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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 32413-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

GRANDVIEW SCHOOL DISTRICT NO. 200,

Appellant,

v.

MARIA SANCHEZ and JOSÉ GARCIA,

Respondents,

BRIEF OF RESPONDENTS MARIA SANCHEZ AND JOSÉ GARCIA

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Other Authorities:

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I. INTRODUCTION

The underlying litigation in this matter, addressing claims under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, extended over four years and included a hearing before an administrative tribunal, an enforcement action through the Office of Superintendent of Public Instruction (“OSPI”), and a review of the administrative record in the Yakima County Superior Court. Respondents Maria Sanchez (“Maria”) and her son José Garcia (“José”) prevailed at each level on their claims against Petitioner Grandview School District No. 200 (the “District”). Ultimately, after substantially affirming the administrative law judge’s determination that the District violated both federal and state law pertaining to the provision of special education and the award of remedial educational relief to José, the Superior Court ordered the District to pay attorneys’ fees and costs for Maria and José in the total amount of \$475,082.51.

Because the District did not file a timely appeal of the Superior Court’s Findings of Fact, Conclusions of Law and Order on Judicial Review of the Administrative Record (“Order on Judicial Review”), the only issue preserved for this Court’s review is the award of fees and costs.¹ 20 U.S.C. § 1415(i)(3)(B) expressly authorizes a trial court to

¹ See Commissioner Monica Wasson’s Ruling dated July 8, 2014, and this Court’s Order Denying Motion to Modify Commissioner’s Ruling, dated October 2, 2014, both holding that the District did not timely appeal from the trial court’s Order on Judicial Review dated August 30, 2014. CP 8052-8082.

award fees and costs to prevailing parents and students for both administrative and court proceedings. Here, the trial court actively considered the evidence and arguments the parties timely presented regarding fees and costs, and properly applied the law. Because the trial court did not abuse its discretion in making its awards of fees and costs, this Court should affirm the trial court, and should also award Maria and José their reasonable fees and costs incurred on this appeal.

II. RESPONDENTS' RESTATEMENT OF THE CASE²

Maria is a low-income, monolingual Spanish speaker. CP 4943 at ¶ 9. She is illiterate. CP 26-27; CP 5939 at ¶ 6; CP 5953 at ¶ 2; CP 5967 at ¶ 2; CP 5973 at ¶ 2; CP 6003 at ¶4. Her son José was born in 1992 with severe bilateral hearing loss. CP 27 at ¶ 13; CP 4941-42. José has lived his entire life in Grandview, Washington. CP 27. He began attending school in the District in 1996 at age three. He has always attended District schools; he never received educational services from another school district. CP 27 at ¶ 11.

Throughout the entire 13 years José attended school in the District, the District failed to provide him with services from a teacher of the deaf,

² Pursuant to RAP 10.3(a)(5), an appellant's statement of the case should be a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." Moreover, "[r]eference to the record must be included for each factual statement." Much of the District's Statement of the Case is not relevant to the fee dispute, and substantial passages are not properly cited to the record. *See, e.g.*, Brief of Appellant at pp. 15-17 (no citations to record). Accordingly, Maria and José are submitting a restatement of the case, as allowed by RAP 10.3(b).

with assistive technology (such as an appropriate FM system so he could access classroom instruction), or sign language instruction. CP 27-33; CP 51 at ¶ 15. Although José has normal cognitive abilities, by the time he was in high school his language skills were severely impaired and he lacked a viable communication system. CP 27 at ¶ 12; CP 44 at ¶ 115. According to the District's own evaluations, in high school José performed at the mid-second to third grade level academically – far below his age group in all academic areas. CP 43, ¶ 111; CP 44 at ¶ 115. His feelings of frustration and anxiety about school had increased to the point where he had to be medicated to control symptoms of depression. CP 44 at ¶ 117-118.

On January 15, 2010, Maria filed a Request for Special Education Due Process Hearing alleging both procedural and substantive violations of the IDEA. CP 20; CP 4941. The case was assigned to an administrative law judge (“ALJ”) who had received training in federal and state special education law. CP 4934. Maria asked to go beyond the IDEA two-year statute of limitations in addressing the District's violations. CP 20. The ALJ bifurcated the due process hearing in order to define the look-back period. CP 8-18.

The first part of the bifurcated hearing was limited to whether Maria could establish either of the statutory exceptions to the statute of limitations. CP 8-18. Based on the evidence presented over three days, from May 24-26, 2010, the ALJ determined that Maria had established by a preponderance of credible evidence that the District more likely than not

withheld information it was statutorily required to provide and thereby effectively prevented her from requesting a due process hearing prior to January 15, 2010. CP 17. The ALJ found that Maria was not bound by the two-year statute of limitations and could allege violations of the IDEA commencing with the 1998-1999 school year through January 15, 2010. CP 17.

The second part of the bifurcated hearing began June 21, 2010. CP 20. Combining phases one and two of the hearing, a total of 19 days of testimony was presented. CP 20. The ALJ made adverse credibility findings against District staff, finding some gave testimony that was false or self-serving. CP 25-26 at ¶ 1-8. The ALJ determined that District staff signed documents attesting they participated in meetings that were never held. CP 26 at ¶ 7-8. The ALJ found the District had denied José a free appropriate public education for many years and directed the District to fund a compensatory education program. CP 55 at ¶32; CP 56 at ¶1. The ALJ's decision materially altered the legal relationship between the parties, and directly benefitted Maria and José. CP 8084, at ¶ 1.

