

MAR 25 2003

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

OFFICE OF
ADMINISTRATIVE HEARINGS

IN THE MATTER OF:

HIGHLINE SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2003-SE-0010

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

A hearing in the above-entitled matter was held by telephone before Administrative Law Judge Jill L. Geary (ALJ), in Seattle, Washington, on March 18, 2003. The Parent, the Parent of the Student at interest¹, was represented by Carol Vaughn, Attorney at Law. Highline School District (District) was represented by David Hokit, 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 January 29, 2003, the District filed a due process hearing request with the Office of Superintendent of Public Instruction (OSPI) to dispute the Parent's request for an individual educational evaluation (IEE) at public expense. On January 30, 2003, the Office of Administrative Hearings on behalf of OSPI, sent notices to the parties scheduling a prehearing conference for February 11, 2003, and a due process hearing for February 21, 2003.

A prehearing conference was held on February 11, 2003. Both parties were present and represented. The Parent requested a continuance of the due process hearing so she could file a motion for summary judgment to dismiss the District's request for hearing as untimely. In the order mailed February 12, 2003, a briefing schedule was established and a prehearing conference was ordered to be held on March 6, 2003.

A prehearing conference was held on March 6, 2003, and both parties were represented. After review of the parties' submissions on summary judgement, the ALJ denied the motion for summary judgment and ordered that the due process hearing be bifurcated. Two hearing schedules were established. A due process hearing was scheduled for March 18, 2003, in which the sole issue for hearing was whether the District

¹In the interests of preserving the family's privacy, this decision does not name the parents or student.

filed its request for due process hearing in a timely manner pursuant to WAC 392-172-150. A due process hearing was also scheduled for March 31, and April 1, 2003, for the remainder of the issues, should further hearing be necessary.

Evidence Relied Upon:

Exhibits Admitted: 1 through 11, and 13. Exhibit 12, offered by the Parent, was reserved and never re-offered during the hearing. On March 20, 2003, by letter, the Parent made an offer of proof and asked that Exhibit 12 be admitted. The exhibit was not necessary to the decision; therefore, the offer of proof was not considered and Exhibit 12 was not admitted into the record.

Witnesses Heard: Nancy Meeks, Special Education Co-director, Highline School District; Fred Row, Educational Consultant on contract with the District; and the Parent.

ISSUE

The issues for hearing are:

1. Whether the District filed its request for due process hearing in a timely manner, pursuant to WAC 392-172-150(5)(a); and
2. Whether the District's requested due process hearing should be dismissed and the Parent's request for an IEE at public expense be granted.

FINDINGS OF FACT

1. The Student, _____, attends school in the District. The Student is eligible for and receives special education services from the District.
2. On January 9, 2003, the Parent made a verbal request for an IEE at public expense. The Parent wanted outside people, of her choosing, to perform the Stanford Binet cognitive assessment and a sensory integration processing evaluation of the Student. The District did not immediately approve or deny the Parent's request for an IEE at public expense.
3. Before January 13, 2003, the District decided that it would perform the Stanford Binet and the sensory integration processing evaluation, utilizing District staff to conduct the testing.
4. At a meeting held on January 13, 2003, the District informed the Parent that it was going to deny the Parent's request for an IEE at public expense. The District also told the

Parent that it would conduct the Stanford Binet and the sensory integration processing evaluations using District personnel.

5. During the January 13, 2003 meeting, the following conversation occurred between the District, the District's consultant, Fred Row, and the Parent's advocate, Rose Moore.

Advocate: I just wanted the District to know that we are going to go ahead and do our own evaluation.
District Staff: I appreciate knowing that.
Consultant: But you are not requesting it at District expense?
Advocate: I will later when it comes out in our favor.
Consultant: Are you requesting an independent evaluation . . .
Advocate: Yes.
Consultant: At District expense at this time?
Advocate: Yes. And you are saying 'No.' And I am saying we are still going to go ahead and do it.
Consultant: And then what the District will have to do is go ahead. . .
Advocate: And reevaluate?
Consultant: No, due process too.
Advocate: Pardon me?
Consultant: The District has to go ahead with the due process hearing.
Advocate: That is up to you. You can go through mediation if you want to.
Consultant: Well, we know we have 15 days from the date you requested the IEE. Unless you withdraw your request, the District must, in denying you, request due process. . .
Advocate: We are not withdrawing our request.
Consultant: Okay, I just want to point that out.
Advocate: We are not withdrawing our request at all.

