provided the Student special education services because the Mother refused services and denied the District permission to conduct the Student's triennial reevaluation, due in October 1999.

26. The Student's program is, with the exception of reading, in her regular education *fifth grade classroom*. Her fifth grade teacher reports that the Student is not making progress. She needs to make gains in all subjects or is at serious risk of not exiting the fifth grade. The teacher provides the Student with a great deal of one to one direction and instruction and other students assist the Student in understanding assignments. However, even with this assistance the Student does not always remember subjects she has been taught (especially in math) nor does she understand many of the assigned tasks. Based on those experiences, the teacher suspects that the Student may have processing and/or retention problems. The teacher provides accommodation in math by sometimes giving the Student less difficult or fewer problems. The teacher recommends achievement testing for the Student to determine the scope and nature of her learning challenges.

27. The Parent asserts that the testimony of the fifth grade teacher regarding the Student's memory problems and the recommendation for reevaluation testing was coached by the District. In support of the assertion, the Parent points to the significant memorization the Student was able to do for the play, *Oliver*. There is no evidence to substantiate the Parent's assertion that the witness was told what to say. The teacher's testimony is credible and is consistent with the Student's 1996 evaluation which provides that the Student may have difficulty remembering things that are not meaningful to her.

28. Cooper Elementary has a reading program entitled "Success For All" (SFA). All students are tested and then grouped by reading ability. The Student was placed in a beginning fourth grade instructional reading level class. The Student has not progressed in her reading level and at 16 weeks she continued to test at 4.1 grade level. The reading teacher notes that the Student can read aloud but she misinterprets and misunderstands the meaning of the words. Most recently, the Student scored 30 to 40% on tests that require at least a 65% to pass. The reading teacher recommends the Student be tested to identify specific areas of deficits, for example, phonics and vocabulary.

29. At the outset of the year, the Cooper school psychologist recognized the need to conduct the triennial reevaluation before the expiration of the IEP on November 1, 1999. On October 1, 1998, she mailed to the Parents, and the Parents received, a notice of intent to reevaluate. It contained a copy of the Parent's procedural due process rights. Based on the letter, on or about October 7, the Mother told the school psychologist she refused to consent to reevaluation of the Student and stated that the Student did not need special education. The Parent requested that the Student continue in the SFA reading program. The school psychologist pointed out that the SFA reading program is a general education class, not specialized instruction. On this occasion or another close in time, a meeting did occur with the Parent. The vice principal attended the meeting, in the absence of the principal. After that meeting, after the Parent left, the vice principal expressed her frustration with the Parent's position. She commented to the effect that if the Parent interfered with the District's job that she (the vice principal) would make the Parent appear an unfit mother. The District did not rebut this testimony, and it is found credible.

30. On October 12, 1999, staff tried to schedule an IEP meeting with the Parent for October 14. The Parent refused because of short notice. Staff acknowledge that they did not give the Parent sufficient notice of the IEP meeting. Also, on October 12, 1999, the Parent filed a request for hearing with OSPI. On November 4, 1999, the District filed its request for hearing, seeking an order permitting reevaluation of the Student.

Access to Student Records

31. The exact chronology of the Parent's requests to see the Student's educational records is unclear. However, at various times she has made such requests of building office staff, school psychologists, a school psychologist supervisor, and principal. She has been given these various responses: the person did not have them, they were in another location, it required two months to process a request, the supervisor had them, and the principal needed to approve a request. The Parent took these responses to mean that she could not look at the files or that they were lost. The Parent did not see the Student's educational records until after filing for the due process hearing.

