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OFFICE OF
ADMINISTRATIVE HEARINGS

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

IN THE MATTER OF:

SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NOS. 2002-SE-0121
AND 2003-SE-0025

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

A hearing in above-entitled matter was held before Administrative Law Judge Jill L. Geary (ALJ), in Washington, on November 6, 2002 and March 17, 2003, and by telephone on January 31, 2003. The interested Parents, and , were presented by Charles Williams, Attorney at Law. School District (SD or District) was represented by Craig Hanson, Attorney at Law. The ALJ, 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 11, 2002, the Parents filed a due process hearing request with the Office of the Superintendent of Public Instruction (OSPI). The request was forwarded to the Office of Administrative Hearing (OAH), to conduct a due process hearing.

By notices dated October 11, 2002, the matter was set for a telephone prehearing conference on October 21, 2002, and a due process hearing on November 6, 2002. The prehearing conference was held as scheduled and a prehearing order was issued on October 21, 2002. The prehearing order set forth the following issues for hearing:

- a. Whether the District has appropriately evaluated the Student in a timely manner;
- b. Whether, as a consequence of failing to appropriately evaluate the Student, the District has failed to provide the Student with a free appropriate public education (FAPE);
- c. Whether the Parents are entitled to an independent educational evaluation (IEE) at public expense, as requested on August 30, 2002;
- d. Whether the Student should receive compensatory education in the form of additional physical therapy (PT) and occupational therapy (OT);
- e. And, whether the Parents are entitled to any other equitable remedies, as appropriate.

Pursuant to that order, a readiness prehearing conference was scheduled for October 25, 2002. The parties appeared for the readiness conference.

A due process hearing was held in Washington, on November 6, 2002.

At the due process hearing, the District stipulated that the District would provide the Parents with an IEE. As a result, the Parents withdrew that issue from the list of issues for hearing. During the due process hearing, the ALJ raised the issue of whether it was necessary for the Student to be determined eligible for special education prior to receiving any relief under the IDEA. The Parents did not specifically raise the issue of eligibility as a matter for hearing, and stated that they want the IEE completed prior to eligibility being determined.

At the due process hearing, an additional day of hearing was scheduled for November 21, 2002, to take the telephonic testimony of the Parents' witness, Dr. Rahul Nath. On November 21, 2002, the parties called in for the hearing as instructed in the notice dated November 8, 2002. However, Dr. Nath was not available to testify. By agreement of the parties, the matter was continued to December 16, 2002.

On December 4, 2002, the Parents requested a continuance of the due process hearing, because its expert witness, Dr. Nath, was not available as anticipated. The District did not have any objection. By order dated December 13, 2002, the matter was continued to December 20, 2002. The decision due date was continued four days, to December 24, 2002.

On December 16, 2002, the Parents requested another continuance of the due process hearing, because, again, Dr. Nath was not available. The District did not object to the continuance. By order dated December 17, 2002, the matter was continued to January 30, 2002. The decision due date was continued to February 18, 2002.

The testimony of Dr. Nath was taken on January 31, 2002, by telephone, by agreement of the parties. During the due process hearing, the parties asked for a conference with the ALJ. A telephone conference was scheduled for February 4, 2003.

On February 4, 2003, the parties informed the ALJ that an evaluation of the Student had been completed. As a result, the Parents were asking to include the issue of eligibility in the issues for hearing. The ALJ advised the Parents that changing the issues could be procedurally attempted two ways: by filing a motion to amend, or by filing a new due process hearing request and a motion to consolidate the two matters. The Parents asked for additional time to consider their options. By order dated February 4, 2003, a telephone conference was scheduled for February 11, 2003. The decision due date was postponed to March 1, 2002.

On February 10, 2003, the Parents filed a Motion to Amend Issues to include whether the District appropriately denied the Student eligibility for special education on January 28, 2003.

