



ART WANG
Chief Administrative
Law Judge

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STATE OF WASHINGTON

OFFICE OF ADMINISTRATIVE HEARINGS Superintendent of Public Instruction
Legal Services

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August 30, 2001

Parents



Federal way, WA 98025

Dr. Sarah Drinkwater, Director
Student Support Services
Federal Way School District
31405 - 18th Ave S
Federal Way, WA 98003

Charlotte Cassady
Attorney at Law
PO Box 2877
Vashon, WA 98070

Jeffrey Ganson
Attorneys at Law
2550 Wells Fargo Center
999 Third Ave
Seattle, WA 98104

RE: Federal Way School District, Special Education Cause No. 2001-SE-0025

Dear Parties:

Enclosed please find the Amended Findings of Fact, Conclusions of Law, and Order Regarding Motion For Summary Judgment and the Third Prehearing Order in the above-referenced matter.

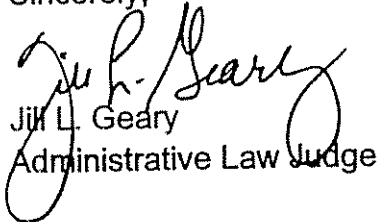
On August 29, 2001, counsel for the district sent the ALJ further legal argument. By the time the letter was received, the amendments to the order had been made and the legal arguments of counsel were not considered with regard to those amendments. On August 30, 2001, counsel for the parents called to say that she wanted the opportunity to submit further legal argument for the record. It was explained that they would not be considered for the amendment.



In re Federal Way School District
Cause No. 2001-SE-0025
August 30, 2001
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If you have any questions regarding this order, please my assistant, Virginia King, at (206)
464-7095.

Sincerely,



Jill L. Geary
Administrative Law Judge

c: Legal Services, OSPI
Mary Radcliffe, OAH/OSPI Coordinator

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

IN THE MATTER OF

FEDERAL WAY SCHOOL DISTRICT.

SPECIAL EDUCATION
CAUSE NO. 2001-SE-0025

THIRD PREHEARING ORDER

A prehearing telephone conference was held before Administrative Law Judge Jill Geary on August 29, 2001, pursuant to agreement by the parties. Appellant, the parents of the student at issue, were represented by Charlotte Cassady, attorney. The Federal Way School District (hereinafter "district"), was represented by Jeffrey Ganson, attorney.

Based upon the statements of the parties and the pleadings and documents on file herein the undersigned enters the following Prehearing Order:

Motion for Reconsideration

On August 3, 2001, Administrative Law Judge Jill Geary issued Findings of Fact, Conclusions of Law, and Order Regarding Motion for Summary Judgment in response to the Federal Way School District's motion for summary judgment. On August 13, 2001, the parents filed Parents' Motion for Reconsideration of that Order. On August 23, 2001, the district filed Federal Way School District's Memorandum in Opposition to Motion for Reconsideration.

On August 29, 2001, a prehearing conference was held to discuss the parents' motion for reconsideration. Present at the hearing were the mother, the attorney for the parents, Charlotte Cassady, and the attorney for the district, Jeffrey Ganson. The parties were given the opportunity to provide oral argument, and the ALJ took the matter under advisement.

The ALJ has reconsidered the decision, and as a result has amended the original order.

Due Process Hearing

1. The hearing scheduled for September 10, 2001, through September 21, 2001, is hereby stricken.

Prehearing Conference

2. A prehearing telephone conference will be held for the purpose of further clarifying what issues remain for hearing and scheduling the due process hearing as follows:

DATE: September 10, 2001

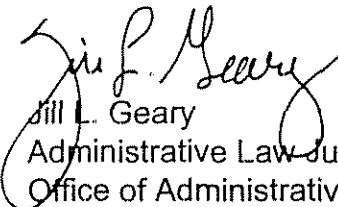
TIME: 9:00 a.m.

PLACE: By telephone. The parties are instructed to call the Office of Administrative Hearings at (206) 464-7095 or (800) 845-8830, ten minutes prior to the scheduled time and leave their telephone number with the receptionist. The administrative law judge will initiate the conference call at the scheduled time. **A party who fails to register an appearance by calling in may be subject to the default provisions of RCW 34.05.440 and .434, as described above.**

The decision day due was previously ordered to be thirty days from the date of the close of the record. This date, at the very least, would have been October 21, 2001. Although this date is likely to change once the due process hearing is rescheduled, at the agreement of the parties, the due date shall currently remain October 21, 2001.

IT IS HEREBY FURTHER ORDERED that if no objection to this Order is filed within ten days after its mailing, it shall control the subsequent course of the proceeding unless modified for good cause by subsequent Order.

DATED at Seattle, Washington this 30th day of August, 2001.


Jill L. Geary
Administrative Law Judge
Office of Administrative Hearings

This certifies that a copy of the above Order was served upon the parties or their representatives on August 30, 2001, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Parents



Federal Way, WA 98023

Dr. Sarah Drinkwater, Director
Student Support Services
Federal Way School District
31405 - 18th Ave S
Federal Way, WA 98003

Charlotte Cassady
Attorney at Law
PO Box 2877
Vashon, WA 98070

Jeffrey Ganson
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999 Third Ave
Seattle, WA 98104

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

IN THE MATTER OF

FEDERAL WAY SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2001-SE-0025

**AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER REGARDING MOTION FOR
SUMMARY JUDGMENT**

STATEMENT OF THE CASE

Amended portions of the order appear in bold type.

