

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

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OFFICE OF
ADMINISTRATIVE HEARINGS

IN THE MATTER OF

EVERETT SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2003-SE-0122

**Order On Motions for Summary
Judgment**

A prehearing telephone conference for oral argument on the parties' cross motions for summary judgment was held before Administrative Law Judge (ALJ) Janice E. Shave, on October 8, 2003, pursuant to notice mailed to the parties. The parent of the student whose education is at issue (hereinafter the Parent and the Student) appeared. The Everett School District (hereinafter the School District) was represented by Jeffrey Ganson, attorney at law.

After oral argument, the parties submitted various documents referred to in their motions. The replies to the post-oral argument documents were due and were submitted on or before October 14, 2003.

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

Findings of Fact

1. The following facts are undisputed:
2. The Student is a thirteen year old child. He attends school in the School District. He received special education services from the School District through the end of the 1999-2000 school year. At that time the School District determined the Student was no longer in need of special education.
3. The Student began the 2000-2001 school year in September, 2000, as a regular education student. In October, 2000, The Parent made a referral of the Student for special education in multiple areas, including behavior, social, personal, health, speech, language and writing. The School District then conducted a full special education evaluation. In October, 2000, the School District again determined the Student was not eligible for special education.

4. In November, 2001, approximately one year after the full evaluation and eligibility determination, the Mother again referred the Student for evaluation as a special education student. The School District did not conduct a full evaluation of the Student. Instead, the School District made its eligibility determination based upon the Student's continued academic improvement. In or about December, 2001, the School District determined the Student did not qualify for special education. This decision was based upon the School District's determination that no initial evaluation was needed. No evaluation was conducted.

5. The Parents disagreed with the School District's decision that the Student was not eligible for special education. On February 19, 2002, the Parents wrote a letter to the School District specifically requesting an independent educational evaluation (IEE) of the Student. They further asked the School District to provide them with the School District's policy for "any agency criteria applicable for independent educational evaluations as set forth in the Washington Administrative Code 392-172-150(2)."

6. There is no direct evidence, such as a date-received stamp, regarding when the School District received that letter. However, the School District states in its written material in support of its motion for dismissal "On February 19, 2002, [the Student's P]arents made a written request for an IEE." For the purposes of ruling on the cross-motions, it is assumed the School District received the Parents' written request on February 19, 2002, when it was written. Fifteen days from February 19, 2002, was March 5, 2002.

7. The School District's then-attorney (not the current attorney) sent a letter to the Parents' then-attorneys on March 11, 2002, stating an IEE was not appropriate "in these circumstances". The letter then makes various incorrect factual statements, including:

...As you had mentioned by phone, and as confirmed by the District, the [S]tudent has never previously been considered for special education and thus has never had a special education evaluation by the District...Under WAC 392-172-150, a parent has a right to an independent educational evaluation 'if the parent disagrees with the school district's ...evaluation.' Here, there is not yet any District evaluation with which to disagree. In short, it appears that a request for an independent education evaluation in this case is premature.

8. The Parents deny receipt of that March 11, 2002, letter. However, it was sent to their agents, their attorneys.

9. On March 11, 2002, the Parents had the Student privately evaluated by Douglas Whiteside, Ph.D. The neuropsychological evaluation included intelligence, achievement and behavior tests. The cost of the evaluation was \$2,200.00.

10. A meeting to discuss the Student and his education took place on or about April 25, 2002, between the School District, the Parents, and the Parents' attorneys. The subject of the Parents' request for an IEE was again addressed at that meeting, and the School District again explained why it was refusing to pay for the IEE. The Parents provided the School District a copy of Dr. Whiteside's neuropsychological evaluation at the April, 2002, meeting. The Student has remained in the School District since that time, and has not been found eligible for special education services.

11. The Parents submitted another written request to the School District dated August 21, 2003, again requesting the School District provide an IEE. As the IEE had already been privately obtained and paid for, this request was for reimbursement to the Parents of the \$2,200 they had paid in March, 2002. The School District wrote a letter to the Parents on September 8, 2003, reiterating its refusal to pay for the IEE. The Parents filed a request for due process hearing with the Office of Superintendent of Public Instruction (OSPI) September 11, 2003.

Conclusions of Law

1. The issue of IEEs is addressed in Washington law at WAC 392-172-150. It provides as follows in pertinent part:

Parents of a special education student or a student referred for special education have the right under this chapter to obtain an independent educational evaluation of the student if the parent disagrees with the school district's or other public agency's evaluation of the student, subject to subsections (4) through (11) of this section.
(Emphasis added.)