On January 11, 2011, the District petitioned for judicial review of the ALJ's decision by the Yakima County Superior Court. CP 3. Although filing for judicial review did not stay implementation of the ALJ's order, the District did not comply with the ALJ's instructions regarding the remediation plan. CP 8085 at ¶ 2. On July 21, 2011, Maria filed a Special Education Citizen's Complaint with the OSPI to enforce the administrative order. CP 7508; CP 8022. The OSPI investigated and

on September 19, 2011, determined the District was out of compliance with state law by failing to implement the 2010 administrative order. CP 7697; CP 8085 at ¶ 2. The OSPI placed the District on a corrective action plan that included funding the compensatory education award. The District was required to comply with the terms of the corrective action plan in order to receive 2011-2012 federal IDEA monies. CP 8023; CP 8085 at ¶ 2. As a result of the OSPI corrective action plan, in November of 2011, the Petitioner finally began funding the compensatory education award. CP 8085 at ¶ 3. However, by this time José had been deprived of educational services for another year. CP 7696.

In the meantime, the Superior Court had commenced its judicial review. In hearings and proceedings conducted over more than three years, the Superior Court reviewed the administrative record and considered new evidence. *See, e.g.* CP 6595 – Citizen Complaint Decision. On August 30, 2013, the trial court entered its Order on Judicial Review, which upheld the ALJ’s key finding that the District denied José a free appropriate public education (FAPE) over a period of many years. CP 8052-82, CP 8071 at ¶ 20; CP 8085 at ¶ 4.

The District requested reconsideration and/or a new trial. CP 7660. Both requests were denied. CP 8083. The Superior Court indicated Maria and José could bring a motion for legal expenses to be determined with separate findings, conclusions and order. CP 8081 at ¶ 6.

On December 27, 2013, Maria and José filed a motion requesting a hearing to determine attorney’s fees and costs. CP 7683-7687. The

hearing was noted for February 7, 2014, but was re-noted to February 14, 2014 to accommodate the Court's calendar.³ On February 13, 2014, the District filed two declarations opposing the motion: the declaration of Attorney Joni Kerr, and the declaration of Brad Shreeve, the District's Assistant Superintendent, Finance and Operations. CP 7897; CP 7894-95. These declarations identified only two specific alleged inaccuracies in the billing records submitted by Maria and José. CP 7901, at ¶ 19.⁴ The District did not file any memorandum of legal authorities in support of its opposition to Maria's and José's request for fees and costs.

On February 14, 2014, after considering oral argument and reviewing the written filings, the trial judge distributed copies of his notes, and assigned Respondents the task of drafting proposed findings and conclusions regarding fees. RP (2/14/14) at 30:13 to 32:2. Once the proposed findings and conclusions were drafted, counsel for the District circulated an email articulating fourteen concerns about the proposed

³ The District did not order the Re-Note as part of its designation of Clerk's Papers. Maria and José have designated the Re-Note as part of their Supplemental Designation of Clerk's Papers; a copy of the Supplemental Designation is attached to this Brief as Appendix A.

⁴ The Declaration of Counsel in Opposition to Respondents' Motion for Attorney Fees and Costs refers specifically to "an entry on May 24, 2010," and to the lack of an entry for July 13, 2010. CP 7901 at ¶ 19. Otherwise, this declaration makes unsupported, conclusory statements. *See, e.g.*, CP 7901 at ¶ 19 (alleging that there are discrepancies between two versions of Ms. Feeney's bills "on at least 27 separate dates" without identifying those dates); *and* CP 7902 at ¶ 21 (asserting "numerous discrepancies and other inaccuracies" in Mr. Grant's bills, without in any way identifying them).

order.⁵ At the presentation hearing on February 20, 2014, the Superior Court addressed the District's objections in detail. RP (2/20/14) at 35:12 to 54:24. It then issued its Findings of Fact, Conclusions of Law and Order re: Respondents' Motion for Attorneys' Fees and Costs ("Order on Fee") on February 24, 2014. CP 8084-91.

In its Order re Fees, the Superior Court reiterated its prior finding that "[t]he District denied the Student [José] a free, appropriate public education (FAPE) over many years." CP 8085. It further found that "the relief finally obtained was more favorable to the Parent and the Student than what the District proposed as settlement." CP 8087, at ¶ 3.

With specific regard to the hourly rates used to compute the lodestar fee, the trial court held that "rates prevailing in the [relevant] community may range from \$200 per hour to \$350 per hour." CP 8088 at ¶ 2. Having established this range, the Court then "set the reasonable rate for Ms. Feeney at \$250 per hour," and determined that "the \$350 hourly rate requested by Artis C. Grant Jr...is justified by Mr. Grant's experience, skill and reputation." CP 8089, at ¶ 6; CP 8091 at ¶ 4.

⁵ This email, from Joni Kerr to Kerri Feeney dated February 19, 2014 at 4:25 p.m., does not appear to be part of the trial court record, unless it is included as part of the Court Hearing Minutes from February 20, 2014. Maria and José have designated those Court Hearing Minutes as part of their Supplemental Designation of Clerk's Papers. That the trial court saw and considered an email from Ms. Kerr is clear from the Report of Proceedings for February 20, 2014. *See, e.g.*, RP (2/20/14) at 34:22-24 (noting that "this morning I reviewed an email which was forwarded to me and which set forth 14 objections or comments that Ms. Kerr on behalf of the School District has").