On February 11, 2003, a telephone conference was held to discuss the Parents' motion to amend the issues for hearing. Over the District's objection, the ALJ granted the Parent's motion. However, fearing procedural impropriety, the Parents withdrew their motion and asked for the opportunity to file a due process hearing request and a motion to consolidate. The request was granted. By order dated February 11, 2003, a telephone conference was scheduled for February 21, 2003.

The Parents filed a second due process hearing request on February 18, 2003. The matter was assigned special education cause number 2003-SE-0025. At the telephone conference held on February 21, 2003, the Parents made a motion to consolidate cause numbers 2002-SE-0121 and 2003-SE-0025. The motion was granted over the District's objection to considering the Student's eligibility prior to January 28, 2003. Pursuant to order dated February 24, 2003, additional days of hearing were scheduled for March 17 and 18, 2003. It was also ordered that post-hearing written argument would be due on March 31, 2003, and that the decision would be due 21 days from the close of the record.

Only one additional day of due process hearing was held, on March 17, 2003. By agreement, the parties extended the time in which to file post-hearing written argument to April 8, 2003. The decision thereby became due on April 29, 2003.

Evidence Relied Upon

Exhibits: Court Exhibits C1-C16, District Exhibits D101-111, D113-118, and Parent Exhibits P201-P219.

Witnesses: _____, SD special education teacher; _____, SD Superintendent; Mother; Dr. Rahul Nath, M.D.; _____, SD Occupational Therapist (OT); Father; and Pam George, OT.

ISSUES

1. Whether the Student is eligible for special education;
2. Whether the District has appropriately evaluated the Student in a timely manner;
3. Whether, as a consequence of failing to appropriately evaluate the Student, the District has failed to provide the Student with a FAPE;

4. Whether the Student should receive compensatory education in the form of additional PT and OT;

5. And, whether the Parents are entitled to any other equitable remedies, as appropriate.

FINDINGS OF FACT

1. The Student, [redacted], is a four year old girl, born [redacted], 1998, who lives with her mother and father, within the District. When the Student was born, she suffered a brachial plexus injury. As a result of this injury, she was unable to use her left shoulder and arm, and could not do things that required two hands.

2. At five months, the Student entered the birth-to-three program in her area.

3. Initially, the Parents treated the Student with PT. At six months, the Student underwent corrective surgery. After surgery, the Parents continued PT twice a week. After the surgery, the Student was able to bend her left arm.

4. The Student underwent her second surgery at 22 months. The purpose of the surgery was to correct muscle imbalances in her arm. After a recovery period, the Student began PT, including water therapy.

5. When the Student was two, in May 2001, the family resource coordinator in the birth-to-three program contacted the District about the Student's transition from the birth-to-three program to a District program. The District was not aware, however, that the request was for a special education assessment, and thought that the Student was going to transition into the three-to-five program, a non-special education program. The District told the coordinator that she should call the District in the fall.

6. Prior to September 2001, the District offered to enroll the Student in its preschool program. It is agreed that the Student is a precocious child and the District believed that although the Student was chronologically young for preschool, she would do well there socially and academically. The Mother declined the offer, because she was fearful that there would not be appropriate protections in place for her daughter without an individualized education program (IEP). It is very important that the Student's shoulder not be strained. At school the Student cannot be allowed to hang from bars, and must be protected from other children pulling her by the left arm.

7. In September 2001, the District held a transition meeting. Present for the meeting were the following: the Parents; [redacted] the birth-to-three coordinator; [redacted] preschool teacher; [redacted] Superintendent and part-time Special Education

Director; and special education teacher. At the meeting, the Parents told the District that the Student was scheduled to have another surgery in late November and that the Student would have a six week recovery period.

8. Because of the pending surgery, the District decided not to go forward with an evaluation of the Student or with providing the Student special education services until after she had completed the six week recovery period. The District did not want to get an inaccurate understanding of what the Student needed. However, this was not the Parents' understanding of what was going to happen. The Parents thought that the Student would start receiving services from the District right after Christmas.