Absenteeism

32. During the Student's school career she has been absent many times. The Parents dispute the accuracy of some of the District's records but at the same time acknowledge the absences, which they see as *not unusual for children*. The following numbers reflect a fair degree of accuracy:

<u>School Year</u>	<u>Absences</u>
1995-96	30
1996-97	18
1997-98	11
1998-99	14
1999-2/17/00	20

33. The Student has also been tardy many times each year, far in excess of the noted absences. However, records do not reflect whether the Student was five minutes, forty-five minutes, or hours tardy. The Parent accounts for the large number because the District staff kept track of the Student more than other students, other parents sneak in the back door of the school, and because of the transportation challenges that naturally arise from driving the Student to school every day.

Medicaid Billing

34. On March 21, 1996, the District addressed a letter to the Parents informing them of its intention to bill Medicaid for medically related evaluations and services, including nursing evaluations. The Parents did not receive the letter until the District sent the Student's records to the Mother in anticipation of the hearing. The Parent concludes that now they know why the Father's wages have been garnished. The Parent did not provide verification for this conclusion.

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 Instruction as authorized by 20 U.S.C. Section 1401 et seq. (Individuals with Disabilities Education Act (IDEA)), Chapter 28A.155 RCW, Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 CFR 300 et seq., and Chapter 392-172 WAC.

Statute of Limitations/Time Bar to Parents' Claims

2. The District asserts, for the first time in its closing brief, that its actions in the 1995-96 and 1996-97 school years are too old and are barred by the state's three year statute of limitations. The District correctly points out that the IDEA and the implementing state

regulations do not provide for a specific time limitation in which a parent may raise an issue for hearing. It is also correct that the Ninth Circuit, in reviewing an Arizona special education dispute, applied the most analogous Arizona statute of limitations pertaining to personal injury disputes. *Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228 (9th Cir. 1994). However, neither the Ninth Circuit nor the state Supreme Court have identified the appropriate Washington statute of limitations. A statute of limitations does not commence until after the cause of action has accrued. See RCW 4.16.005. A cause of action does not accrue until the conduct causing the injury ceases. See *Hill v. Dept. of Transportation*, 76 Wn.App. 631, 887 P.2d 476 (1995) (Court of Appeals applies the federal "continuing tort doctrine").

3. Based on the evidence presented, the District failed to comply with its notice requirements until November 1998 when it provided the Parent a copy of her procedural due process protections. At that time the District was continuing to ignore the Parent's fundamental opposition to special education services, thereby failing to consider her input in violation of the IDEA. The undersigned concludes that this situation is analogous to the court's analysis in *Hill v. Dept. of Transportation*, *id.* If a statute of limitations was applicable here, the Parent's cause of action would begin to accrue no earlier than fall 1998 when the Parent learned of her due process rights, or in fall 1999 when the District formally agreed to stop serving the Student until the dispute regarding eligibility and services was resolved. A statute of limitations would expire, at the earliest in fall 2001.

4. It bears noting that it could not be credibly argued that the District relied on the appearance or belief that the Parent had given up, or that the District had resolved the Parent's long standing opposition to special education services. The undersigned concludes that neither the application of a three year statute of limitations nor the equitable principle of *laches* prevent consideration of the 1995-96 and 1996-97 school years.

The IDEA, Generally

5. Congress enacted the Individuals with Disabilities Education Act (IDEA) in order to address inadequacies in the educational system in the United States which resulted in many children being excluded from school. 20 U.S.C. Sec. 1400. Congress wanted to ensure that every child had access to a free public education that was appropriate to his or her unique needs regardless of disability. 20 U.S.C. Sec. 1400(c). In addition, Congress recognized that some children who attended regular education classes were prevented from having a successful educational experience because of undetected disabilities, and that those children's needs should be identified and served. 20 U.S.C. Sec. 1400(5). Responsibility falls on local school districts to find and evaluate those children in their communities. WAC 392-172-100. The IDEA is also intended to protect the rights of students and their parents 20 U.S.C. Sec. 1400(c). Since the inception of

the IDEA, there has been an increasing emphasis on parent partnership with the district in all stages of the special education process.¹

6. The IDEA and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. The responsible district bears the burden of proving compliance with the procedural requirements of the IDEA. *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396 (9th Cir. 1994).