As for the hours component of the lodestar fee, the trial court noted that counsel for Maria and José had separated their billing entries for the administrative proceeding, the OSPI enforcement action, and the judicial review, and found that “the billing entries for the separate components are applicable to the litigation as a whole.” CP 8089 at ¶ 4. Having reviewed the time entries for both Ms. Feeney and Mr. Grant, the trial court determined that “there is a substantial amount of redundancy that precludes awarding the full fee request.” CP 8089 at ¶ 7. The court noted that it had gone through the time entries, but “lack[ed] the time and resources to pick through the four years of time entries to determine a precise reduction,” and therefore imposed an across-the-board reduction of 25%. CP 8090 at ¶ 7; RP (2/14/2014) at p. 29.

Based on these factual determinations regarding reasonable rates and reasonable hours, the trial court determined that the lodestar award for Ms. Feeney was \$266,568.75, and that the lodestar award for Mr. Grant was \$177,782.35. CP 8091. The trial court made no adjustment to these lodestar sums, once determined. CP 8087-91. Finally, because “[t]he District offered no objection to the costs requested,” the trial court awarded the full requested costs without reduction. CP 8090; RP (2/14/2014) at p. 29.

The District filed a motion for reconsideration on March 6, 2014. The Respondents’ brief opposing reconsideration included as an exhibit

the District's legal bills.⁶ Those bills indicate the District had already paid approximately \$200,000 to various attorneys working on the case even before the District filed for judicial review in 2011.

On March 14, 2014, the trial court denied the District's motion for reconsideration, and entered separate judgments on attorney's fees and costs for Ms. Feeney and Mr. Grant. CP 8092; 8093-8095 and 8096-8098. The District subsequently filed a notice of appeal on April 14, 2014, in which it sought review of the August 30, 2013 Order on Judicial Review as well as of the fee awards. CP 7992-93. Maria and José moved this Court to hold that the District's appeal was untimely except as to the issue of fees and costs, and this Court granted the motion.

III. ARGUMENT

A. SUMMARY OF THE ARGUMENT.

The District waived many of its objections to the fee award by not raising them in the trial court. However, even if the District did not waive its objections, they lack merit. For years the District failed to provide José with the free appropriate public education to which he was entitled by law. When Maria and José initiated this action against the District under the IDEA, 20 U.S. C. § 1400 *et seq.*, they prevailed at each level. By law, they are entitled to recover their reasonable attorney's fees and costs.

⁶ The District failed to designate its Petitioner's Motion for Reconsideration or Respondents' Opposition to Petitioner's Motion for Reconsideration of Order re: Attorney's Fees and Costs (filed March 11, 2014) as part of its clerk's papers. Both of these documents are included in Respondents' Supplemental Designation of Clerk's Papers.

Moreover, the trial court did not abuse its discretion in awarding attorney fees and costs to Feeney Law Office, PLLC in the amount of \$292,766.05 (CP 8096-8098); and fees and costs to Grant & Associates totaling \$182,316.46 (CP 8093-8095).

B. THIS COURT REVIEWS BOTH AN AWARD OF ATTORNEYS' FEES UNDER THE IDEA AND AN ORDER ON A MOTION FOR RECONSIDERATION FOR AN ABUSE OF DISCRETION.

Pursuant to the IDEA, a trial court has the discretion to “award reasonable attorneys’ fees as part of the costs ... to a prevailing party who is the parent of a child with a disability”⁷ On appeal, an award of such fees is reviewed for abuse of discretion.⁸ “In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion.”⁹ A trial court abuses its discretion if it rules based on “untenable grounds or for untenable reasons,” or if it takes irrelevant factors into account.¹⁰ Appellate court deference to a trial court’s factual determinations about a fee award is rooted in the fact that “it is the trial

⁷ 20 U.S.C. § 1415(i)(3)(B)(i)(I).

⁸ See, e.g., *Aguire v. Los Angeles Unified Sch. Dist.*, 461 F.3d 1114, 1121 (9th Cir. 2006) (holding, in case focused on fees under the IDEA, that “[w]e review the district court’s factual findings for abuse of discretion and its conclusions of law de novo”); and *Matter of Pearsall-Stipek*, 136 Wn. 2d 255, 265, 961 P.2d 343 (1998), as amended (Oct. 17, 2000) (noting generally that “[a]n award of attorney fees is left to the trial court’s discretion and will not be disturbed absent a clear showing of abuse”).

⁹ *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn. 2d 527, 538, 151 P.3d 976, 981 (2007)

¹⁰ *Id.* See also *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 98 P.3d 1264 (2004).

judge who has watched the case unfold...who is in the best position to determine which hours should be included in the lodestar calculation.”¹¹

Two other factors bear on the standard of review here. First, the District made its initial objection to the award of costs in its Motion for Reconsideration. CP 8090 at ¶ 8. By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts.¹² But while the issue is preserved, the standard of review is abuse of discretion, and the focus is on whether the party seeking reconsideration had a “good excuse” for belatedly raising the issue.”¹³

Second, “unchallenged findings of fact are verities on appeal.”¹⁴ Here, the Brief of Appellant makes no “separate concise statement” of any factual error allegedly committed by the trial court, nor are any alleged factual errors “clearly disclosed in the associated issues” pertaining to the assignments of error that *were* made.¹⁵ Accordingly, all of the trial court’s

¹¹ *Chuong Van Pham*, 159 Wn.2d at 540.