9. On November 23, 2001, the Student underwent her third surgery. The purpose of the surgery was to construct a shoulder socket for the Student's left arm. After the surgery, the Student was restricted from using her arm for eight weeks. During that time, under doctor's orders, the Student was not to put any weight bearing strain on her arm. She was also to go to therapy.

10. On December 17, 2001, the Student turned three years old.

11. At the beginning of January 2002, the Mother contacted the District to request services. The District told the Mother that it needed to evaluate the Student.

12. The Mother signed a consent for evaluation on January 15, 2002.

13. In February, 2002, Linda Gately, Occupational Therapist, evaluated the Student. She tested the Student with the Peabody Developmental Motor Scales (Peabody) and observed the Student. Ms. Gately's written report states in pertinent part:

Educational Implications

[The Student] has limited range of motion in her left upper extremity as a result of Erb's Palsy. She could be injured if others including students and staff were not aware of precautions. [The Student] may also have some difficulty using school tools at times or may need specially designed tools or positioning to assist her in taking part in school activities.

Recommendations

Occupational therapy is recommended at this time to assist [the Student] to use school tools and assure that she can safely take part in school activities with her peers. Extended school year is not recommended at this time.

See Exhibit D103, page 2. According to the Peabody, the Student had the fine motor skills of a 37 month old and the gross motor skills of a 32 month old. At the time of testing the

Student was 38 months old. The Mother agrees with Ms. Gately's recommendations, with the exception that the Mother believes the Student needs OT over the summer to prevent her muscles from tightening.

14. On February 27, 2002, the District sent the Parents a consent for exchange of information form. On March 11, 2002, the District received the form signed by the Mother, authorizing an exchange of information with Dr. Rahul Nath, the Student's surgeon in Texas.

15. On March 11, 2002, the District wrote to Dr. Nath, requesting information about the Student.

16. By April 17, 2002, the District had not received information from Dr. Nath. The District asked the Parents to agree to an extension of the time to evaluate the Student. The Parents did not sign the extension.

17. On May 7, 2002, the District invited the Parents to participate in an evaluation group meeting on May 21, 2002, to determine the Student's eligibility for special education. According to the District's Notice of Action, the District had not received any information from Dr. Nath, and was going to make an eligibility determination based on the evaluation of Ms. Gately, O.T.

18. On May 17, 2002, Dr. Nath faxed two letters to the District. With regard to the Student's educational planning, Dr. Nath stated that children with the Student's injury "have more difficulty in fine motor skills at school and require additional help with certain activities." See Exhibit D106, page 3.

19. On May 21, 2002, the evaluation group determined that the Student did not qualify for special education because her medical conditions did "not affect her educational performance." See Exhibit D105, page 4. The meeting was attended by the following: the Parents; a grandparent; _____, special education teacher; _____, Linda Gately, O.T.; _____ Superintendent and Special Education Director. The Parents disagreed with the determination, indicating that the report was not complete and that the Peabody Developmental Motor Scales would not properly evaluate bilateral ability. See Exhibit D105, page 5.

20. On May 23, 2002, the Mother signed a consent to extend the determination of eligibility to June 28, 2002, in order to allow the District the opportunity to receive more of the Student's medical records.

21. On June 10, 2002, the District received medical information about the Student from Edward Steinweg, M.D. See Exhibit D107, pages 3-6. The information did not contain recommendations for educational planning.

22. On July 1, 2002, the District received information about the Student from Harrison Rehabilitation, the Student's private occupational therapists. See Exhibit D108, page 2. According to Harrison Rehabilitation, the Student's condition had the following educational implications:

She experiences difficulty with any tasks requiring bilateral arm use, and this will impact her school day in many ways.

Some examples of activities requiring use of both arms include: carrying her lunch tray, pulling down and up her pants after toileting, clapping and acting out songs and skits in the classroom (Itsy Bitsy Spider, Simon Says, Follow the leader, etc.) holding the paper with her left hand so she can cut with her right hand, stabilizing a writing/coloring surface with her left arm while she writes with her right, and this is just start. (sic)

See Exhibit D108, page 2. The letter goes on to offer the District their services in drafting IEP goals for the Student.