On March 29, 2001, the parents filed a request for due process hearing against the Federal Way School District (district). According to the due process hearing request, at issue was whether the district failed to evaluate the student for special education and develop an Individual Education Program (IEP) for the student in the seventh, eighth, ninth and tenth grades; whether the student needs residential placement in order to receive a free appropriate public education (FAPE); whether the parent's chosen placement of Boulder Creek Academy is an appropriate residential placement for the student; whether the district should be responsible for funding all aspects of the student's placement at Boulder Creek Academy; whether the district should reimburse the parent's for the student's prior placement at Boulder Creek Academy; whether the district should fund the placement on an extended year basis; and whether the district should reimburse the parents for the cost of an educational evaluation performed at the parent's expense in July 1999.

A prehearing conference was scheduled for April 12, 2001. At the parties' request the prehearing conference was postponed until April 18, 2001. On April 18, 2001, a prehearing conference was held. The district was represented by Jeffrey Ganson, Attorney, and the parents were represented by Charlotte Cassady, Attorney. During the prehearing conference, the parties indicated that they intended to file motions for summary judgement. Accordingly, a motion schedule was developed. Motions were to be exchanged by June 28, 2001. Responses were to be exchanged by July 5, 2001. On

Amended Findings of Fact, Conclusions of Law, and Order Regarding Motion for Partial Summary Judgment

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June 28, 2001, the parents informed the administrative law judge and the district that it did not intend to file a motion. The district filed its motion and the parents responded in a timely manner.

A prehearing conference was held on July 9, 2001, to allow the parties to make oral argument on the motion for summary judgement before Administrative Law Judge Jill Geary. The matter was taken under advisement.

On August 3, 2001, Administrative Law Judge Jill Geary issued Findings of Fact, Conclusions of Law, and Order Regarding Motion for Summary Judgment in response to the Federal Way School District's motion for summary judgment. On August 13, 2001, the parents filed Parents' Motion for Reconsideration of that Order. On August 23, 2001, the district filed Federal Way School District's Memorandum in Opposition to Motion for Reconsideration.

On August 29, 2001, a prehearing conference was held to discuss the parents' motion for reconsideration. Present at the hearing were the mother, the attorney for the parents, Charlotte Cassady, and the attorney for the district, Jeffrey Ganson. The parties were given the opportunity to provide oral argument, and the ALJ took the matter under advisement.

ISSUES FOR SUMMARY JUDGMENT

The District moves for summary judgment on the following matters:

1. Whether the parents should be denied reimbursement for the student's placement at [REDACTED] because they withdrew the student before he could be evaluated by the district and without disputing the student's placement;
2. Whether the district is responsible for evaluating and educating the student since his removal from the district as of June 1999;
3. Whether the parents' claims should be barred due to the applicable statute of limitations and the equitable doctrine of laches; and

Amended Findings of Fact, Conclusions of Law, and Order Regarding Motion for Partial Summary Judgment

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4. Whether there is evidence to support a conclusion that the district should have identified the student as eligible for special education prior to the student's withdrawal from the district.

MATERIALS CONSIDERED

In addition to argument of the parties, the ALJ has considered the following documents and materials:

1. The parents' request for due process hearing dated March 28, 2001;
2. The district's Motion for Summary Judgment;
3. Declaration of Christopher Willis, dated June 21, 2001;
4. Letter to Mr. Randy Kazor, from the mother, dated September 16, 1998;
5. Letter to Sarah Drinkwater, Director of Special Education Services, from the mother, dated September 16, 1998;
6. Referral for Special Services, for the student, by the mother, dated October 5, 1998;
7. Federal Way School District Parent Questionnaire, completed by the mother, dated October 5, 1998;
8. Parent/Guardian Consent for Evaluation, signed by the mother, dated October 5, 1998;
9. District notes regarding student testing, dated October 27, 1998, October 29, 1998, and November 2, 1998;
10. Letter to whom it may concern, from Tom Langdon, School Psychologist, dated December 2, 1998;
11. Withdrawal Form and checklist, for the student, dated December 7, 1998;
12. Federal Way Public Schools Student Emergency Information & Medical Care Authorization, for the student, signed by the mother on September 4, 1998;
13. Photo release form for the student;
14. Withdrawal Form, for the student, signed by the registrar on December 14, 1998;
15. [REDACTED] Transfer of Records Request, signed by the mother on December 16, 1998;
16. Referral for Special Services, for the student, signed by the mother on September 10, 1999;
17. Federal Way Public Schools Authorization for Exchange of Confidential Information, for the student, signed by the mother on September 10, 1999;
18. Federal Way School District Parent Questionnaire, for the student, signed by the mother on September 10, 1999;
19. Parent Questionnaire list of treating professionals;
20. Federal Way Public Schools verification for Medicaid consent form, signed by the mother on September 10, 1999;