Subsections (4) through (11) of WAC 392-172-150 provide as follows:

(4) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district or other public agency.

(5) If a parent requests an independent educational evaluation at public expense, the school district or other public agency must either:

(a) Initiate a hearing within fifteen days under this chapter to show that its evaluation is appropriate; or

(b) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under this chapter that the evaluation obtained by the parent did not meet agency criteria.

(6) If the school district or other public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(7) If a parent requests an independent educational evaluation, the school district or other public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the school district or other public agency must either provide the independent educational evaluation at public expense or initiate a due process hearing to defend the public evaluation.

(8) If the parent obtains an independent educational evaluation at public or private expense, the results of the evaluation:

(a) Must be considered by the school district or other public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the student; and

(b) May be presented as evidence at a hearing under this chapter regarding that student.

(9) If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(10) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the school district or other public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(11) Except for the criteria described in subsection (10) of this section, a school district or other public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Emphasis added.)

2. It must first be determined whether the provisions of WAC 392-172-150 apply to the Student and the Parents. At the time the Parents made the written request for an IEE on February 2002, they were the Parents of a student referred for special education. Thus, as a threshold matter, WAC 392-172-150 applied to the Parents as parents of a student referred for special

education. There was not a pending referral for special education as of the time the IEE was requested, but the Parents had made a referral for special education services a few months before the request for IEE, and had just received the School District's decision on the referral prior to making their written request for an IEE.

Fifteen Day Time Limit

3. According to WAC 392-172-150 (5)(a), if a parent requests an IEE at public expense, the school district must either initiate a hearing within fifteen days under Chapter 392-172 WAC to show that its evaluation is appropriate, or, ensure that an IEE is provided at public expense, unless the school district demonstrates in a due process hearing that the evaluation obtained by the parent did not meet agency criteria.

4. Fifteen days from February 19, 2002, was March 5, 2002. The School District waited longer than fifteen days, and did not either initiate a hearing under Chapter 392-172 or agree to pay for the IEE.

5. Special education law, both federal and state, provides few bright lines. The fifteen day limit for a school district to act within is one such bright line. The School District fell outside the time limit at its peril.

Statute of Limitations

6. The Individuals with Disabilities Education Act (IDEA) and Chapter 392-172 of the Washington Administrative Code (WAC) do not include an express time limit (statute of limitations) for the parents of a special education student, or parents of a student referred for special education, to file a request for due process hearing. However, given the annual development of individualized education programs (IEPs, the written plan for each special education student's education), school districts' notice obligations, and the requirement that a written decision at the conclusion of a due process hearing be issued within forty-five days of the filing of the request, it is clear that Congress anticipated the speedy identification and resolution of disputes in special education cases. It has long been the law in the Ninth Circuit that speedy resolution of special education disputes is important. "It is critical to assure appropriate education for handicapped

children at the earliest time possible.” *Alexopoulos v. San Francisco Unified Sch. Dist.*, 817 F.2d 551, 556 (9th Cir. 1987.) See also WAC 392-172-158, -302, -356.

7. In *Dreher ex rel. Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228, 20 IDELR 1449, 1450 (9th Cir. 1994), the Ninth Circuit Court of Appeals considered an argument that a thirty-five day statute of limitations pertaining to appeals from administrative actions should be applied to an IDEA claim. In *Dreher*, 22 F.3d at 231, at 20 IDELR 1450, the court stated:

Because the Act does not specify a statute of limitations, we must look to Arizona's statute of limitations applicable to the most closely analogous state cause of action. See *Wilson v. Garcia*, 471 U.S. 261, 268 (1985); *Alexopoulos v. San Francisco Unified Sch. Dist.*, 817 F.2d 551, 554-55 (9th Cir. 1987). We apply that statute of limitations unless it conflicts with underlying federal policies. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985).

8. Subsequent to issuance of *Alexopoulos* and *Dreher*, in determining the statute of limitations to apply to a special education dispute arising in Oregon State, the Ninth Circuit held that “a two-year limitations period is consistent with both the policy underlying the IDEA and with the limitations periods adopted by most other circuits.” *S.V. v Sherwood Sch. Dist.*, 254 F.3d 877, 881 (9th Cir. 2001). Oregon’s two year limitations period applied to tort claims and specifically applied to claims alleging breaches of statutory duty by school districts and other public bodies.