23. On July 1, 2002, the District received information about the Student from Kitsap Children's Therapy in the form of a letter signed by Maria Hendryx, MPT. See Exhibit D108, page 4. The letter reads in part as follows:

She has difficulty performing all fine motor and self-help skills as well as some play activities, particularly those that require bilateral hand use. She has undergone several procedures in an attempt to strengthen and stabilize her left shoulder. It is imperative that she continue to learn to use her left arm and hand to assist with all her daily activities. If she is not encouraged to use the left hand, all gains that have been made as a result of her multiple surgeries may be lost. Also, it is important that these issues be addressed while she is young, and before she develops too many compensations or substitutions. These issues can better be addressed within the school system, as teachers and staff may have more opportunity to observe her and redirect her with her daily skills.

See Exhibit D108, page 4.

24. On August 30, 2002, the Parents wrote the District to request an IEE. See Exhibit D110, page 2. The Parents expressed dissatisfaction with the District's failure to complete an evaluation of the Student by the June 28, 2002 extension date.

25. The District provided the Parents with a list of independent assessment resources. See Exhibit D111, page 2.

26. In October 2002, an occupational therapy evaluation of the Student was performed by Linda Oddo, MHS, OTR/L. Ms. Oddo makes the following educational recommendation:

[The Student] does exhibit impairments that will impact her pre-school activities in the areas of self-care, fine motor, and bilateral integration. Although she does very well in the school setting, she would benefit from occupational therapy intervention, both direct and consultative, one time per week.

See Exhibit D112, page 1.

27. The Parents filed a request for due process hearing on October 11, 2002.

28. By the first day of hearing, November 6, 2003, the District had agreed to pay for an IEE for the Student.

29. In December, 2002, Ms. OT, performed another evaluation of the Student. According to Ms. the Student "struggles with managing clothing fasteners, personal hygiene related to toileting, carrying heavy objects that require two hands, and activities that require her to maintain her left arm at her side or large reaching movements." See Exhibit D117, page 1. Although Ms. does not believe the Student needs specially designed instruction, she does recommend that the Student receive occupational therapy in the school setting. She states as follows:

I would, however, recommend that she receive occupational therapy to progress the function of her left arm with self-care skills and to prevent joint contracture. [The Student] is a bright and capable student who does not like to be pulled from her classroom activities. At the preschool level teacher and classroom aides are available to assist her with toileting needs. [The Student] participates enthusiastically in both gross and fine motor activities. Therefore, I recommend that therapeutic activities be carried out by modifying existing activities, small group activities to be designed by the teacher and occupational therapist and carried out by the classroom aide,

and/or individual sessions with the occupational therapist to instruct, monitor and upgrade activities as [the Student's] skills progress.

See Exhibit D117, page 1 and 2.

30. During her testimony, Ms. testified that since Fall 2002, she has been overseeing the provision of OT to the Student in the classroom. She has done activities in the classroom designed to expand the Student's range of motion and put weight bearing pressure on the Student's joint to get the bone to develop. She has worked with classroom teachers and aids to modify what the Student does to achieve more joint motion. She has provided therapy in the context of the Student's basic preschool skills, in consultation with the teacher and aids. To the extent possible, she has modified the classroom activities for the Student, so the Student has to bring her elbow into her side, turn her head, turn her palms up and down. She has changed activities so the Student does more stretching as she goes through her day. This includes having the Student do dress-up with an aide, or having the aide assist the Student in doing her work on a board on the wall. She has the Student engage in songs with hand motions and lacing cards to help her with range of motion in her hand. According to Ms. these types of activities make a big difference in how the Student does at school. If the Student is not taught to use her arm to encourage stretching and range of motion throughout the day, she will experience contractions of her muscles that will impede her ability to perform the above types of tasks.

