

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

IN THE MATTER OF:

SELAH SCHOOL DISTRICT

SPECIAL EDUCATION  
CAUSE NO.2002-SE-0094

**ORDER ON RECONSIDERATION  
and  
ORDER ON SUMMARY JUDGMENT**

On December 6, 2002, an ORDER GRANTING SUMMARY JUDGMENT IN PART, DENYING SUMMARY JUDGMENT IN PART was served by mail on the parties.

**Procedural History since service of Order:**

On the morning of Monday, December 16, OAH staff retrieved from the facsimile a 5 page document from the Parents consisting of Motion for Clarification and/or Stipulation of the Discovery Process and attachments, which bore at the top the sending facsimile machine's notation of date and time sent: Dec. 13 2002 04:58PM. The subject of the motion was discovery, availability of district employees for interview, deposition and/or subpoena of district employees, and procedures for witness appearance by telephone. The administrative law judge responded via correspondence sent by facsimile to both parties, with discovery issues to be considered more fully at the prehearing conference previously scheduled December 18, 2002 at 3:00 p.m.

On the morning of Tuesday, December 17, 2002, OAH staff retrieved from the facsimile a 27 page document from the District consisting of cover sheet, Motion for Clarification and Reconsideration, and attachments, which bore at the top the sending facsimile machine's notation of date and time sent: 12/16/2002 MON 16:57.

On December 18, 2002, less than two hours before the prehearing conference OAH staff received by facsimile a 39 page document from the Parents consisting of cover sheet, Motion to Petition for Reconsideration, and appendix, which bore at the top the sending facsimile machine's notation of date and time sent: Dec.18 2002 01:39PM.

At the prehearing conference the District moved for dismissal of the Parents' Reconsideration motion for lack of timely filing.

## PARENTS' MOTION NOT TIMELY FILED

The Parents admit that their motion for reconsideration was not timely filed. RCW 34.05.470 requires that the motion be filed within 10 days of service of the December 6, 2002 Order. The Order Granting Summary Judgment In Part, Denying Summary Judgment In Part contained the following notice to parties, following the judge's signature:

**NOTICE TO PARTIES:** This is a final agency decision regarding the paragraphs 1, 4 and 5 of the above Order granting partial summary judgment are 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.

The Districts motion for dismissal due to lack of timely filing is proper and is granted. Moreover, the Parents' motion merely re-argues matters previously considered and decided.

## CLARIFICATION AT PREHEARING CONFERENCE

Student A clarified at the prehearing conference on December 18, 2002 that he did desire to pursue the due process hearing begun by his parents, and that he desired that they continue to represent him. He then asked to be excused so that he might return to his job. The Parents then clarified during the prehearing conference that the claim for compensatory education and other relief for Student A is based on claimed IDEA violations through the Student's 1990-91 school year.

The District argues properly that **there is no current referral for special education for Student A and there is no claim that Student A is currently eligible for special education services under IDEA.** If there were current eligibility issues, the application of the statute of limitations would be more problematical. When all is said and done, however, the District correctly argues that the entire claim should be dismissed as it is time barred by the statute of limitations.

## **DISTRICT'S MOTION FOR CLARIFICATION AND RECONSIDERATION**

The District seeks dismissal for lack of jurisdiction of the claims for retaliation, discrimination, attorney fees, and for Student A of the claims for transition services and potential hospitalization. The District seeks dismissal of adult Student A's claims for reimbursement for Shamrock and compensatory education—should he agree to continue the due process hearing begun by his parents during his minority—on the basis they are time barred by either the two-year or three-year statute of limitations. Finally, the District argues that any hearing be limited to whether there was any denial of FAPE and, if so, what the IDEA remedies should be without any evidence on “civil” damages or mitigation of civil damages.

For clarification, it will be helpful to recall the four Issues in the Second Amended Complaint, the two Remedies (paragraphs 94 and 95) and the eight Prayers for Relief (paragraphs 96-103). The First Issue is whether the District failed and continues to fail to provide FAPE to Students A and M under IDEA. The Second Issue is whether the District's Policy 2161 and Procedure 2161P are consistent with state requirements for IDEA, specifically as to LEA eligibility. The Third Issue is whether the District violated Section 504 of the Rehabilitation Act, Title II of the ADA, or both, in respect to Students A and M's education, or through retaliation or discrimination against the parents for filing a complaint with OCR or OSPI. The Fourth Issue is whether the District, under color of law, breached its standard of care to Students A and M after the parents notified the District of their intent to file a complaint with OCR and OSPI, and whether through action or inaction caused injury to the students or the parents.