See Exhibit 13, audio tapes of the January 13, 2003 meeting.

6. Later in the January 13, 2003 meeting, the following exchange occurred between the same two people:

Consultant: The issue we want to make very clear is that while the District conducts the original assessments, if you'd like to withdraw your request pending the outcome of those assessments and then make a determination as to whether you want to seek an independent educational evaluation at District expense, then we would not have to (inaudible for one or two words) a due process hearing.

Advocate: Again, we are going ahead with the request we made and we are going to do the reevaluation.

Consultant: Then the District has no option but to file for a due process hearing.

7. During his testimony, the District consultant stated that he continued to be confused as to whether the Parent was withdrawing her request for an IEE at public expense after the above exchanges. However, during the meeting held on January 13, 2003, the District consultant did not make any further attempts to clarify his understanding, nor did he communicate to the Parent that he was confused as to her intent. The consultant's confusion was not reasonable once the Parent's advocate stated several times that the Parent was not withdrawing her request for an IEE at public expense.

8. During the January 13, 2003 meeting, the Parent gave consent to the District to conduct the evaluations by District personnel. In giving the consent, the Parent did not indicate that she was reconsidering her decision to pursue an IEE at District expense.

9. After the meeting of January 13, 2003, the consultant reported to the Co-Director of Special Education that he was confused about whether the Parent was continuing to pursue an IEE at District expense or whether the Parent was going to pursue reimbursement later.

10. On January 17, 2003, the Co-director of Special Education received the Parent's written request for an IEE. The request had been sent to the District prior to January 13, 2003, but was not sent to the special education department's fax number. It took several days for the letter to reach the Co-director.

11. On January 17, 2003, the Co-director wrote a letter to the Parent confirming that the Parent had asked on two occasions for an IEE at District expense. The letter includes the following statements:

I am writing to formally respond to your recent verbal requests for an Independent Educational Evaluation (IEE). It is my understanding that at the January 9 Reevaluation feedback meeting you formally requested an Independent Educational Evaluation.

* * *

However, it is my understanding that your advocate, Rose Moore, indicated that you would still have an IEE completed and that after reviewing findings you would again request the district provide reimbursement for all costs of

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the IEE. This leaves the district with no option but to request a Due Process Hearing to show that our reevaluation is appropriate.

At the January 9 reevaluation feedback meeting you and Mrs. Moore indicated that you would send a written request for the IEE. Your written fax request was not received in our office until January 17, 2003. While you faxed it on January 10, 2003, you faxed it to the wrong fax number and it was not forwarded to our office until today. However, because you made a verbal request at both the January 9 and 13 meetings, I am writing to formally deny your request. The district is required by WAC [Washington Administrative Code] 392-172, subsection 150 requirements to formally request a Due Process Hearing within 15 days of your request.

If it is your desire to avoid a Due Process Hearing, while the district's evaluations move forward, you will need to provide a letter formally withdrawing your request for an IEE at district expense. If we do not receive a withdrawal letter by noon, January 24, the district will file for a Due Process Hearing.

See Exhibit 5. The Co-director's letter indicates that as of January 17, 2003, the District was aware that the Parent had made a request for an IEE at public expense as of January 9, 2003, and that the Parent had not withdrawn that request.

12. After receiving the Co-director's letter, the Parent did not withdraw her request for an IEE at public expense.

13. The District contacted its attorney on January 24, 2003, to request that a due process hearing request be filed. The due process hearing request was not filed until January 29, 2003.

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.

2. The IDEA provides parents with the right to an independent educational evaluation (IEE). The IDEA procedural safeguards provide, in relevant part:

(a) Establishment of procedures

Any state educational agency, State agency or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include -

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

20 USC 33 §1415.

3. Federal implementing regulations provide that a parent may request the IEE be at public expense. See 34 C.F.R. § 300.502. Specifically, the regulation provides:

(b) Parent right to evaluation at public expense. (1) A parent has the right to an [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an evaluation at public expense, the public agency must, without unnecessary delay, either -

(i) Initiate a hearing under Sec. 300.507 to show that its evaluation is appropriate; or

(ii) Ensure that an [IEE] is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria.