31. Ms. testified that the program she provides to the Student would be appropriate under the standards of a 504 program or an IEP. She does not believe the Student needs pull-out therapy in order to get the therapy she needs to make educational benefit. The Student does not like to miss class for pull-out therapy.

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 (or Chapter 392-171 WAC for cases arising before November 11, 1995).

2. The Individuals with Disabilities Education Act (IDEA) (formerly the Education for All Handicapped Children Act) 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. 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, as follows:

First, had the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 3051. Clearly a "free appropriate public education: consists of both the procedural and substantive requirements of EHA. The *Rowley* court articulated the following standard for determining the appropriateness of special education services:

According to the definitions contained in the (Education for All Handicapped Children Act) a 'free appropriate public education' consists of education instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items of the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act.

Id. at 3041, 3042.

Eligibility

3. The first issue to be addressed is whether the Student is qualified to receive special education. If the Student is not eligible for special education, then she would not be entitled to relief available under the IDEA and state special education laws and regulations.

4. A special education student is defined as follows:

Any student, enrolled in school or not, (i) who has been identified as having a disability, (ii) whose disability adversely affects the student's educational performance, (iii) and whose unique needs cannot be addressed exclusively through education in general education classes

with or without individual accommodations and is determined to be eligible for special services.

WAC 392-172-035 (2)(a).

5. There is no dispute that the Student in this case has an orthopedic impairment that would be considered a disability. In order to qualify for special education as an orthopedically impaired student, the Student's impairment must "adversely affect [her] educational performance and require specially designed instruction." WAC 392-172-122.

6. Specially designed instruction is defined in pertinent part, as follows:

Organized and planned instructional activities which adapt, as appropriate, to the needs of eligible students under this chapter, the content, methodology or delivery of instruction:

- (i) To address the unique needs that result from the student's disability;
 - (ii) To ensure access of the student to the general curriculum so that the student can meet the educational standards of the school district.
- . . .that apply to all students.

WAC 392-172-045. "Specially designed instruction includes instruction conducted in the classrooms, in the home, . . . and in other settings; and instruction in physical education." WAC 392-172-045(1)

7. Specially designed instruction does not include "individual accommodations within general education that alone would be sufficient and effective to meet the learning needs of the student." WAC 392-172-045(2).

8. The Ninth Circuit has not yet specifically addressed what would constitute specially designed instruction for an orthopedically impaired child. However, the issue was discussed at some length by the Eight Circuit Court of Appeals in *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369 (8th Cir. 1996). In *Yankton*, the court addressed the needs of an older student, Tracy, with cerebral palsy. Although Tracy was exceptionally bright, and had gone through most of her schooling receiving above average grades, she had qualified for special education since third grade. The services provided to Tracy by that district included: adaptive physical education, physical therapy, transportation, and assistance going between classes, up and down stairs, carrying her lunch tray, and setting up her saxophone. The district also provided Tracy with shortened writing assignments, photocopies of teachers' class notes, computers for certain classes, special instruction on how to type with one hand, and four separate sets of test books for her home and school so she did not

need to carry books. *Id.* at 1371. After freshman year of high school, Tracy had met her physical education requirement for graduation, and the district sent notice to the parents that Tracy would be exited from special education because she no longer needed specially designed physical education to participate successfully in the general education curriculum. This would have also terminated her right to transition services. *Id.*

9. In *Yankton*, the Court of Appeals found Tracy continued to be eligible for special education. The Court rejected the district's argument that Tracy was not eligible because her orthopedic impairment did not adversely impact her educational performance pursuant to 34 C.F.R. §300.7(b)(7), as demonstrated by her academic success. *Id.* at 1375. On this issue, the Court of Appeals states:

The definition [of orthopedic impairment] requires that the impairment adversely affect a child's educational performance, but the regulation does not elaborate on what is meant by an adverse affect on performance. *The record here establishes that but for the specialized instruction and services provided by the school district, Tracy's ability to learn and do the required class work would be adversely affected by her cerebral palsy.* For example, without the specially designed instruction in one-handed typing and shortened writing assignments, Tracy would have difficulty taking notes or completing her assignments. Without the mobility assistance services, and provision of multiple text books, Tracy would be late to class and unable to take her books. Tracy's academic success has depended on these special measures and her long hours of study. Her impairment would adversely affect her performance in the regular classroom setting absent the personalized instructions and supplementary services she has received. Even though the district failed to include these services in her last IEP, her need for them did not end upon her completion of the district's physical education requirements. Application of the regulation would not bar consideration of her claim under IDEA.