¹² *See, e.g., Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986).

¹³ *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 230-31, 272 P.3d 289 (2012) (citing to *Rosenfeld v. U.S. Dep’t of Justice*, 57 F.3d 803, 811 (9th Cir. 1995)).

¹⁴ *Zunino v. Rajewski*, 140 Wn.App. 215, 220, 165 P.3d 57, 59 (2007).

¹⁵ Brief of Appellant, at pp. 3-5. *Cf.* RAP 10.3(a)(4) and RAP 10.3(g). *See also Painting & Decorating Contractors of Am. Inc. v. Ellensburg Sch. Dist.*, 96 Wn. 2d 806, 814, 638 P.2d 1220 (1982) (holding that where an appellant failed to assign error to a finding of fact, “we must assume the facts stated therein are established facts in the case”).

factual findings regarding the award of fees and costs should be taken as verities for the purposes of this review.¹⁶

C. THE DISTRICT WAIVED ANY OBJECTION BASED ON CR 54(d)(2) BY FAILING TO RAISE THIS ISSUE IN THE TRIAL COURT. EVEN IF THE DISTRICT HAS NOT WAIVED THIS OBJECTION, IT HAS FAILED TO SHOW ANY PREJUDICE.

Maria and José, having prevailed in the Order on Judicial Review issued August 30, 2013, filed their Motion for Hearing to Determine Attorneys' Fees and Costs on December 27, 2013. CP 7683; CP 8052. The District now asserts for the first time on appeal that the fee motion did not comply with CR 54(d)(2).¹⁷ That rule provides in pertinent part as follows:

Attorneys' Fees and Expenses. Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.¹⁸

The District argues the trial court erred by not invoking this rule against Maria and José and by not denying their fee claim as untimely.¹⁹

However, the District never raised this issue in the trial court. *Cf.* RP (2/14/2014); RP (2/20/2014).²⁰ It never informed the trial court that it

¹⁶ As for the trial court's findings and conclusions expressed in the August 30, 2013 Order on Judicial Review, they are the binding law of the case due to the District's failure to file a timely appeal of that order.

¹⁷ Brief of Appellant, at pp. 25-28.

¹⁸ CR 54(d)(2) (emphasis added).

¹⁹ Brief of Appellant, at pp. 3-4.

believed Maria and José waited too long to bring their fee claim. The District is thus in the unenviable position of arguing that the trial court erred by failing to do something that the District never asked it to do. Accordingly, this Court should invoke RAP 2.5(a) and refuse to consider this assignment of error.

RAP 2.5(a) states in part that “[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” This rule reflects the point that “[a]ppellate courts in this country do not generally review errors raised for the first time on appeal.”²¹ The underlying policy of the rule is to “encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.”²²

Here, there are several reasons why the District should be held to

²⁰ This Court should not construe the vague statement by District counsel that “I don’t know on what basis the Respondents in this matter can wait over 90 days to come and ask the Court to still take jurisdiction over attorney’s fees unless the case is still open” as adequately raising a CR 54(d)(2) objection. RP (2/20/2014) at 39. Not only did the District not cite to CR 54(d)(2), it didn’t even hint that there is a rule that requires fee motions to be brought with 10 days of entry of the final judgment. To assert that the trial court lacked jurisdiction over fees unless the case was still open is simply not sufficient to alert the trial judge that he needed to consider the application of CR 54(d)(2)’s 10-day limit on fee motions.

²¹ *State v. Bertrand*, 165 Wn. App. 393, 406, 267 P.3d 511 (2011) (concurring opinion by Judge Quinn-Brintnall). *See also* 2A Wash. Prac., Rules Practice RAP 2.5 (7th ed.) (noting that “the traditional rule [is] that an appellate court will ordinarily refuse to review issues that were not raised at the trial court level”).

²² *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

have waived any claim of error based on Maria's and José's alleged lack of compliance with CR 54(d)(2). First, Maria and José did not hide their view that the August 30, 2013 Order on Judicial Review was a final, appealable order. CP 7696: 3; CP 7698: 18-19; see also RP (2/20/14) at 39: 10 50 40:24. By openly making this contention prior to the trial court's ruling on their request for fees, they implicitly placed the District on notice of the potential application of CR 54(d)(2). The District's subsequent failure to raise the rule is the District's sole responsibility.

Second, if the District had timely raised an objection under CR 54(d)(2), Maria and José could have moved for an enlargement of time. CR 54(d)(2) allows a trial court to exercise its discretion to enlarge the time for bringing a fee motion.²³

Third, none of RAP 2.5(a)'s exceptions to the general rule of waiver apply to the facts here. An alleged failure to comply with CR 54(d)(2) does not go to "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, [or] (3) manifest error affecting a constitutional right."²⁴ In particular, a trial court lacks jurisdiction only if it either lacks personal jurisdiction over the parties or

²³ CR 54(d)(2) (stating that "[u]nless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of the judgment") (emphasis added).

²⁴ RAP 2.5(a). The analysis that follows focuses on the jurisdictional exception, because it is plain that neither the second exception (failure to establish adequate facts) nor the third (manifest error affecting a constitutional right) applies here.

subject matter jurisdiction.²⁵ Here, the District affirmatively submitted itself to the jurisdiction of the Superior Court by bringing its appeal from the ALJ's decision there, rather than in federal court. CR 54(d)(2) itself confirms that the trial court has subject matter jurisdiction over fee claims that arise from litigation in that court, and its provision for the extension of the deadline at the discretion of the court shows that the deadline is not jurisdictional.