7. In *Hendrick Hudson District Board of Education vs. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act. The Court held that the State's first responsibility is to comply with the procedures set forth in the IDEA.

Initial Evaluation

8. The Parent asserts that the District's 1996 evaluation of the Student was manipulated so that the District would falsely determine the Student eligible for special education and receive federal funds. The Parent's assertion is not supported by the record.

9. The tests administered to the Student were appropriate for her suspected disability, age and grade level. There is no evidence to suggest that the tests were improperly administered, scored or manipulated. The statistical significance of the tests was appropriately determined by a school psychologist. The tests scores correctly established the Student's eligibility as Specific Learning Disability. The results were and remain consistent with the Student's learning delays. The results do not show, as the Parent fears, that the Student is retarded. To the contrary, a learning disability is a determination that a student is significantly not achieving her potential. Some of the Student's early learning delays may have been attributable to her home schooling. The evaluation reasonably considered and rejected it as the primary basis of her learning delay. The undersigned concludes that the District's summary analysis properly qualified the Student for special education pursuant to the requirements set out in WAC 392-172-106, -108 and -126 through -132.

Unauthorized Testing

10. The Parent's assertion that the District administered tests to the Student without the knowledge or consent of the Parent is supported by the record. In April 1998, the

¹For example, the January 2000 state regulations, Ch. 392-172 WAC, amended to comply with the 1997 IDEA amendments and 1999 federal regulations, contain a new provision for definition of the IEP team. The parent of the student is the first listed team member. See WAC 392-172-153

Student's teacher administered an individual achievement test without prior notice to, or knowledge of, the Parent, in violation of WAC 392-172-184. In addition, at the time the test was administered the IDEA required that a district obtain parental consent before conducting reevaluative testing. 20 U.S.C. Sec. 1414(b)(3).² Therefore, the District committed procedural error when it conducted this testing without notice and consent of the Parents.

11. The Parent's assertion that the test and results were improperly manipulated or misrepresented to the Parents is not supported by the record.

Parent Participation

12. The IDEA and implementing regulations require a district to make efforts to obtain parent participation and to consider the parent's input in the educational planning for a student. See WAC 392-172-156(2) through (7) for IEP meetings held before June 1997, 20 U.S.C. Sec. 1415(b)(1) for IEP meetings thereafter, and W.A.C. 392-172-153, -15700, and -15705 beginning January 2000. Here, the Parent asserts that the District did not consider her input during the IEP processes each year and only sought her participation in 1996 because it needed her consent. The Parent's assertion has merit.

13. The IEP processes that followed the initial 1996 IEP were held with limited demonstrated effort to obtain the Parent's presence. This is not surprising because the Parent's input was her request to exit the Student from special education. Such a position cannot be incorporated usefully into an IEP.

14. The undersigned concludes that the Parent's position was, at a minimum, a revocation of her consent for the provision of special education services. The option of a parent revoking consent was provided for in the District's initial IEP, which the Parent signed under protest, and is required by WAC 392-172-040(4)(c). However, the District failed to give meaning to the Parent's input and instead, continued to update the Student's IEP from year to year without addressing and considering the Parent's fundamental opposition to special education services. As a result of her input failing to bring about meaningful response, the Parent provided written notice of withdrawal of the Student from special education. When that failed she moved her child to two different schools in the hopes that her wishes would be heard. The District's lack of consideration for the Parent's input rendered the Parent's participation in the educational planning of her child meaningless.³ The undersigned concludes that the District's actions seriously infringed on

²1997 Amendments to the IDEA.

³If the District were to assert that the Parent had recourse in a due process hearing, it should be noted that the District did not provide the Parent notice of her due process procedural protections until fall 1998. In any event, the District's obligation to consider a

the Parent's right to participate in the Student's educational planning. That failure constitutes a denial of a free appropriate public education, pursuant to *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992).