Id. at 1375-1376 (emphasis added). The Court of Appeals makes it clear, that in determining the eligibility of an orthopedically impaired student, it is important not just to look at the student's ability to be successful in the general education curriculum, but also at what instruction and services related to the disability contributed to that success.

10. In applying the analysis of the *Yankton* decision to the present case, it is important to look at the services that the District has provided to the Student in the classroom in order for her to be successful. The District's OT testified that the

Student continues to need OT services in order to fully develop and maintain a full range of motion in her arm. This has been identified as important to the Student making progress in learning the basic life-skills of dressing and toileting. The OT has also indicated OT is necessary to assist the Student in developing the ability to do the simple task of carrying things in both arms, such as lunch trays or boxes. The OT also testified that within the curriculum, she looks for ways to modify the Student's day to help her develop use of her left hand, such as in lacing activities, and incorporating hand movements into songs. The OT recommends that throughout the Student's day, she receive instruction on movement and how to use different accommodations in order to be successful. The OT makes it clear that pull out OT sessions are neither sufficient or necessary, and that without continued instruction and guidance in this area from aids and teachers, the Student's skills would regress. As a result, her ability to perform dressing and toileting functions and her ability to participate in physical education would also be adversely affected. The OT calls all this service an accommodation; however, given its educational nature, it is more appropriately termed specially designed instruction, "organized and planned instructional activities which adapt, as appropriate, to the needs" of the eligible student, "the content, methodology or delivery of instruction." WAC 392-172-045.

11. Although the Student does not need special education in order to get benefit from the academic aspects of school, this alone is not the test for eligibility, for special education includes physical education as well. WAC 392-172-045. From the District OT's testimony, it becomes clear that the Student's orthopedic disability requires that she receive specially designed instruction in movement and life skills throughout her day, in order to participate and grow in the physical aspects of school. The Student's disability is not static. If she does not get instruction on how to use her arm continually, her skills will regress. Likewise, it is just this instruction, that will allow the Student to perform at her ability level and continue to thrive in the regular education academic curriculum, like the student in the *Yankton* case. It is concluded that the Student qualifies for special education due to an orthopedic impairment that would, if she did not receive specially designed instruction, adversely affect her educational performance. WAC 392-172-122.

12. In coming to this conclusion, it is also important to note that there is a distinction between those services that will allow the Student to participate in the general curriculum, and those that will maximize the use of her arm. Special education need not maximize the Student's potential. What the Student will need in terms of an IEP must be determined by her IEP team, in accordance with the applicable laws and regulations.

13. Having determined that the Student is eligible to receive special education, it becomes appropriate to address whether the District met its obligations under the IDEA in evaluating and serving the Student.

Timeliness of the Evaluation

14. Once a child is referred to a district for special education, a district has 25 days to provide the parents notice of the referral and its intent to investigate, review the referral, gather available information regarding the child's disability, and make a determination about whether the student is a candidate for evaluation. WAC 392-172-104(1). If the student is a candidate for evaluation, the district must fully evaluate the student within 35 school days after the date of written consent for an evaluation has been provided by the parents. WAC 392-172-104(2)(a). The 35 days may be longer, if agreed to by the parents and reasons for the extension are documented by the district. WAC 392-172-104(2)(c).