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21. Letter to Sarah Drinkwater, Special Services Director, Request for Special Education Evaluation, from the parents, dated September 16, 1999;
22. Letter to Sarah Drinkwater, Special Services Director, Request for Funding for Residential Treatment Program, dated September 16, 1999;
23. Letter to the parents, from Sarah Drinkwater, dated September 29, 1999;
24. Letter to mother, from Sarah Drinkwater, dated January 13, 2000;
25. Letter to mother, from Thomas Murphy, Superintendent, dated February 8, 2000;
26. Letter to Superintendent Murphy, from the parents, dated February 25, 2000, with attachments, signed by the parents on January 31, 2000;
27. Letter to the parents, from Thomas Murphy, Superintendent, dated March 13, 2000;
28. Letter to Chris Willis, Special Education Services, from the parents, dated July 3, 2000, with four pages of attachments: test results;
29. Letter to the parents, from Eileen Mason, Administrative Assistant, CEDU Family of Services [REDACTED] dated April 19, 2000;
30. Confidential Psychological Report for the student, from Boulder Creek Academy, prepared by dated July 29, 1999, with attachments;
31. Letter to the parents, from Christopher Willis, Student Support Services Coordinator, dated July 25, 2000;
32. Letter to Dr. Drinkwater, from Charlotte Cassady, Attorney, dated March 1, 2001;
33. Letter to Chris Willis, Coordinator Special Education Services, from the parents, dated August 3, 2000.
- 34. Declaration of Wynn Stack, dated July 5, 2001¹;**
- 35. Declaration of Wynn Stack in Support of Parents' Motion for Reconsideration of District's Summary Judgment Motion, dated August 13, 2001;**
- 36. Declaration of Charlotte Cassady in Support of Parents' Motion for REconsideration of District's Summary Judgment Motion, dated August 13, 2001;**
- 37. Virginia Mason Mercer Island Teacher Evaluation Form and CAP Rating Scale, dated June 23, 1998;**
- 38. Educational Evaluation by Barbara Bennett, MA, Educational Therapist, dated July 1998;**
- 39. Printouts of Federal Way School District computer records for student registration maintenance (three pages);**
- 40. Printout of Federal Way School District e-mail correspondence between WSIPC Support, Teri Mahlstedt, IA, and Jenee Moss, ILH, dated January 21, 1999;**
- 41. Printout of Federal Way School District e-mail correspondence between Ron MacDonald, Sarah Drinkwater, and Jan Bleek, dated March 8, 2000; and**

¹The information contained in this document was considered in the original order, however it was not listed in the *Materials Considered* section.

42. Letter from Leland M. Johnson, M.D., dated April 19, 1999.

43. Declaration of Christopher Willis, dated June 21, 2001.

FINDINGS OF FACT

The record reflects the following material facts are either undisputed, or those that are most favorable to the nonmoving party, the parents:

1. The student is a sixteen year old, who is currently enrolled in [REDACTED] a private residential program, located in northern [REDACTED]. The parents are paying for the student's enrollment in [REDACTED].

2. The parents currently reside within the boundaries of the district.

3. The student was first enrolled in the district in September 1990, for kindergarten.

4. The student attended middle school in the district at [REDACTED]. During the student's seventh grade year (1997-1998), the student received passing grades during his first semester, and mostly failing grades his second semester.

5. On September 16, 1998, the parents sent a letter to [REDACTED] principal, Randy Kaczor, requesting a special education evaluation. The letter stated that over the summer the student had been evaluated at the parent's expense and it was determined that he had learning disabilities. The parents sent a similar letter to Sarah Drinkwater, Director of Special Education Services.

6. The parents were given a referral form to complete, which they did. It was returned to the district on October 13, 1998. On the form, the parents wrote the following:

[The student] had a very difficult year in the 7th grade. He was assessed over the summer by an Ed. therapist. He was found to have learning disabilities.

See Exhibit 3. On the parent questionnaire, the parents indicated that the student had difficulty in completing and understanding assignments. With regard to the student's health, the parents indicated that he had allergies. With regard to the student's social skills, the parents indicated that he got along with his family and other children well. With regard to the student's behaviors, the parents wrote that, "at times he can be very oppositional and has been depressed." They also wrote that he was creative, kind, generous and stubborn. The parents indicated that they expected the school to address

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the student's learning problems. **When the parents referred the student for special education, they provided the district with a copy of the report from Barbara Bennett. Ms. Bennett's report discusses the student's trouble with anger, depression, and sleep, as well as his resistance to testing. The district was aware from the student's performance in seventh grade that he had problems with work completion and missing school in the past.**

7. The district sent notice to the parents of the referral and its decision to evaluate the student. The district's form entitled parent/guardian consent for evaluation was given to the parents and stated as follows:

Your son/daughter has been referred to Special Education because a suspected disability may be interfering with his/her success in school. A review of referral information, previous assessments, and or/classroom performance indicates the need for an assessment to determine if such a disability exists and to plan the most appropriate program.

To evaluate the need and determine special education eligibility it is recommended that assessments be done in the following areas: intellectual, academic. . .Evaluation personnel may include, but may not be limited to, the school nurse, psychologist, occupational therapist, physical therapist, special education teacher, speech-language pathologist, and classroom teacher

* * * *

Consent is voluntary and may be revoked at any time prior to the completion of the evaluation. Please read your procedural safeguards, as described in the enclosed booklet. This is an important source of information and should be kept by you as a reference.