9. A Washington State statute of limitations for IDEA claims has not been identified by statute or regulation, or adopted by the courts. The first potentially applicable statute of limitations is the six year action upon a contract in writing, or liability express or implied arising out of a written agreement. Revised Code of Washington (RCW) 4.16.040. The court in *Sherwood* specifically rejected the notion that a six year statute of limitations is consistent with the policy underlying the IDEA. The Ninth Circuit noted in *Sherwood* that the source of the School District’s alleged duty to a special education student is the IDEA, and not a contract or a quasi-contract. The six year contract statute of limitations is therefore rejected as not appropriate for special education due process claims.

10. The second potentially applicable statute of limitations is the three year 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 added.) RCW 4.16.080. The School District's duty to the Student arises under the IDEA and the state regulatory scheme. The Parents' claim is in essence an alleged breach of the Student's right to receive a free appropriate public education (FAPE), or to be appropriately evaluated for such a special education. The claim is thus for the injury to the rights of another. In order to apply RCW 4.16.080, it must then be determined whether the rights alleged to have been injured (failure to provide a FAPE) are "hereinafter enumerated." That is, whether that specific right is addressed within Title 4.16 RCW, after ("hereinafter") RCW 4.16.080.

11. The final potentially applicable statute of limitations, which does appear after RCW 4.16.080, is the two year action for relief not otherwise provided for ("hereinbefore") within Title 4.16 RCW. RCW 4.16.130. The language of RCW 4.16.130 is even more general than RCW 4.16.080. It does not identify with any specificity the violation of a right, and cannot be said to enumerate a special education due process cause of action.

12. It is concluded the three year statute of limitation for actions injuring the rights of another, which is contained within RCW 4.16.080, is the applicable statute of limitation for special education due process matters. Based on this standard, the Parents would not be barred from challenging in September, 2003, a decision made by the School District related to a written request for an IEE made February 19, 2002, relating to an evaluation completed by the School District in October, 2000.

13. The School District explained in oral argument that it interpreted the Parents' February 19, 2002, request for an IEE as disagreement with the School District's December 2001, eligibility decision. The School District asserts the Parents did not specify disagreement with any particular evaluation. The School District did not inquire of the Parents which evaluation was at issue, and instead assumed the request for an IEE was actually a challenge to the December 2001 eligibility determination. In furtherance of its line of analysis, the School District cites to a hearing officer's decision in *Manhattan School District*, 37 IDELR 23 at 84.

14. There is nothing in the wording of the Parents' February 19, 2002, written request for an IEE to support the School District's interpretation. The Parents made a clear request for an

IEE. They only requested an IEE. If the School District disagreed with the Parents' request, it had a mechanism at hand to defeat the Parents' request. The School District needed to make a request for hearing within 15 days of its receipt of the request for IEE.

15. The *Manhattan* decision is not binding, and is factually dissimilar. It involved a school district which protected its position and requested a due process hearing, unlike the School District in this case. *Manhattan* dealt with the merits of whether the Parents would be entitled to a "case study evaluation" in 2000, following an evaluation in 1996 and 1999. In the present case, request for IEE was made by the Parents a little more than one year after the School District's full evaluation of the Student. While the School District characterizes this as "stale disputes over old evaluations," the request was made within the applicable statute of limitations, and is allowed under the law.

Accrual

16. The Parents' right to request an administrative due process hearing to enforce their right to an IEE accrued fifteen days after February 19, 2002, when the School District neither agreed to fund the IEE nor requested a due process hearing to defend its evaluation.

Relief From The Applicable Washington State Statute Of Limitations

17. A policy letter from the assistant secretary of the agency responsible for interpreting, overseeing and implementing special education policy written in 1989 and appearing as *Letter to Fields*, 13 EHLR 213:259 answered certain questions posed to the agency:

Q. 5. After a parent has received reimbursement for an independent evaluation in year three of a three year evaluation cycle, is the public agency required to pay for parent initiated independent evaluations performed unilaterally and without notice to the IEP committee and which were performed during years one and two of the evaluation cycle?

...

Q.6. What is the maximum amount of time after a public agency evaluation that a parent must notify an IEP Committee of a disagreement and request an independent evaluation at public expense? Must we either call for a hearing or pay for an evaluation if a parent waits more than two (2) years after the public agency evaluation to notify us of a disagreement and request an independent evaluation?

18. A similar opinion letter, containing identical language on the relevant two questions and answers, was issued in May, 1990, as *Letter to Thorne*, 16 EHLR 606. The *Fields/Thorne* letters, from the federal Office of Special Education Programs (OSEP), provide guidance, as they originate from the agency responsible for interpretation of the federal special education laws, but are not controlling. The letters restate facts of the particular case that was at issue, which facts do not appear in the questions themselves.