15. In this case, the Student turned three and became potentially eligible to receive special education services on December 17, 2001. Prior to this time, the District had already determined that the Student was a candidate for evaluation and had expressed its intent to evaluate the Student, therefore the timeliness of the referral is not at issue. The question is whether the District proceeded appropriately in its evaluation the Student as of December 17, 2001.

16. In mid-December 2001, the Student was still well within the eight week recovery period prescribed by her doctor for the surgery conducted on November 23, 2001. At that time, it would not have been prudent to evaluate the Student for two reasons. First, she was under restrictions that were not likely to apply when she received services from the District, but would have effected the results of the evaluation, and two, in all likelihood, once the Student had completed her eight week recovery period, the Student would have a different ability level with her arm that would also effect the outcome of the evaluation and the types of services that might ultimately be appropriate. Therefore, it was not an error for the District to not pursue evaluation of the Student as of mid-December, 2001.

17. The Student's eight week recovery period would have ended in mid-January 2002, just at the time the Parents provided the District with consent to evaluate the Student. From then, the District had 35 school days, unless agreed otherwise, to complete the evaluation process. WAC 392-172-104(2)(a). The District then appropriately proceeded with the evaluation of Linda Gately, OT, and completed her portion of the evaluation in a timely manner.

18. It is concluded, that as of completing Ms. Gately's evaluation, in February 2002, the District has sufficient information to determine that the Student would need specially designed instruction in the educational setting, pursuant to the standards discussed above. Ms. Gately recommended that the Student would need OT throughout her school day, and would need to be taught alternative ways to participate in the regular curriculum. As of the end of February 2002, it became the District's obligation to develop an IEP within 30 days, by April 2002. WAC 392-172-156.

19. The District argues that any delay in the evaluation was caused by a delay in obtaining consent to contact the Student's doctor, and then the Student's doctor's failure to quickly provide that information. Certainly this information would have been relevant and pertinent to a full evaluation. However, under the circumstances, by the end of February 2002, the District had sufficient information to determine eligibility and proceed with an IEP. Had the doctor provided relevant programming information later, modifications could have been made.

20. The District has also argued that the issue of the Student's eligibility prior to January 28, 2003 should be barred as not being timely raised by the Parents in their original due process hearing request. This is not persuasive. The Parents clearly raised FAPE as an issue from the beginning, and therefore, the District has been on notice throughout this matter that the issue would be considered. To refuse to look at whether the Student was denied a FAPE because the Parents did not specifically use the term "eligibility" would put form over substance. The purpose of the IDEA is to provide special education students with an appropriate education, which is what this decision intends to do.

Denial of a Free Appropriate Public Education

21. The next issue to be addressed is whether the Student was denied a FAPE due to the District's failure to determine her eligible as of March 2002, approximately 35 school days after the District received the Parents' consent to evaluate, and its failure to develop an IEP within 30 days, by April 2002.

22. Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990), or seriously infringe the parents' opportunity to participate in the IEP formulation process, *Roland M.*, 910 F.2d at 994; *Hall*, 774 F.2d at 635, clearly result in the denial of a FAPE. See *W.G. v. Board of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992).

23. In the present case, the District's failure to determine the Student eligible for special education necessarily resulted in a denial of FAPE. Had the Student been determined eligible, the District would have had an obligation to conduct an IEP meeting within 30 days of the eligibility determination. WAC 392-172-156. The failure to do so completely denied the Parents "opportunity to participate in the IEP formulation process," which in turn is a denial of FAPE. See *W.G. v. Board of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992).

24. Based on procedural violation alone, the Student has been denied FAPE for the period from March 1, 2002, approximately when the Student should have been determined eligible, to the present date. (The eligibility date is used to determine the period of denial, rather than the IEP date, because the District should now have the benefit of thirty days to develop its IEP, as allowed by law.) The next issue then becomes what is the appropriate relief for the denial of FAPE.