The parents gave consent for the district to evaluate the student. Around this time, the district gave the parents a booklet which described their procedural safeguards. **The parents do not deny getting a booklet informing them of their procedural safeguards. However, there is no finding that the procedural safeguards contained information with about the notice requirement of 20 USC 33 § 1412 (a)(10)(C)(iii)(I).**

8. The district scheduled evaluation testing for October 27, 1998. On October 27, 1998, the student refused to sit for the testing and the parents called the district and asked that

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they have more time to prepare the student. On October 29, 1998, the parents called the district to reschedule the testing. On November 2, 1998, the parents called to again cancel the testing.² Later in November, the parents called the district and said that they did not want the assessment at that time because the student did not want special education assistance. **The mother spoke to the school counselor and explained that the student was resistant to the testing and that she was fearful that if forced to proceed, the student would stop going to school all together. The counselor did not make any suggestions on how to otherwise accomplish the evaluation. The evaluation was put off.**

9. Neither the parents nor the district made any attempt to reschedule the evaluation testing prior to December 7, 1998.

10. On December 7, 1998, the parents called [REDACTED] to say that the student was being withdrawn from school. At the time of his withdrawal, the student was receiving failing grades in all of his classes. On December 16, 1998, the parents sent the district a request

²In their letter of September 16, 1999, the parents indicate that the evaluation did not occur because the student was "unable to cooperate." However, there is nothing in that letter that explains how or whether this was communicated to the district. In February 2000, the parents wrote the following with regard to the evaluation process:

The student was approached about taking tests for the special education evaluation in a classroom setting, in front of his classmates. Feeling chagrined, the student told the school counselor he did not feel like taking the tests that day. The counselor acquiesced to not testing him that day. Another date for testing was set, verbally, with the student at that time. When the test date arrived, the student refused to attend school. The student's mother contacted the school counselor to notify him of this; and inquired what could be done to alleviate [the student's] anxiety over taking the tests. The counselor had no input; nor did they offer to set up the testing in any other (more private and less stressful to the student) setting, such as the ESC or the student's home. This matter was left unresolved. Another test date was not set after that. No further attempts were made by the District to evaluate this student, and no services were ever offered.

See Exhibit 14, page 5. This explanation accompanied the parents request that the district pay for the student's private residential treatment. The parents did not submit a sworn declaration with regard to the facts leading up to the student's withdrawal.

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that it send the student's records to [REDACTED] a private school in [REDACTED] Washington. The student attended [REDACTED] for one day.

11. The student was enrolled in the district's Internet Academy in January 1999, but never performed any work through the academy. In February or March 1999, the district called the parents to inquire as to the student. The parents explained that they could not get him to do any work and did not know what to do. The student's name remained in the district's Internet Academy records until July 1999. The student was available to the district for evaluation from January 1999 until June 1999.

12. There is no evidence that the parents ever communicated their desire to have the student evaluated for special education while the student was enrolled in the Internet Academy, nor did the district take any steps to evaluate the student during this period.

13. On July 29, 1999, the parents enrolled the student in [REDACTED]

14. On September 10, 1999, the parents submitted a Referral for Special Services form to the district. On the form, with regard to the student's social abilities, the parents wrote that as of June 1999, the student was not getting along with families members, and only got along with other children "ok." With regard to the student's behaviors, the parents indicated that they were concerned about "LD, violent, depressed, oppositional, school refusal." On the form, the parents indicated that they did not think the public school could do anything for the student. The parents gave their consent for a special education evaluation.

15. On September 16, 1999, the parents wrote the district asking the district to perform a special education evaluation of the student, and asking that the district pay for the student's residential treatment program.

16. On September 29, 1999, the district responded by saying that because the student was residing outside the district, in the residential treatment program in Idaho, it was not in the position to extend evaluation services to the student. The district also stated that the district only bears responsibility for students currently residing in the district, and that the location of the family home is not determinative. The letter concludes by stating that if the student were to relocate within the district, the district would recommence its evaluation efforts.

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17. On January 11, 2000, the district met with the parents. At the meeting, the district restated its position with regard to its responsibility for the student so long as the student was out of the state. The district offered to work with the parents to transition the student back into the district. The district followed up the meeting with a letters dated January 13, 2000, and February 8, 2000.

18. On February 25, 2000, the parents wrote the district asking that they take financial responsibility for the student's placement. In the letter, the parents indicate that they would bring their son back to the district "after he successfully completes his residential treatment program." In the letter, the parents indicated that they had been in contact with legal counsel and that if the district did not agree to their requests, they would take legal action against the district.

19. On March 13, 2000, the district responded by letter that it was not responsible for the parents' unilateral placement of the student in the private residential placement, and it reiterated its position with regard to the student's residence.

20. On July 3, 2000, the parents sent the district the results of psychoeducational testing of the student, done at [REDACTED]

21. On July 25, 2000, the district responded in letter, thanking the parents for the information and offering to evaluate the student when he returns to the district.

22. On March 1, 2001, the parents' attorney sent a letter to the district, asking that the district take financial responsibility, both past and future, for the student's placement at [REDACTED]. On March 28, 2001, the parents sent their request for due process hearing to the Office of the Superintendent of Public Instruction.

23. There is no evidence that the student has returned to the district since he was enrolled in [REDACTED]

24. There is no evidence that the parents filed for a due process hearing prior to March 28, 2001.

CONCLUSIONS OF LAW

Jurisdiction

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.

Standard

2. The motion for summary judgment is directed to the authority of the administrative law judge to decide a matter where there is no dispute of material facts. See WAC 10.08.135; *ASARCO Inc. v. Air Quality Coalition*, 92 Wn. 2d 685, 696, 601 P.2d 501 (1979). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton Condominium Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (citing *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974)).