Fourth, the overall context of this case strongly supports a finding of waiver. There is no doubt that the District violated José's right to a FAPE under both state and federal law.²⁶ The District knew José was performing far below grade level, despite the fact he has normal intelligence, yet did nothing to address this until Maria filed for due process. Counsel for Maria and José were instrumental in remedying a substantial wrong and their success vindicated an important public interest.²⁷ Equity does not favor stripping Maria's and José's counsel of the fee award when any delay on their part in requesting fees worked no

²⁵ See, e.g., *Marley v. Dep't of Labor & Indus. of State*, 125 Wn. 2d 533, 541, 886 P.2d 189 (1994)(noting that "a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim").

²⁶ Because the District failed to timely appeal the Order on Judicial Review, the trial court's findings and conclusions regarding the District's violations of the IDEA are the law of the case.

²⁷ See, e.g., *Wilson v. Government of District of Columbia*, 269 F.R.D. 8, 19 (D. D.C. 2010) (noting that "[l]itigating claims under the IDEA is not a simple matter. Surely, parents and guardians are likely to fare much better if they wade into the complex sea of education law with the safety net of an attorney").

prejudice on the District, and especially where the District made no objection in the trial court based on the timing rule. Moreover, the purpose behind CR 54(d)(2) is to “to prevent parties from raising trial-level attorney fee issues very late in the appellate process, sometimes after one or all appellate briefs have been submitted.”²⁸ That purpose would simply not be served by enforcing the rule here, since Maria and José did not wait until “very late in the appellate process” to make their request for fees, but instead made their motion before the District had appealed.

Finally, even if this Court were to decide that the District did not waive its CR 54(d)(2) objection, it should reject the District’s claim that the trial court erred by not enforcing that rule. This is because “reversal for failure to comply [with CR 54(d)(2)] requires a showing of prejudice.”²⁹ A party establishes prejudice by showing “a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to provide countervailing oral argument and submit case authority.”³⁰

The District can make no such showing of prejudice here. Maria and José filed their Respondents’ Motion for Hearing to Determine Attorney’s Fees and Costs on December 27, 2013. CP 7683. They initially noted the motion for February 7, 2014. CP 7688. Eventually, the hearing was held on February 14, 2014. RP (2/14/14) at p.1. All of

²⁸ 4 Wash. Prac., Rules Practice CR 54 (6th ed.) (quoting Drafters’ Comment to the 2007 amendments to CR 54).

²⁹ *O’Neill v. City of Shoreline*, 183 Wn. App. 15, 22, 332 P.3d 1099, 1104 (2014) (citing to *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 665, 709 P.2d 774 (1985)).

³⁰ *Id.*

Maria's and José's supporting materials were filed and served before the end of January 2014. CP 7691, 7779, 7788, 7799, 7806, 7812, 7874, 7880, and 7888.³¹ The District accordingly had at least two weeks to prepare its response. CP 7894; CP 7897. Moreover, the District had an opportunity to present oral argument, as well as a chance to object to the proposed findings and conclusions Maria's and José's counsel prepared at the trial court's direction. RP (2/14/14) at pp. 7-23; RP (2/20/14). Finally, the District filed, and the trial court considered, a Motion for Reconsideration. CP 8199.³² The District did not complain of prejudice at the time of these filings and hearings and, under *O'Neill*, cannot credibly show prejudice now.³³ For all of these reasons, this Court should reject the District's new contention that the trial court abused its discretion by not denying fees based on CR 54(d)(2).

³¹ This last supporting document, the Supplemental Declaration of Kerri Feeney, was filed on January 30, 2014.

³² The District did not designate its Petitioner's Motion for Reconsideration, filed March 6, 2014, as part of the clerk's papers. See CP 8209. Maria and José have filed with the trial court their Respondents' Supplemental Designation of Clerk's Papers, as per RAP 9.6(a), which lists the Petitioner's Motion for Reconsideration, among other documents. A copy of the Respondents' Supplemental Designation of Clerk's Papers is attached to this Brief as Appendix A.

³³ *O'Neill*, 332 P.3d at 1104. The lack of prejudice to the District is underlined by the insistence of District's lead counsel that she closely reviewed the invoices of both Ms. Feeney and Mr. Grant prior to the initial hearing on fees. CP 7902 at ¶ 19; CP 7903 at ¶ 21. That she failed—with two exceptions discussed below—to specifically identify alleged “discrepancies and other inaccuracies” cannot now be credibly blamed on an alleged lack of time to perform her review. *Id.*

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MAKING THE AWARD OF FEES AND COSTS.

The District now alleges that the trial court “failed to meaningfully review” the concerns it raised about the fee award.³⁴ It is certainly true that trial courts “must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.”³⁵ Here, however, the trial court clearly did take an active role in determining the fee award, and properly addressed the concerns which the District timely and specifically raised below.

1. The trial court properly addressed the few specific objections the District raised regarding Ms. Feeney’s and Mr. Grant’s hours.

With two minor exceptions, the District did not timely raise *any* specific concerns with the hours stated in the billing records of Ms. Feeney and Mr. Grant.³⁶ In particular, although claiming to have compared earlier versions of Ms. Feeney’s bills with those filed in support of the fee motion, and alleging to have found “at least 27 separate” disparities, the District completely failed to identify what they were. CP

³⁴ Brief of Appellant at p. 4 and p. 29.