### **FIRST, SECOND and FOURTH ISSUES, and STATUTE OF LIMITATIONS**

IDEA does not provide rights to every student. As previously noted in the Order, only those students who have been determined eligible for special education services have rights under IDEA. It follows there can be no failure to provide procedural and substantive protections under IDEA, or failure to provide FAPE, unless there is first an eligibility determination. No substantive or procedural violations of IDEA arise as to non-eligible students.

Thus, the prior Order noted that before there can be a determination that Student A's right to FAPE was violated in the past, there must first be a determination that Student A was eligible under IDEA in the past. When matters concerns past events, the issue of the statute of limitations arises.

The District correctly argues that the question of whether to apply a two-year or three-year statute of limitations is a question of law. It also correctly argues that Washington's special education regulations and case law are silent on this point, and

that the lead case from the Ninth Circuit is *S. V. v. Sherwood School District*, 254 F.3d 877 (9<sup>th</sup> Cir. 2001). Under *Sherwood*, the undersigned must determine which statute of limitations for an analogous state cause of action is to be applied. RCW 4.16.080 provides that certain actions are limited to three years, including:

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated; (emphasis supplied).

By comparison, RCW 4.16.130 provides that action for relief not otherwise provided for (in the other sections of Chapter 4.16 RCW) “ shall be commenced within two years after the cause of action shall have accrued.”

Having considered the First, Second and Fourth Issue, the undersigned concludes the action is most analogous to a tort action. The three year statute of limitations in RCW 4.16.080 shall apply.

#### **STATUTE OF LIMITATIONS:**

#### **The date at which the Parents and Student A reasonably could have discovered violations**

As previously noted, under CR 56, a summary judgment shall be granted only if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. *Balise v. Underwood*, 62 Wn. 2d 195, 199, 381 P.2d 966 (1963). On this point, additional facts are necessary. The Facts found in the prior Order shall remain unchanged.

#### **Additional findings:**

1. The Parents received notice of their due process rights and the District's policies and procedures under IDEA, as to Student A, in the 1989-90 and 1990-91 school years.
2. The Parents received notice of their due process rights and the District's policies and procedures under IDEA, as to Student M, in each school year from 1988-89 to 1994-95, and in 1996-97.
3. The Mother of Students A and M was a member of the District's School Board from 1993 to 1997.

4. There is no claim that Student A is currently eligible for special education, and the Parents and the District have not made a special education referral as to Student A.

#### **Dismissal of IDEA claims for Student A based on statute of limitations:**

The claim was brought in July 2002. The request for relief is based on alleged IDEA violations during the time period in which Student A was eligible for special education in 1989-90 and 1990-91 school years, 11 years prior to filing of the claim. The Parents allege that the District should have been alerted in Student A's 1997-98 school term of the discrepancy between his academic ability and his performance, especially after he was hospitalized in a juvenile mental health facility in February 1998. The prior Order had ruled that genuine issues of material fact existed regarding the date upon which the Parents and adult Student A could have reasonably discovered violations, as if there an ongoing claim of violation. Even under a three year statute of limitations, eligibility issues related to Student A's three prior school years could have been addressed.

However, at the prehearing conference the administrative law judge finally understood that there is no current claim of eligibility, and no pending referral for Student A. The claims for relief for Student A all relate to violations that are over 10 years old.

The District's motion to dismiss Student A's IDEA claims under First and Second Issues in the Second Amended Complaint are granted.

#### **FOURTH ISSUE AND THE *ROBB* DECISION**

To properly apply the analysis of the Ninth Circuit in *Robb v. Bethel School District*, 308 F.3rd 1047 (9<sup>th</sup> Cir. October 2002), the specifics of the complaint must be considered. In *Robb*, the student was in fourth grade, diagnosed with cerebral palsy. The parents alleged the school district's practice of removing her from the classroom for peer tutoring sessions violated IDEA. They brought suit for money damages to compensate them for "lost educational opportunities" and "emotional distress, humiliation, embarrassment and psychological injury." At issue was whether the parents could avoid the IDEA's exhaustion requirement by limiting their prayer for relief to money damages. The dispositive question was whether the alleged injuries could be redressed to any degree by the IDEA's administrative procedures and remedies. If so, exhaustion of those remedies is required. If not, the claim necessarily falls outside the IDEA's scope and exhaustion is unnecessary.

The Fourth Issue asserts the parents' investigation in the records of the students uncovered numerous system issues, to which the District reacted in an unexpected and "injurious way". Specifically, the parents list 13 paragraphs (# 81-93) which address the time period from August 2001 through spring 2002, and which "persists to this day."

They allege the district refused to discuss parent concerns about past special education noncompliance issues for both students, and declined to assist or were deceptive when assisting the parents who were considering Student M's residential placement in Shamrock. They also allege they had not been provided an opportunity to share the results of an IEE for Student M with the District's evaluation team.