3. In determining the motion, the facts should be considered in the light most favorable to the nonmoving party. *Bowles v. Washington Dep't of Retirement Sys.*, 121 Wash.2d 52, 62, 847 P.2d 440 (1993). However, once the moving party makes factual assertions, it is then upon the nonmoving party to provide the factual basis to rebut the moving parties position. In *White v. State*, 131 Wn.2d 1 (1997), the Washington Supreme Court stated:

However, a nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain. After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Meyer v. University of Wash.*, 105 Wn2d 847, 852.

White, at 9.

Reimbursement for Private Placement

4. Parents are entitled to reimbursement by school districts for their expenditures on private special education for a child if it is ultimately determined that such placement, rather

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than the IEP proposed by the school district, is proper under the IDEA. *School Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985). **Reimbursement is described as the appropriate remedy for parents who have placed their children in a private placement pending the outcome of administrative and judicial review, instead of keeping them in what is ultimately determined to be an inappropriate placement. Id. at 369-370.**

5. Reimbursement for a student's private placement by his or her parents is addressed in Washington regulation. The WAC states:

If the parents of a special education student, who previously received special education and any necessary related services under the authority of a school district or other public agency, enroll the student in a private preschool, elementary or secondary school without the consent of or referral by a school district or other public agency, a court or a hearing officer may require a school district or other public agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that a school district or other public agency had not made a free appropriate public education available to the student in a timely manner prior to that enrollment and that the private placement is appropriate.

WAC 392-172-231(1). The regulation goes on to allow reduction or denial of reimbursement, if the parents do not give prior notice to the district of their rejection of the district's proposed placement and their intent to withdraw the student. WAC 392-172-231(2).³

³In 1998, the only codification of the law with regard to reimbursement for students placed without consent or referral from a district was in 20 USC 33 §1412(a)(10)(C). That provision specifically applies to children who had previously received special education and related services, and is not applicable in this case. We have considered the parents' argument that under the Ninth Circuit Court of Appeal's reasoning in *Hacienda LaPuente*, the same protections should apply to a disabled student who has not received services. See *Hacienda La Puente Unified Sch. Dist. v. Honig*, 976 F.2d 487 (9th Cir. 1992). We disagree. That case discusses the extension of IDEA protections, specifically the right to a due process hearing, to disabled students who have not been identified as eligible for special education. The court reasoned that there was nothing in the law that required the that only students receiving special education had a right to a due process hearing, and therefore so long as the student was disabled the question of the student's right to special education was subject to the procedural protection of a due process hearing. In our case, the statute is very specifically directed to students who have previously received services, not just disabled students who are potentially eligible for special education. Therefore, it is this ALJ's conclusion that the statute is not applicable and the reasoning otherwise set forth in the decision under *Bulington* and its progeny,

6. The regulation is silent as to parents' right to reimbursement if a student has not been evaluated and identified as a special education student. However this situation was addressed by the Washington Court of Appeals in *Hunter v. Seattle School District*, 46 Wn. app. 523 (1987). In *Hunter*, the child was enrolled in the Seattle School District in the fourth grade. While in the Seattle School District, the child started demonstrating behavioral problems, and his teacher suggested that he get psychological help. *Id.* at 524. The following year, the student was enrolled in a private school, where he stayed for over three years. He was expelled from the private school, and shortly thereafter, moved in with his grandparents in the Edmonds School District, where he stayed for over a year. The student then went to live with his father in the Federal Way School District, where he was expelled after about two months. The Federal Way School District recommended that the mother contact the Seattle School District, where she lived, for assistance. Instead, the mother enrolled the student in a private school in Utah. A week after the student was placed in Utah, the mother contacted the Seattle School District for help and the Seattle School District declined to offer assistance, stating that they would evaluate the student's special education needs upon his return to the Seattle School District. In its decision, the Court of Appeals frames the issue as follows:

The controlling issue in this case is: Must a school district reimburse a parent for the cost of tuition expended on a child when the parent, without informing the school district, unilaterally places the child in a private school, located out of state, before the school district has had the opportunity to assess the child's educational needs and make a placement recommendation? We answer this question in the negative.

Id. at 526. In justifying its conclusion, the Court of Appeals explained:

In the present case, the Seattle School District has never proposed a placement for [REDACTED]. He was placed in the private school before his mother contacted the District and asked for District assistance. There was no dispute between the District and the appellant as to the appropriate placement of [REDACTED].

Id. The Court of Appeals emphasized that expressed parental disagreement to what a district proposed was a crucial element of the right to reimbursement. *Id.* at 527. The Court of Appeals did not fault the Seattle School District for failing to go out of state to evaluate the student.

including *Ash v. Oswego*, is the correct analysis.

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7. The reasoning in *Hunter* was upheld and explained by the Ninth Circuit Court of Appeal in *Ash v. Oswego*, 980 F.2d 585 (1992). The Ninth Circuit states:

In arriving at its conclusion, the district court relied on a case which places a significant burden on parents to bring their disabled children to the school district's attention before they can resort to self-help with the hope of reimbursement. See *id.* (citing) *Hunter ex rel. Hunter v. Seattle Sch. Dist. No. 1*, 46 Wash. App. 523, 731 P.2d 19 (Wash. Ct. App. 1987)). Yet the IDEA also burdens participating states to seek out disabled children. Specifically, "participating states must implement policies and procedures such that all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated." *Hacienda La Puente Unified Sch. Dist. v. Honig*, 976 F.2d 487 (9th Cir. 1992) (quotation omitted). Furthermore, in proceeding under the IDEA, a school district must notify parents whenever it proposes (or refuses) to initiate (or change) "the identification, evaluation, or educational placement of their child or the provision of a free appropriate public education to their child." 20 U.S.C. §§ 1415(b)(1)(C). The notice required in such instances must also inform parents of their rights under the IDEA. *Id.* §§ 1415(b)(1)(D).