Access to Records

15. The IDEA ensures that a district must provide a parent of a special education student the opportunity to examine all educational records as part of the parent's procedural due process protections.⁴ See 20 U.S.C. Sec. 1415(b). It stands to reason that a district is entitled to have a procedure by which a parent may ask to see her child's educational records. Here, the District put off the Parent's requests with various vague responses which only served to discourage the Parent rather than reasonably inform the Parent of the means by which she could exercise her right to see the Student's records, in violation of 20 U.S.C. Sec. 1415(b).

Transportation

16. A school district is responsible to provide transportation to eligible special education students pursuant to W.A.C. 392-172-204. The record is insufficient to establish the Parent's indirect assertion that the district failed to comply with this responsibility. Moreover, the Parent selected two schools in order to avoid special education services and cannot claim that the District had an obligation to provide special education transportation but refrain from other special education services. Based on the evidence, the undersigned declines to render any conclusions that the District failed in its obligations to provide appropriate transportation pursuant to W.A.C. 392-172-204.

Medicaid Bill

17. A school district is required to provide special education and related services to an eligible student without cost to the parents. W.A.C. 392-172-020(2). The Parent asserts that her husband's wages have been garnished because of a 1996 letter from the school advising the Parents of its intention to submit a bill to Medicaid for its 1996 evaluative activities for the Student. The Parent provided no support for this assertion. If the Parent wants reimbursement from the District, she must provide documentation about the nature and basis of the garnishment to the District. If it is related to the District's evaluation or provision of special education to the Student, the District is required to reimburse the

parent's input is not contingent upon whether the parent has been given notice of her procedural safeguards.

⁴Of note, the January 2000 state special education regulations require a district to provide the parent a copy of the evaluation and each IEP. See WAC 392-172-111(b) (evaluation) and WAC 392-172-160(3) (IEP).

Parents. If the garnishment is related to a District activity that applies to all students, not just special education students, or is unrelated to special education, then the District is not required to reimburse the Parents. In the event of a dispute, either party may request a due process hearing to resolve the matter.

Exiting the Student from Special Education

18. The Parent asserts that the Student should be exited from special education because the Student does not have a disability, her learning delays are attributable to lack of instruction.

19. A special education student remains eligible for special education until the district evaluates the student and the multi-disciplinary team, including the parent, determines that the student no longer qualifies for services. 20 U.S.C. Sec. 1414(c)(5) and W.A.C. 392-172-186(4). Part of the evaluation is to consider whether there are other primary reasons that may account for the learning delay, such as lack of instruction. See W.A.C. 392-172-10905(2)(a).

20. Based on the foregoing, the undersigned denies the Parent's request to exit the Student from special education. The 1996 evaluation appropriately identified the Student as eligible. A new evaluation must be conducted in order to exit the Student from special education, as required by W.A.C. 392-172-186(4). If the Parent disagrees with the reevaluation she may file a request for hearing pursuant to W.A.C. 392-172-350.

Request to Reevaluate

21. The District requests permission to conduct new testing in its triennial reevaluation of the Student, over the objection of the Parent. A district is required to reevaluate a special education student at least every three years. See 34 CFR 300.536 and W.A.C. 392-172-182. If the reevaluation exceeds a review of current records and includes new individual testing, consent of the parent is required. See 34 CFR 300.505 and W.A.C. 392-172-185. If a parent refuses consent a district may seek an order from a hearing officer overriding the lack of consent and granting permission to conduct the reevaluation, pursuant to W.A.C. 392-172-304.

22. The purposes of reevaluation are to determine: (1) whether the student continues to need special education; (2) the present levels of performance and educational needs of the student; and, (3) any additions or modifications to the special education and related services to enable the student to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general curriculum. See W.A.C. 392-172-186(2).