The Fourth Issue also asserts the parents due process rights were violation by the manner in which the employee complaint (against Director of Special Services, C. Egan) was handled by the Superintendent. They also assert their appeal to the School Board was not handled appropriately, and that their were denied their due process rights when the Board required they submit the appeal in writing, then did not reconvene after reviewing the Parents' appeal. They allege the Superintendent and the Director of Special Services were allowed to present "their side" to the board, but the parents were not allowed to defend themselves or present additional evidence.

Finally, the last paragraph of the Fourth Issue (#93) contends the Director, the Superintendent and the board "acted with deliberate indifference that persists to this day, interfering with the parents' right to advocate for their children, as evidenced by the way this appeal hearing was conducted."

The details of the Fourth Issue are set forth in paragraphs 81 to 93, all of which are incorporated by reference in the two "Remedy" paragraphs. The parents allege these actions caused injuries, damages and harm to the students, including but not limited to failure to identify, evaluate, appropriate placement, provision of FAPE, disability discrimination, and denial of access to educational programs and loss of right to remain in the custody of the Parents and attend school in the least restrictive environment of their resident school district. The second "Remedy" paragraph mirrors the first, adding the injuries, damages and harm to the students include the necessary placement in residential care, and references "extreme emotional distress, loss of reputation, shame, humiliation, pain and suffering, inconvenience, mental anguish, impairment in the quality of life, and consequential losses. They ask for a cease and desist order.

### **Some Fourth Issue claims are outside IDEA's scope**

The issues related to the employee complaint, response by the Superintendent and the Board set forth in paragraphs 87 through 92 are outside the scope of the IDEA

and exhaustion of administrative remedies under IDEA is not required under the *Robb* analysis. The District's motion to dismiss these claims is granted.

The issues related to Student M set forth in paragraphs 81 to 86 have been addressed, either through dismissal in the prior Order or in related case, Docket 2002-SE-0124. The District's motion to dismiss the claims in Fourth Issue as to Student M is granted.

### **Some Fourth Issue claims are within IDEA's scope**

The issues related to Student A in paragraphs 81 and 93 are similar to the claims involving IDEA violations in the First and Second Issue. There is some confusion because like *Robb* there is a claim of injury, damage and harm, but unlike *Robb* there is no money damage claim in the prayer for relief. The prayer for relief seeks reimbursement for expenses related to Shamrock, for compensatory education for Student A for at least one year, transition services to prepare Student A to prepare for post-secondary experiences, for an order requiring the District to pay for future uninsured hospitalization expenses through June 2004 should it become necessary for Student A to receive inpatient treatment for mental health or disability related issues, for an order requiring the District to immediately stop all retaliatory and discriminatory actions or behaviors toward the students or the parents, and for attorney fees related to the due process hearing filed by the District in 2001 and incurred in preparation for this pending action.

It seems probable that evidence regarding parental concerns and requests for assistance for Student A, and the allegations regarding handling or mishandling of Student A's education records, will be duplicated in the evidence and claims supporting First and Second Issues (procedural and substantive violations of IDEA) and discovery of the student's cause of action.

### **Conclusion regarding First, Second and Fourth Issues and Student A**

Given the nature of the remedy sought, and that the parents and Student A are pro se, the undersigned concludes that the inartful pleadings are intended to convey a claim that the district should have evaluated Student A for special education eligibility, and that if they had done so, they would have determined him to be eligible for special education and in need of specially designed instruction, and that their failure to do so demonstrates procedural and substantive violations of IDEA. First, Second and Fourth Issues as to Student A are merged, and all are subject to the three year statute of limitations at RCW 4.16.080(2). Like First and Second Issues, the Fourth Issue as to Student A and to Student M is dismissed as barred under the statute of limitations.

### THIRD ISSUE

The claims of violation of Section 504 and the ADA were dismissed for lack of jurisdiction in the prior Order on Summary Judgment and will not be reconsidered.


If Student A or Student M seek transition or other services under Section 504, those matters may be addressed with the District directly, and if dissatisfied, there is a District-based due process hearing (distinct from the OSPI-OAH based due process hearing.)

#### **Dismissal of other claims of relief**

The District correctly argues that the undersigned has no jurisdiction to grant the prayer for relief in paragraph 102 to stop retaliatory and discriminatory actions of the district, and in paragraph 103, regarding attorney fees, and those claims are dismissed.

**Now therefore, on Reconsideration it is hereby ORDERED that these proceedings are dismissed. The District's motion for summary judgment is granted in full.**

DATED at Yakima, Washington this 20th day of December, 2002.



Johnette Sullivan  
Administrative Law Judge

**NOTICE TO PARTIES:** This is a final agency decision granting summary judgment 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.

Copies to:

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