Recognizing that states participating in IDEA owe a certain obligation to the disabled children within their borders, the decision in *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985), affirmed an order reimbursing parents where the school district "egregiously violated the procedural requirements" of the IDEA. *Id.* at 632. The court did so despite the parents' initial failure to confront the school district regarding its actions and to pursue immediately their rights under the IDEA. *Cf. Town of Burlington*, 736 F.2d at 799.

Ash, at 589. In *Ash*, the U.S. Court of Appeals denied reimbursement between 1983 and 1989, even though the school district in that case had failed to follow child find and evaluation procedures mandated by the IDEA. *Id.*

8. In *Hall*, the U.S. Fourth Circuit Court of Appeals upheld the district court's earlier conclusion that the school board had "egregiously violated the procedural requirements of the EAHCA." *Hall*, 774 F.2d at 632. In its decision, the Court of Appeals emphasized how, along with other procedural violations, the most notable was that the school board had repeatedly failed to notify the parents in the case of their procedural rights. *Id.* at 634.

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9. The question in this case then becomes whether the district, in its failure to evaluate the student, committed procedural errors so egregious as to give rise to the reasoning in *Ash and Hall*.

Evaluation

10. In 1998, when the district gave the parent notice of its intent to evaluate the student, that notice was required to contain a description of the action proposed, an explanation of why the agency was proposing the action, a description of other options considered, a description of the evaluation procedure, test, record or report the agency used as a basis for the proposed action, a description of other relevant factors, and a statement that parents have procedural safeguards and the means by which a copy of the safeguards can be obtained. 20 USC 33 §1415(c).

11. In this case the district's notice, though not entitled "prior written notice," contained notice that the district was going to assess for eligibility for special education, because review of referral information indicated a need. It also explained that intellectual and academic assessments would be performed. It also included not only a statement that procedural safeguards exist, but enclosed a copy of the safeguards. The evaluation notice does not state the specific documents used to make the decision to refer the student, but given that the mother referred the student, this was not a point of prejudice to the mother.

12. A district has an obligation to locate, evaluate and identify students residing in the boundaries of the district who are suspected of having a disability. WAC 392-172-100(1). This obligation extends to children attending private, including religious schools. *Id.* Once a district has decided to evaluate a child, it has thirty-five days from the date of obtaining written consent from the parents to complete the evaluation, unless that deadline is extended by agreement between the parents and the district. WAC 392-172-104(2).

13. The Department of Education Office of Special Education Programs has issued an extensive policy letter discussing a school district's obligation under child find to locate, evaluate and identify children unilaterally placed by their parents in private settings. See

*Memorandum to Chief State School Officers, OSEP: 00-14, dated May 4, 2000.*⁴ The memorandum makes it very clear that a school district continues to have all of its child find obligations, including re-evaluation, even if the student is in a private setting. The memorandum also addresses the local school districts obligations to conduct child find activities when a student is placed outside of the district where the parents reside. In answering this question, OSEP writes:

SEAs and, consistent with State policy, LEAs, are responsible for ongoing efforts to locate, identify, and evaluate all children residing in the State who are suspected of having disabilities under Part B, so that FAPE is made available to all eligible children. 34 CFR §§300.121, 300.125, and 300.220. Generally, as a matter of State law, children are considered to reside in the home of their parents even if they physically do not live there. This would mean that if a child attends a private school located in an LEA (either in the same State or in another State) other than the LEA in which the child's parents reside, the LEA in which the child's parents reside generally would be responsible for child find, as well as ensuring that required reevaluations are conducted, unless the State assigns that responsibility to another entity. An LEA has flexibility as to how it ensures these responsibilities are met. For example, it may assume the responsibility itself, contract with another public agency, or make other arrangements. If the LEA through child find identifies a child as a child with a disability, and is not the entity responsible for child find, that LEA should notify the resident LEA of the child's parents so that required evaluations can occur.

Id. at Section 1, Question and Answer 11. The memorandum does not address situations where, as a matter of State law, children are not considered to reside in the homes of their parents if they are not physically there.

14. Without addressing the issue of residency directly, in *Ash*, the U.S. District Court did not assign any procedural error to the fact that the Oregon school district was unable to complete an evaluation process started in January 1989 until August 1989, noting that it was because the student was in school out of state. *Ash*, 766 F.Supp. at 864. The Ninth Circuit Court of Appeals said nothing that would indicate it disagreed with this reasoning, when as a matter of law it could have increased the period of reimbursement back to some

⁴The memorandum is available on the Internet at OSEP's home page.

earlier date in 1989 if it determined that the state's decision to put off the evaluation until the child was returned was unreasonable. See *Ash*, 980 F.2d 858.

Analysis

15. In applying the law to the facts of our case, there are two ways of defining relevant periods of time. There is the breakdown of the time before and after September 1998, when the parents first made their disagreement known to the district. There is also the time before and after July 1999, when the student was placed out of state. Both of these distinctions are considered in the following analysis

16. The parents have not established a right to reimbursement for any period prior to their expression of disagreement in September 1998. In coming to this conclusion, it is important to look carefully at the facts as set forth in *Ash*.