23. In this case, a reevaluation is required for two reasons: the Parent's request to exit the Student from special education cannot be granted without an evaluation; and, three years have expired since the last evaluation. Credible evidence establishes that in the

language arts and math areas the Student is not consistently learning what is being taught.⁵ The District has established that the Student has made some progress since her initial 1996 evaluation but only new achievement testing can determine the amount and nature of her progress. Therefore, the District's request for the Student's reevaluation to include new achievement testing is appropriate to meet the purposes of reevaluation. In addition, the Student may have memory and/or processing problems which may need to be evaluated. The need for any such additional testing or evaluation would be determined by the evaluator and paid for at district expense.

24. Accordingly, the undersigned grants the District's request to reevaluate the Student pursuant to W.A.C. 392-172-182 through -190, over the objection of the Parent, pursuant to W.A.C. 392-172-304. The method of reevaluation is discussed below in the Remedies section of this decision.

Remedies

25. The Parent's request for one to one tutoring for the Student is granted. The undersigned has authority to order compensatory education when a district has denied the Student a FAPE. See *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cr. 1990), cert. denied, 111 S.Ct. 1317 (1991), and *Burlington Sch. Comm. v. Massachusetts Dept. Of Ed.*, 471 U.S. 359, 369 (1985). Here, the undersigned concludes that 50 hours of tutoring is an appropriate compensatory remedy because it addresses the needs of the Student, who suffered consequences of the District's and Parent's unresolved dispute.

26. The manner in which the tutoring will be provided will be decided by the recommendation of the evaluator or, if the Student remains eligible for special education, by the IEP team, as discussed below. The undersigned anticipates that the tutoring may be provided as several hours a week over a period of time and/or concentrated in a summer program. It is anticipated the tutoring would be completed by November 30, 2000. The District shall identify two appropriate and qualified tutors (depending on the recommendations of the evaluator), who may be district employees or private tutors. The Parent may select which tutor will provide services. The subject matter(s) of the tutoring will be determined by the recommendation of the evaluator, as discussed below.

27. As stated earlier in this decision, the Parent's request to exit the Student from special education is denied because a student may not be exited without a current evaluation, pursuant to W.A.C. 392-172-186(4). There being no current evaluation, and a triennial reevaluation due, the undersigned orders that a reevaluation, including new achievement testing, be conducted to determine whether the Student continues to be

⁵This does not mean that the Student is retarded or bad. In fact, the Student clearly has other exceptional qualities and abilities. It may mean that she continues to be in need of specially designed instruction that fits her unique learning style.

eligible for special education services, and to determine the other requirements of a reevaluation.

28. In light of the Parent's opposition to a reevaluation, the undersigned considers whether there is a way to structure the reevaluation process so that the Parent will consider it fair and impartial. The District's past failure to consider the Parent's input has given the the Parent reason to doubt the fairness of the District.⁶ The undersigned concludes that the appropriate remedy is that the reevaluation be conducted by an independent evaluator at public expense. Being mindful of the independent evaluation canceled by the Parent prior to the hearing, the undersigned provides the manner in which the reevaluation will be conducted.

29. The reevaluation shall be conducted as follows:

30. The District shall compile a list of at least three independent and qualified evaluators, pursuant to W.A.C. 392-172-150. These evaluators shall be qualified to administer, score, and interpret appropriate achievement tests, and render relevant educational conclusions and recommendations, as appropriate, about the Student's suspected area of disability: *specific learning disability*.

31. The District shall provide that list to the Parents and the undersigned no later than 5:00 p.m. on Monday, April 24, 2000.

32. The Parent shall notify the undersigned, with a copy to the District's counsel, no later than 5:00 p.m. on Monday, May 1, 2000, of any considerations she has of any of the listed evaluators. The Parent may prioritize her choice of evaluators by assigning the number "1" for her first choice and so on.