* * *

(4) If a parent requests an [IEE], the 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 public agency may not unreasonably delay either providing the [IEE] at public expense or initiating a due process hearing to defend the public evaluation.

34 C.F.R. Sec. 300.502.

4. The State's implementing regulation on IEEs provides, in relevant part:
- (5) If a parent requests an [IEE] 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.

* * *

(7) If a parent requests an [IEE], 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 [IEE] at public expense or initiate a due process hearing to defend the public evaluation.

WAC 392-172-150.

5. The District asserts that a student should not be automatically entitled to an IEE at public expense as a result of a district violation of the 15 day period for two reasons: (1) Because the state regulation is an administrative rule that does not carry the force and effect of statute; and (2) because in balancing the equities of the case it would be unfair to do so. The District's position is not persuasive.

6. As stated above, Congress requires each state agency to establish procedures that will ensure parents the provision of fundamental procedural safeguards. Congress' inclusion of the IEE in the list of four fundamental procedural safeguards provides a strong statement of the importance of the IEE as a mechanism for parental participation. The IEE, whether at public expense or not, provides the fundamental mechanism by which a parent can bring outside professional judgment to bear on a district's identification, evaluation, and delivery of educational services of a special education student.

7. In Washington, our regulations give meaning to the fundamental nature of the IEE within the IDEA by requiring a district to act within a specific period of time and providing, without a parent having to initiate a hearing, a specified remedy for the failure to act. The language is clear and unambiguous. The IEE regulation further provides that although a district may inquire as to a parent's reasons for seeking an IEE, it may not do so to delay its decision to either grant the request or initiate due process.

8. The reasons for requiring strict compliance with the 15 day deadline are compelling. Although the 15 day deadline is regulatory, rather than statutory, it is appropriately applied in this case. This is supported by the state's authority to establish procedures pursuant to 20 USC 33 §1415. Most importantly, as stated above, it is the only special education regulation which explicitly provides the remedy for failure to comply. It also specifically states that no matter what reason a parent provides, a district must still either grant the request or initiate a hearing.

9. In administering this case load, I have found that it is common practice for school districts file a request for hearing within the 15 days as a matter of course, even when it is anticipated or hoped that the matter will be resolved without recourse to the hearing process. This common practice brings predictability and speedy resolution of requests for IEE. This ensures the IDEA goal of providing one of the four fundamental procedural safeguards established by Congress and the overall goal of speedy resolution of disputes. Failure to enforce the 15 days would create unpredictability as to when a district could request a hearing and when a parent could expect a response from a district.

10. With regard to the District's argument that the Parent was unclear about or modified her request, when her advocate said they would request reimbursement after the evaluation, we conclude that the advocate's statement did not change the fundamental nature of the Parent's request. The statement makes sense in light of the District's refusal to pay for the IEE. At that point the Parent had no choice but to pay for the IEE on her own and then make a request for reimbursement after the fact. As of the meeting of January 13, 2003, the Parent would not have known that the District was not going to file for a due process hearing within a timely manner. She could have reasonably anticipated that the matter would need to be sorted out through a due process hearing. The District's position that the Parent changed her request for an IEE at public expense as of January 13, 2003, is not reasonably supported by the record.

11. Based on the foregoing, it is concluded that the District failed to comply with the 15 day deadline. As a consequence it must provide the Student an IEE at public expense, pursuant to WAC 392-172-150.

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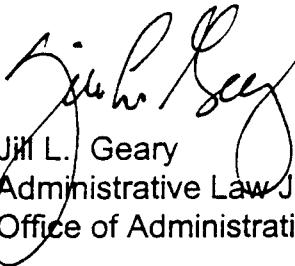
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ORDER

1. The District failed to file for a due process hearing in a timely manner, pursuant to WAC 392-172-150(5)(b);
2. The issue as to whether the District provided the Student with an appropriate evaluation is dismissed; and
3. The District shall pay for the Parent's requested IEE per the provisions of WAC 392-172-150(5)(b).

Dated at Seattle, Washington this 25th day of March, 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 ALJ at her address at the Office of Administrative Hearings. The petition will be considered and disposed of by the ALJ. 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.