³⁵ *Mahler v. Szucs*, 135 Wn. 2d 398, 434, 957 P.2d 632 (1998) order corrected on denial of reconsideration, 966 P.2d 305 (1998); *implicitly overruled on other grounds* by *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn. 2d 643, 272 P.3d 802 (2012).

³⁶ The two minor exceptions concerned Ms. Feeney’s entries for May 24, 2010 and July 13, 2010. CP 7901 at ¶ 19. The trial court specifically addressed and resolved these concerns. CP 8089 at ¶ 5; RP (2/14/2014) at pp. 2-5 and 29. Tellingly, the District no longer assigns error to these specific determinations.

7901, at ¶ 19; CP 2951-79.³⁷ Similarly, the District’s critique of Mr. Grant’s submissions consisted entirely of a naked allegation that they “contain numerous discrepancies and other inaccuracies.” CP 7902 at ¶ 21. The fact that the District provided almost no details to support its allegations provides critical context for understanding the trial court’s assertion that it “lack[ed] the time and resources to pick through four years of time entries.” CP 8090. The District simply failed to do its job of providing specific objections, and should not be allowed to cast the blame for this failure on the court.³⁸

This case is thus very different from *Berryman v. Metcalf*, where the Court of Appeals found that failure to address “very specific objections that certain blocks of time billed were duplicative or unnecessary” was reversible error.³⁹ As the *Berryman* court itself acknowledged, “[a] trial court does not need to deduct hours here and there just to prove to the appellate court that it has taken an active role in assessing the reasonableness of the fee request.”⁴⁰ Here, despite the lack of guidance from the District, the trial court did review the time entries of

³⁷ CP 7951-79 represents Exhibit F to the Declaration of Counsel in Opposition to Respondent’s Motion for Attorney Fees and Costs. It is completely devoid of any indications by the District as to what entries it regards as problematic.

³⁸ Compare Brief of Appellant, at pp. 31-34 (raising specific concerns about hours billed that were not raised below, either in written pleadings or oral argument).

³⁹ *Berryman v. Metcalf*, 177 Wn. App. 644, 658-659, 312 P.3d 745 (2013) (emphasis added).

⁴⁰ *Id.* at 658.

Ms. Feeney and Mr. Grant. CP 8089. Based on its review, it determined that there was “a substantial amount of redundancy that precludes awarding the full fee request.” Because of this finding, the trial court reduced the hours requested by 25%. The District completely fails to show that this decision was an abuse of discretion with regard to the hours billed by counsel for Maria and José.⁴¹

2. The District’s cursory argument that the trial court erred by not discounting for hours spent on unsuccessful claims lacks all merit.

The District also argues that the trial court erred by not reducing the hours awarded for time spent on allegedly “unsuccessful claims.”⁴² The District first raised this argument in written form in its Motion for Reconsideration.⁴³ An award of fees should be limited to hours spent on “successful claims,” but only if those hours are “unrelated and separable” from the hours spent on the unsuccessful claims.⁴⁴ In contrast, in cases where the claims for relief involve a common core of facts, and much of

⁴¹ See, e.g., *Steele v. Lundgren*, 96 Wn. App. 773, 780-81, 982 P.2d 619 (1999) (holding that where “the court did not simply adopt counsel’s recommendation and award the full amount of fees,” and “reviewed the billings himself,” the court “properly took an active role in assessing the reasonableness of the fees requested”).

⁴² Appellant’s Brief at pp. 34-35.

⁴³ Cf. CP 7897-7903 (devoid of any reference to degree of success).

⁴⁴ *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659, 672, 989 P.2d 1111 (1999).

the attorneys' time is devoted generally to "the litigation as a whole," the court may award fees on all of the issues.⁴⁵

Here, all of Maria's and José's claims involved a common core of facts establishing that the District had failed to provide a free appropriate public education to José and that this failure occurred over a period of many years.⁴⁶ The claims were based on related legal theories establishing the District's duty to provide José a FAPE. Thousands of pages of evidence were reviewed and many days of hearing were conducted by both the administrative and Superior Court. The Superior Court affirmed the administrative court's determination that José was denied a FAPE over many years. CP 8187. Moreover, it is virtually impossible to separate many of their findings regarding the denial of FAPE. CP 20-58 and CP 8159-8189.

A determination that a student was denied a FAPE "is the most significant of successes possible under the [IDEA]."⁴⁷ Where a student obtains excellent results, the attorney fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.⁴⁸ "The result is what matters."⁴⁹

⁴⁵ *Id.* at 672-73 (citing to *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983)).

⁴⁶ *Hensley*, 461 U.S. at 435.

⁴⁷ *Park v. Anaheim*, 464 F.3d 1025, 1036 (9th Cir. 2006).

⁴⁸ *Hensley*, 461 U.S. at 435 (construing 42 U.S.C. § 1988, and holding that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee").

⁴⁹ *Id.*

Finally, the trial court expressly held that the hours expended by Ms. Feeney and Mr. Grant were “applicable to ‘the litigation as a whole.’” CP 8089 at ¶ 4 (citing to *Hensley*). The District has not assigned error to this factual finding, which is thus a verity on appeal.⁵⁰ For all of these reasons, the District’s argument that the trial court should have reduced hours charged to reflect “unsuccessful work” fails.