We understand your question to be describing a situation in which a parent receives an IEE at public expense at the conclusion of a three year cycle and also requests reimbursement for IEEs performed in two previous years. It appears that these evaluations were not initiated by the parent as a result of a public agency evaluation with which the parent disagreed; and, therefore, the parent would not be entitled to reimbursement for these IEEs.

...

[Applicable federal] regulations do no [sic] establish timelines regarding how long after receiving the results of a child's public agency evaluation a parent can wait to request reimbursement for an IEE. However, State and local agencies may establish reasonable timelines in this matter. In the situation presented by your inquiry, it would not seem unreasonable for the public agency to deny a parent reimbursement for an IEE that was conducted two years after the public agency's evaluation. Therefore, it would not be necessary for the public agency to initiate a hearing in this situation.

(Emphasis added.) *Letter to Thorne, Id.*

19. The letters are not helpful to the inquiry presently before us, for a variety of reasons. First, the IEEs obtained by the parents who were the subject of the *Fields* and *Thorne* letters were not initiated as a result of agency evaluations with which the parents disagreed. Thus, the protection of the regulation does not apply to them at all, as that is the first factor which must be met. Even if the regulation applied to them, the letters acknowledge no time line applies to request such a hearing. The letters suggest the states may adopt reasonable time lines, but Washington State has not done so, and therefore we are left with the three year statute of limitations. Two years had not passed from the time the School District fully evaluated the Student in November, 2000, and the time the Parents requested the IEE in February, 2002. The statute of limitations applied to special education disputes in 1990 in the State of Texas, where the *Fields/Thorne* inquiry arose, is not known. It is the holding of this decision that Washington

has a three year statute of limitations, although that issue has not been addressed in either Federal or Washington State court. Finally, the opinion letters are specifically limited to the specific circumstances set forth in that situation, which is not similar to the circumstances in this matter.

Equity

20. The equitable doctrine of *laches* bars a claim for equitable relief where a party's delay in filing a suit was (1) unreasonable and (2) resulted in prejudice to the other party. *Murphy v. Timberlane Sch. Dist.*, 22 F.3d 1186, 1189 (1st Cir. 1994). A parent's delay in challenging educational planning may be grounds for denying relief under a theory of *laches*. IDEA remedies are based on equitable principles and the conduct of both parties should be examined. See *W.G. v. Board of Trustees of Target Range School District*, *id.*

21. It is concluded there is no showing that the Parents' delay in filing was unreasonable, or that the delay resulted in prejudice to the School District. The delay was reasonable, given that the Parents relied on the School District's opinion to the Parents that the Parents had no right to request an IEE, and the School District had no obligation to pay for one. The School District was on notice of the dispute about payment for the IEE from February 19, 2002, and was therefore accorded an opportunity to pay for the IEE or request of a hearing to establish the appropriateness of its evaluation, or to demonstrate that the Parents were not entitled to an IEE at public expense. The School District has not shown that it acted to its detriment in reliance on the Parents' actions, or that consideration of the Parents' claims at this time will cause it injury. The Parents still request reimbursement for the same IEE at the same cost, \$2,200.00. The School District has not alleged harm to it as a result of passage of time, such as witnesses that would be unavailable, for instance, which would make application of the statute of limitations unfair or inequitable.

Issues for Hearing

22. Two of the issues for hearing have been resolved in favor of the Parents by operation of law, and without a hearing on the merits: (1) Whether the School District made a timely response to the Parent's request for an IEE; and (2) Whether the Parents are entitled to

their requested remedy, which includes the reimbursement of an independent educational evaluation (IEE) at public expense, or other equitable remedies, as appropriate.

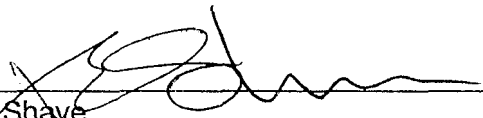
23. The School District did not make a timely response to the Parents' request for an IEE. The resolution of the first issue dictates the resolution of the second issue: the Parents are entitled to their requested remedy, which is reimbursement of the \$2,200.00 IEE obtained by them in March, 2002, from Douglas Whiteside, Ph.D. As the Parents have made no request for another remedy, it appears the matter is concluded with no further issues remaining for a due process hearing. There is no need to reach the merits of the case regarding the appropriateness of the School District's October, 2000, evaluation.

Decision

1. The School District shall reimburse the Parents \$2,200.00 for the cost of the IEE obtained by the Parents in March, 2002.

2. No other issues exist for resolution in this matter. The hearing date is stricken.

Dated at Seattle, Washington on the date stamped above.



Janice E. Shave
Administrative Law Judge
Office of Administrative Hearings