33. The undersigned will select the evaluator, giving due regard to the Parent's comments and priorities, as well as to the evaluators willingness and availability to conduct the evaluation as provided for in this decision. The ALJ will provide the parties written notice as to the selection of the evaluator. The District shall then arrange for contracting with the evaluator but not have any other contact with the evaluator. The contract should include a reasonable amount of time for a parent meeting with the evaluator after the issuance of the report. The District shall notify the undersigned and the Parent when the contract has been executed. The undersigned, in her discretion, may provide to the evaluator either a letter and/or a copy of the specific pages in this decision that pertain to

⁶The undersigned does not conclude that had the District acted differently the Parent would have agreed to an evaluation and to special education services. The Parent has an opinion about special education that may not be impacted by a procedurally and substantively compliant process. She is, nonetheless, entitled to such a process.

the evaluation to ensure the evaluator is aware of the nature and scope of the requested evaluation.

34. The evaluator shall identify, in writing, those educational records at his or her discretion, that are relevant for review in conducting the evaluation and provide the list to the Parent and District. The District shall prepare and provide to the Parent a release of information form identifying the requested documents, and the Parent shall sign and promptly return the release of information form. The District shall then provide those documents to the evaluator. In the event the activity requires the exercise of discretion (such as Student work samples) the District and Parent shall collaborate and decide which samples to send the evaluator. If the parties are unable to reach agreement, each party may identify an equal number that each may provide to the evaluator.

35. The District shall also prepare a release form that allows the District to receive a copy of the evaluation report. The Parent shall sign and return the release to the District.

36. The Parent shall cooperate with making the Student available for evaluation.

37. The evaluator may, as s/he determines appropriate, conduct new intelligence testing and make a recommendation for an additional evaluation to determine whether the Student has a potential processing or memory problem (if the evaluator does not have the qualifications or expertise to assess this type of suspected disability). In the event the evaluator recommends such an evaluation, the evaluator may conduct said evaluation (if qualified) or suspend his or her evaluation until the second evaluation is done and reported to the evaluator. Selection of the second evaluator will follow the same process as described for the first evaluator.

38. After the evaluation has been conducted, the evaluator will provide a written evaluation report to the Parent and the District, incorporating, as appropriate, any other evaluative data or report. The written report shall include, but not be limited to: a list of documents reviewed; achievement tests administered and their results and significance; a diagnosis as to any identified learning disability; a recommendation regarding the Student's eligibility for special education; an opinion, if appropriate, as to whether the Student's learning delays are the result of lack of instruction, absenteeism, and/or any other basis; and educationally relevant recommendations. The evaluator is additionally asked to consider and make a recommendation as to tutoring. Specifically, if the evaluator finds the Student no longer eligible for special education, in what way would 50 hours of one to one tutoring best be implemented and in which subjects. If the evaluator finds the Student continues to be eligible for special education, in what way would 50 hours of one to one tutoring best be implemented given the evaluator's educational recommendations. The evaluator should identify any particular skills or knowledge needed by the tutor. The tutoring is intended as *additional support* to the Student as compensatory education.

39. After the evaluation is issued, the Parent shall have an opportunity to meet with the evaluator to ask questions and obtain information about the evaluation and/or the evaluation report. This shall be at public expense. The Parent is responsible for scheduling the appointment with the evaluator.

40. Upon receipt of the evaluation the District shall schedule an evaluation team meeting, including the Parent, to discuss the evaluation, decide any remaining issues necessary to conclude the reevaluation process, and take any further actions as required by the reevaluation regulations, W.A.C. 392-172-182 through -190. If the District has questions or needs clarification regarding the evaluation, the District may schedule a conference call with the evaluator to take place during a team meeting so that the Parent has an opportunity to be present during the discussion with the evaluator.

41. If the Parent disagrees with the results of the reevaluation, she may indicate her dissent, and/or file a request for a due process hearing regarding the appropriateness of the reevaluation pursuant to W.A.C. 392-172-350. If the Parent tells the District that she disagrees with the reevaluation but does not request a hearing, the District shall consider the Parent's concerns and decide whether to request a hearing to establish the appropriateness of the evaluation. Either party may request a hearing to determine the appropriateness of the District's reevaluation pursuant to W.A.C. 392-172-350.