Compensatory Education

25. If a violation of the IDEA is found either procedurally or substantively, the court shall grant such relief as [it] deems appropriate. *20 U.S.C. 33 Sec. 1415(i)(2)(B)(iii) and Hacienda La Puente School v. Honig*, 976 F.2d 487 (9th Cir. (CA) 1992). By analogy, the ALJ likewise has broad discretion in determining the appropriate relief.

26. Compensatory education and reimbursement for parentally supplied educational services are remedies provided to a parent and student when a district has failed to offer and/or provide a student with a FAPE. See *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 111 S.Ct. 1317 (1991), and *Burlington Sch. Comm. v. Massachusetts Dept. Of Ed.*, 471 U.S. 359, 369 (1985). However, in the 9th Circuit, compensatory education does not need to be a day for day equivalent of the time when the education was not appropriate. *Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F3d at 1497.

27. In this case, it is impossible to determine the appropriate reimbursement or compensatory education to award the Student for a number of reasons.

28. First, educational services are to be determined by an appropriately constituted IEP team, in an IEP team meeting. This has not occurred, and therefore, the record does not have the benefit of the outcome of that meeting. Questions not clearly answered by the record, that could be answered in the context of an IEP team meeting include whether the Student needs pull-out services, whether the Student needs ESY, whether the Student needs water therapy for educational benefit, and whether the Student is currently receiving a substantively appropriate program under Ms. Oddo.

29. There is also a question about which of the Student's OT and PT services are medically necessary and which are necessary to counter the adverse affect the Student's disability has on her educational performance. The medical standard and the educational standard for OT and PT may be different. There is insufficient evidence in the record to legally make that distinction.

30. Therefore, although it is determined that the Student is eligible to receive compensatory education to make up for the District's failure to find her eligible as of March 2002, and maybe some reimbursement, a specific award is not made. Rather, the District is ordered to convene an IEP meeting and develop an IEP for the Student, as quickly as possible. Once the IEP team has determined the appropriate educational program for the Student, they should let the terms of the IEP guide the appropriate compensatory education. To the extent that educationally needed services were not provided or paid for by the District from March 2002 to present, the District shall either make plans to provide the services or reimburse the Parents if they provided them. Similarly, the services of Ms. Oddo should not be discounted, and to the extent they were appropriate and allowed the Student to make meaningful progress, the team should take that into account in determining the amount of compensatory education.

31. It is understood that there may be future conflict with regard to the appropriate relief. Any future disagreement is subject resolution through a due process hearing.

32. In accordance with the findings of fact and conclusions of law, the following order is hereby entered.

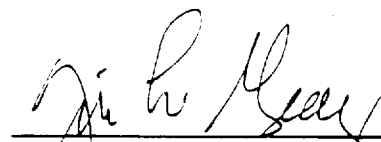
ORDER

1. The Student was eligible for special education as of March 2002;
2. The District conducted an evaluation of the Student in a timely manner, upon her release from medical restrictions in mid-January 2002;
3. The District erroneously failed to determine the Student eligible for special education as a result of its evaluation in 2002;
4. The District's failure to determine the Student eligible for special education and subsequent failure to develop an IEP for the Student resulted in a denial of FAPE from March 1, 2002, through the date of this order;

5. The Parents are entitled to receive relief for the denial of FAPE to the Student in the form of compensatory education or reimbursement for services, to be determined by the IEP team, in accordance with the conclusions of law set forth above;

6. The District shall convene an IEP meeting with an appropriately constituted IEP team, as quickly as possible, and develop an IEP for the Student in accordance with the applicable statutes and regulations.

Dated at Seattle, Washington this 29th day of April, 2003.



Jill L. Geary
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 USC 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.

PURSUANT TO 20 USC 1415 (e) (INDIVIDUALS WITH DISABILITIES EDUCATION ACT) AND CHAPTER 34.05 RCW, THIS MATTER MAY BE FURTHER APPEALED TO A COURT OF LAW. THE 30-DAY TIME LIMIT FOR FILING A PETITION FOR JUDICIAL REVIEW COMMENCES WITH THE DATE OF THE MAILING OF THIS DECISION.