3. The trial court did not abuse its discretion in setting Attorney Feeney’s hourly rate.

Under both Washington state and federal law, courts follow the “lodestar” approach to setting reasonable attorney’s fees.⁵¹ The lodestar amount is determined by taking the number of hours reasonably expended on the litigation and multiplying it by a reasonable hourly rate.⁵² In determining hourly rates, the trial court must look to the “prevailing market rates in the relevant community.”⁵³ In making its calculation, the Court should also consider the experience, skill and reputation of the

⁵⁰ *Zunino*, 140 Wn. App. at 220.

⁵¹ See, e.g., *Scott Fetzer v. Weeks*, 114 Wn.2d 109, 786 P.2d 265 (1990); *Absher Constr. v. Kent School District No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995).

⁵² *Snell v. North Thurston School District*, No. C13-5488 RBL (W.D. Wash. May 22, 2014)

⁵³ *Bell v. Clackamas County*, 341 F.3d 858, 868 (9th Cir. 2003).

attorney requesting fees.⁵⁴ The Court may rely on its own knowledge and familiarity with the legal market in setting a reasonable hourly rate.⁵⁵

In this case, the trial court identified a range of “rates prevailing in the [relevant] community” for comparable special education litigators of between \$200 and \$350 per hour. CP 8088 at ¶ 2. The District has assigned no error to this finding.⁵⁶ The trial court then “set[] the reasonable rate for Ms. Feeney at \$250 per hour,” which is plainly within the uncontested reasonable range. CP 8089 at ¶ 6.

The District now apparently claims that it was error for the trial court not to use the rate Ms. Feeney requested, rather than a rate within the range prevailing in the community for litigators of similar skill and experience.⁵⁷ Unfortunately for the District, its argument here relies on inapposite authority concerning adjustments to the lodestar product (reasonable hours times reasonable rates), rather than adjustments to set the reasonable rate itself.⁵⁸ In fact, Washington and federal law both

⁵⁴ *Schwarz v. Sec’y of Health & Human Services*, 73 F.3d 895, 906 (9th Cir. 1995).

⁵⁵ *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011); *and see Snell v. North Thurston School District*, *supra* (determining the hourly rate of \$375 for attorney representing the student/parent is reasonable).

⁵⁶ *See* Brief of Appellant, at pp. 3-5.

⁵⁷ *See* Brief of Appellant, at pp. 35-38.

⁵⁸ *See* Brief of Appellant at pp. 36-37, citing to *Stewart v. Gates*, 987 F.2d 1450, 1453 (9th Cir. 1993) for the proposition that “[o]nce determined, the basic fee leaves very little room for enhancement,” and citing to *Berryman*, 312 P.3d at 757, for the proposition that “adjustments to the lodestar are reserved for ‘rare’ occasions” (emphasis added to both quotations).

clearly establish that “[t]he attorney’s usual fee is not ...conclusively a reasonable fee and other factors may necessitate an adjustment” before the lodestar product is calculated.⁵⁹ “While evidence of counsel’s customary hourly rate may be considered by [a trial court], it is not an abuse of discretion...to use the reasonable community standard.”⁶⁰ That is precisely what the trial court did here, and its decision was not error. CP 8088-89.

4. An award of fees for work related to enforcing the administrative order is not contrary to law.

The Administrative Order removed authority for developing and implementing an appropriate compensatory education program from the District, but held the District responsible for using state and federal monies to fund the program. CP 55 at ¶ 32; CP 56 at ¶ 3. It is not unheard of for a school district to be relieved from delivering instruction where, as here, there has been a systemic failure on the part of a school district to

⁵⁹ See, e.g., *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193, 203-04 (1983)(holding that “[i]n addition to the usual billing rate, the court may consider the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney’s reputation, and the undesirability of the case”); *Steele v. Lundgren*, 96 Wn. App. 773, 785-86, 982 P.2d 619, 626 (1999)(rejecting argument that a party “was entitled to recover only the amount her lawyers actually billed, rather than an amount based upon a reasonable rate multiplied by the number of hours expended”); and *Davis v. City & Cnty. of San Francisco*, 976 F.2d 1536, 1548 (9th Cir. 1992), *opinion vacated in part on denial of reh’g.*, 984 F.2d 345 (9th Cir. 1993).

⁶⁰ *Davis*, 976 F.2d at 1548.

meet the needs of a disabled student.⁶¹ Although the Administrative Order was issued in October 2011 with a 60-day timeline to begin implementation, the District failed to implement it throughout the 2010-2011 academic year. The District's refusal was completely without legal merit. Under both federal and state law, when a new educational placement is dictated by the administrative court that becomes the "stay put" placement where the child is entitled to remain through the end of all appeals.⁶² See CP 7243 at ¶ 2.

The Administrative Order indicated the OSPI was responsible for enforcing the terms of the Order. CP 56 at ¶ 4. The District's failure to obey forced Maria Sanchez to file a complaint asking the OSPI to withhold the District's special education funding until it complied. The OSPI investigated, found the District in violation of state and federal law, and determined that the District's federal special education funding would be withheld unless the District complied with the Administrative Order by a date certain. CP 8085 at ¶ 2; CP 7232-7248; CP 7247 at "Reminder." The District finally complied, but by that point José had been denied receipt of his compensatory education award for one full year. CP 7696.

⁶¹ See, e.g., *Draper v. Atlanta Independent School System*, 518 F.2d 1275 (11th Cir. 2008).