17. Christopher Ash was born in 1978. In 1981, he was evaluated by his local Education Service District and referred to an ESD-run play program for mentally retarded and developmentally disabled children. The Ashes were given a copy of procedural safeguards at this time. An IEP was developed for Christopher in 1981. In 1982, Christopher was diagnosed as autistic, and referred to his local school district. The school district concluded that Christopher was eligible for special education. In 1982, the Director of Special Education for the ESD told the parents of a public program available to Christopher. There is no indication that a new IEP was created. In 1983, Christopher was eligible to go into public school. Instead, the parents placed him in a Montessori School, without expressing any disagreement with what the district proposed. The school district did not make any effort to locate the student in 1983. In 1984, the parents met with the school district to ask whether the student could attend public school with his private tutor. The school district said it would not be appropriate. There was no further contact between the parents and the district until 1989. The student remained in the Montessori School until 1985, when he was placed in a private, residential program for autistic children out of Oregon. In January 1989, the parents contacted their local school district for reimbursement for Christopher's out-of-state placement. The school district declined to reimburse the parents, and said that they needed to evaluate the student and create a new IEP. Christopher returned to Oregon in July 1989, and the evaluation was completed in August 1989. The school district proposed what was ultimately found to be an inappropriate IEP for the student in September 1989. See *Ash*, 766 F. Supp. 852, 853-855.

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18. In considering the facts of *Ash*, and the reasoning of *Hunter* and *Hall*, the Ninth Circuit Court of Appeals concluded that the parents' right to reimbursement only went back to September 1989, the date when the district made its in appropriate proposal. Prior to that time, the Court of Appeals concluded that the school district's procedural failings, stretching between 1983, when it failed to locate the student, until 1989, when the parents finally asked for assistance, did not rise to the level necessary to excuse the parents from their obligation of expressing discontent with the district's actions.

19. In applying the reasoning of *Ash* to this case, it is necessary to look at both whether and how the parents expressed their dissatisfaction with the district, as set forth in *Hunter*, versus whether the district's actions were so egregious as to alleviate the parents obligation to make their discontent known, as set forth in *Hall*. In this case, there is no evidence that the parents expressed dissatisfaction with the district's attempts to evaluate the student in the fall of 1998. Rather, the district made repeated attempts to evaluate the student for a potential learning disability, and those attempts were unsuccessful. It is relevant with regard to expression of intent, that it was the parents who canceled the testing, even though they did so at the student's insistence. Shortly thereafter, it was the parents who withdrew the student from the district all together, again with no clear expression of discontent. The first time the parents did express their disagreement with the district's actions was September 1999, and by that time, the student had already been unilaterally placed at the Boulder Creek Academy for almost three months. Under the reasoning of *Hunter* and the plain language of the regulation WAC 392-172-231, the parents did not put the district on notice of their dissatisfaction with the district's actions prior to their unilateral placement.

20. The next step in the analysis is whether the district's procedural failings were so egregious as to overcome their need to confront the district with their dissatisfaction. See *Hall*. The facts show that once the parents made a referral for special education, the district took immediate steps to evaluate the student. The district provided notice to the parents as well as information regarding their procedural rights. It is true that the district did not complete the evaluation in the thirty five days set forth in the regulation. WAC 392-172-104(2). However, this failure was, in part, due to the parents' requests that testing be postponed. As the parents argue, the district could have taken more stringent steps to evaluate the child in light of the indication on the parents' referral that the student was oppositional. However, at the time, the student was being referred to the district for a learning disability, not a behavior problem. **The district also had an obligation to include and listen to the parent in making decisions to act or not act, and it was**

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based upon the parents request to postpone the evaluation that the district put off the evaluation. The district's actions in its attempts to evaluate the student, and its failure to complete the evaluation in 35 days, was not an egregious procedural error.

21. The larger question is whether it was egregious on the part of the district to continue to fail to evaluate the student after his withdrawal and before his placement at ██████████ in July 1999. Clearly, the district had a continuing obligation to "locate, identify and evaluate" the student after his withdrawal. WAC 392-172-100. However, given the parents' actions to take the student out of the district without any further expression of discontent, the district's failure to conduct child find activities was similar to the situation in *Ash*, and does not rise to the level of being so egregious as to excuse the parents from more clearly expressing their discontent with the district's actions. Unlike the parents in *Hall*, the parents in this case were informed of their procedural rights and chose not to follow up on them. **The important procedural right that the parents would have been aware of was the right to a due process hearing to dispute a districts decision or failure to act, as discussed in length in *Hacienda LaPuente*, 976 F.2d 487 (9th Cir. 1992).**

22. It is important to note a difference in standards. By concluding that the district's actions were not egregious, this decision is not concluding as a matter of summary judgment that the district satisfied its procedural obligations. However, that is different from the question that is being answered here: whether the parent has a right to reimbursement.

23. The next question is whether the parents have a right to reimbursement since they put the district on notice of their disagreement in the Fall of 1999. This issue is closely linked to the issue of whether the district has had the obligation to evaluate the student while he has been in Idaho because he was not a resident.

24. Without answering the question of residency, a similar issue is also addressed in the reasoning of *Ash*. In the history of *Ash*, it is clear that the U.S. District Court of Oregon did not fault the local school district failing to evaluate the student sooner, when the process extended from January through September of 1998. Rather, it specifically excused the delay because the student was out of state. *Ash*, 766 F.Supp. at 864.