42. If the Student continues to be eligible for special education, the IEP team shall meet to determine how to implement the recommendations of the reevaluation, including compensatory education tutoring, and develop an appropriate IEP. The District shall make efforts to ensure the Parent's participation, as called for in the regulations. If the Parent elects to not participate the District shall make a record of its efforts to obtain her participation. Any IEP resulting from the reevaluation is not an initial IEP and does not require the consent of the Parent before it is implemented. If the Parent disagrees with the proposed IEP, either the Parent or the District may request a due process hearing for a determination of the appropriateness of the IEP, pursuant to W.A.C. 392-172-350.

43. The undersigned denies the Parent's request to reprimand the District, as it is not within the jurisdiction of the administrative law judge to impose a reprimand.

44. The undersigned retains jurisdiction of this matter solely on the selection process of the evaluator(s). In order to enforce this Order, the parties are directed to state superior court.

ORDER

1. The District conducted a reevaluation test without notice to the Parent in violation of W.A.C. 392-172-184 and 20 U.S.C. Sec 1414(b)(3). The District's initial evaluation of the Student was done with the consent of the Parent and complied with the regulations pertaining to evaluations. The District did not misrepresent or manipulate the testing in the

initial evaluation or the April 1998 test in order to falsely qualify the Student for special education services.

2. The District failed to consider the Parent's views during the Student's IEP process. As a result, the District seriously infringed on the Parent's right to participate in the educational planning process of the Student, thereby denying the Student a free appropriate public education.

3. The District acted in a manner so as to discourage the Parent from exercising her right to review the Student's educational records, in violation of 20 U.S.C. Sec. 1415(b).

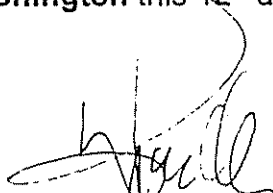
4. The District has established a basis for conducting new testing in the Student's triennial evaluation, so that the Parent's refusal to consent to the reevaluation is overridden, pursuant to W.A.C. 392-172-304. The reevaluation shall be conducted by an independent evaluator as provided for in the Remedies section of the Conclusions of Law.

5. The Parent's request to exit the Student from special education is denied for lack of authority. An independent evaluation, as described in Order #4, shall determine whether the Student should be exited from special education pursuant to W.A.C. 392-172-186(4).

6. The District shall provide the Student 50 hours of one to one tutoring as compensatory education. The nature and manner in which this is delivered is to be determined by the independent evaluator and, if the Student remains eligible for special education, by the IEP team, consistent with the Remedies section of the Conclusions of Law.

7. The Parent's request for a reprimand of District staff is denied because the undersigned has no authority to reprimand District staff.

Dated at Seattle, Washington this 12th day of April, 2000.



Mary L. Radcliffe
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

This is a final agency decision subject to a **petition for reconsideration** filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the administrative law judge at his/her address at the Office of Administrative Hearings. The petition will be considered and disposed of by the administrative law judge. A copy of the petition must be served on each party to the proceeding and the Superintendent of Public Instruction. The filing of a petition for reconsideration is not required before seeking judicial review.

Pursuant to 20 U.S.C. Section 1415 (i) (Individuals with Disabilities Education Act) and Chapter 34.05.542 RCW, this matter may be further appealed to a court of law. The **Petition for Judicial Review** of this decision must be filed with the court and served on the Superintendent of Public Instruction, the Office of the Attorney General, all parties of record, and this office within thirty days after service of the final order. If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). Otherwise, the 30-day time limit for filing a petition for judicial review commences with the date of the mailing of this decision.

This certifies that a copy of the above Findings of Fact, Conclusions of Law and Order was served upon the parties or their representatives on 4/12/00, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Parent




ML

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