25. The facts of our case indicate that whenever asked to evaluate the student, the district has responded that when the student returned to the district, the district would evaluate him. There is no evidence that the student has been made available by the parents to the district since their request in September 1999. Therefore, in light of the district's willingness to assume the responsibility for evaluation should the student be made reasonably available within the boundaries of the district, we conclude that it has fulfilled its obligations to the student.

26. This begs the issue of whether the student is a resident, and in order to more completely resolve the matter as to any current or future child find obligations, it is an important question to answer.

Residency

27. A school district's has an obligation to conduct child find activities for the purpose of locating students with suspected disabilities within its boundaries. WAC 392-172-100.

28. As set forth above, it is the position of OSEP that where a child resides is a matter of State law. See *OSEP Memorandum 00-14*. As argued in the district's motion, the courts have also addressed the issue of residency, and have consistently looked in part to state law to resolve the issue. See *Wise v. Ohio Dep't of Educ.*, 80 F.3d 177 (6th Cir. 1996) (applying Ohio law); and *Union Sch. Dist. v. Smith*, 15 F.3d 1519 (9th Cir. 1994) (applying California law). In *Union*, there is discussion of residency normally being defined as lying within the district where the parents live. However, the case does not specifically discuss whether that would be true as a matter of federal law in states that have defined residency differently, as in Washington.

29. In Washington, neither Chapter 28A.155 RCW nor chapter 392-172 WAC include a definition of student residency in the special education context. However, WAC 392-137-115 does define residency in the contest of student transfers as follows:

Student residence -- Definition. As used in this chapter, the term "student residence" means the physical location of a student's principal abode -- i.e., the home, house, apartment, facility, structure, or location, etc. -- *where the student*

lives the majority of the time. The following shall be considered in applying this section:

(1) The mailing address of the student -- e.g., parent's address or post office box -- may be different than the student's principal abode.

(2) *The student's principal abode may be different than the principal abode of the student's parent(s).*

(3) The lack of a mailing address for a student does not preclude residency under this section.

WAC 392-101-110 (emphasis added).

30. Although this definition is set forth in the student transfer regulations, it has been historically used as the definition for student residency in the special education context. See *In re Federal Way School District*, Special Ed. Cause No. 92-35, Memorandum and Order of Dismissal (1992).

31. Applying Washington's definition of student residency to this case, the student has not been a resident of Washington since his parents removed him from the state in July 1999, and unilaterally placed him in a residential program in Idaho. Therefore, because the student has not been a resident of the state since the parents expressed their dissatisfaction with the district's actions, the district has not been under an obligation to conduct child find activities. Rather, the district has correctly stated to the parents that its obligation under the law will be to evaluate the student once the student has returned to the district.

32. It is understood that the above conclusions could lead to a situation where there is not a state obligation to conduct child find activities in regard to a certain child because the state where the parents live defines residency as lying with the child's location, and the state where the child lives defines residency as lying where the parents live. However, this situation will only occur when parents unilaterally place a child in another state and do not ultimately establish a right to reimbursement. See *Wise v. Ohio*, 80 F.3d 177, 183 (6th Cir. 1996), citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993). This is the same risk that all parents face when they make a unilateral placement. See *Florence County*, 510 U.S. 7.

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Statute of Limitations/Laches

33. Having found in favor of the school district on the substantive portions of its summary judgment motion, the ALJ declines to conclude as a matter of summary judgement that the parents claims are barred as a matter of laches or statute of limitations.

Identification

34. The district asks as a matter of summary judgment that it be determined that the student could not have been identified as eligible for special education prior to the student's withdrawal from the district.

35. The district's argument of the issue blends two different steps in the process, the step at which a child is located and referred for a special education evaluation, and the step where, once the evaluation is completed, the student is then identified as eligible or ineligible for special education. We agree with the statement that prior to his withdrawal it would have been impossible to identify the student as eligible for special education, because that can only be properly done in the context of an evaluation performed in accordance with the procedures as set forth in regulation. Again, this is not a conclusion as a matter of summary judgement that the district satisfied its obligation to evaluate the student.

Other Arguments Raised by the Parties

36. The Administrative Law Judge has considered all arguments made by the parties. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights given the ultimate outcome on the issues.

Order

IT IS HEREBY ORDERED that the District's motion for summary judgment is granted in part and denied in part. The parents are not entitled for reimbursement for their unilateral placement of the student at [REDACTED] in Idaho. The district has

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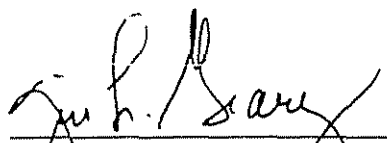
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not been responsible for the evaluation of the student since his parents unilaterally placed him at [REDACTED] in July 1999. As a matter of summary judgement, the parents claims are not barred by the statute of limitations or laches. Because the district did not complete the evaluation of the student prior to his withdrawal, the school district could not identify the student as eligible for special education prior to his withdrawal.

IT IS HEREBY FURTHER ORDERED that, in accordance with WAC 10-08-130(3), if no objection to this Order is filed within ten days after its mailing, it shall control the subsequent course of the proceeding unless modified for good cause by subsequent Order.

SIGNED at Seattle, Washington on August 30, 2001.



JILL L. GEARY
Administrative Law Judge
Office of Administrative Hearings

Certificate of Service

This certifies that a copy of the above Order was served upon the parties or their representatives on August 30, 2001, by depositing a copy of same in the United States mail, postage prepaid, or sending by facsimile, addressed to the following:

Parents

[REDACTED]
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