⁶² WAC 392-172A-05125(4); 20 U.S.C. § 1415(j); 34 CFR § 300.515(c); See *Joshua A. v. Rocklin Unified School District*, 559 F.3d 1036, 1040 (9th Cir. 2009) ("[T]he stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process").

The Superior Court awarded fees for the actions taken to enforce the Administrative Order. The District now asserts that the Superior Court had no jurisdiction to award legal fees relating to the state citizen complaint process.⁶³ The District's position is that although Maria was forced to pursue a costly procedure simply to enforce the administrative award, she is not entitled to reimbursement as a prevailing party.

The IDEA authorizes attorney fees “[i]n any action or proceeding” brought under 20 U.S.C. §1415 (i)(3)(B). In 2000, the Ninth Circuit determined that Congress’ use of the word “any” is significant because it suggests there is more than one type of “proceeding” that could result in an award of attorney fees.⁶⁴ The Ninth Circuit noted that federal regulations provide for both a state citizen complaint and an impartial due process hearing to address IDEA complaints and that these procedures are simply alternative (or even serial) means of addressing a complaint brought under §1415.⁶⁵

Courts have wide discretion to award reasonable attorney’s fees to a prevailing party in connection with a due process hearing or judicial action. Here, the purpose of the Citizen’s Complaint was to enforce the administrative order which the District does not challenge was issued under the authority of § 1415. The Citizen’s Complaint was a necessary

⁶³ Brief of Appellants, at page 39.

⁶⁴ *Lucht v. Molalla River School District*, 225 F.3d 1023 (2000) (awarding attorney fees for an IEP meeting convened as a result of a state citizen complaint process).

⁶⁵ *Id.*

(and successful) corollary given the District's attempt to avoid implementation of the Administrative Order. Further, an attorney's follow-up work to ensure implementation of an administrative order where reasonable and necessary has been recognized as reimbursable.⁶⁶ There is no support for the District's position that the trial court lacked jurisdiction to award Maria and José their reasonable fees incurred in the OSPI proceeding to enforce the Administrative Order.

5. The reimbursement of costs associated with procuring the testimony of Dr. Marlowe at the Superior Court Review is appropriate and not contrary to law.

Federal courts have interpreted 20 U.S.C. § 1415(i)(3)(B)(i)(I) as creating a strong presumption in favor of awarding costs to the prevailing party; however the court has discretion to deny costs if appropriate.⁶⁷ To overcome the presumption, the losing party must "establish a reason to deny costs."⁶⁸ Here, the District had several weeks to review the Respondents' cost accountings and declarations. To merit consideration by the trial court, the District should have presented objections with specificity and with legal authority. The District failed to make any written objections and failed to object orally at the hearing on February

⁶⁶ In *Dominique L. v. Board of Education of the City of Chicago, Dist. 299*, 2011 WL 5077617 (N.D. Ill. 10/25/2011), the U.S. District Court held that the follow-up work by the parent's attorney monitoring compliance with the hearing officer's requirements was reasonable and necessary given the serious issues involved and to meet the child's special education needs and his rights under the IDEA.

⁶⁷ See, e.g., *Miles v. California*, 320 F.3d 986, 988 (9th Cir. 2003).

⁶⁸ *Dawson v. City of Seattle*, 435 F.3d 1054, 1070 (9th Cir. 2006).

14, 2014, prompting the trial court to note that as the District had not objected to the Respondents' cost accounting, costs would be awarded to the Respondents in full. RP (2/14/2014) at 29:21.

As noted in the Respondents' Restatement of the Case, three days later, the District routed an email expressing "concerns" about the Respondents' cost accounting. At the presentation hearing on February 20, 2014, the Superior Court directed the District to file specific objections to costs if it filed a reconsideration motion. The Court noted this would not preclude the Respondents from asserting that the initial failure to object amounted to a waiver.

In its motion for reconsideration, the District cited to *Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*, 548 U.S. 291, 126 S. Ct. 2455, 165 L.Ed.2d 526 (2006), and argued that the trial court erred in awarding costs of \$4,612.00 for Dr. Marlowe's fees in testifying during the judicial review. The District continues to advance this argument on appeal. However, there are two problems with the District's position. First, because the District initially raised its argument about costs in a motion for reconsideration, it has to show that the Superior Court abused its discretion by not considering this issue.⁶⁹ CP 8090. Because it has no excuse for its delay, the District cannot show an abuse of discretion.⁷⁰

⁶⁹ *Newcomer v. Masini, supra.*

⁷⁰ *River House Dev. Inc. v. Integrus Architecture, P.S., supra* (citing to *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 811 (9th Cir. 1995))

Second, the District's reliance on *Arlington* is misplaced. As noted in *Meridian Joint Sch. Dist., No. 2 v. D.A.*, 2013 WL 6181820 (D. Idaho, 2013), *Arlington's* scope is narrow:

Arlington addresses a narrow, clearly defined issue: Whether the IDEA's fee-shifting provision "authorizes prevailing parents to recover fees for services rendered by experts in IDEA actions." *Arlington*, 548 U.S. at 293-94. There, a student's parents sought \$29,350 for services by a non-lawyer educational consultant as litigation costs under 20 U.S.C. § 1415(i)(3)(B). The Supreme Court held that neither the goals of the IDEA, the Court's interpretation of identical language in other statutes, nor the text of the fee-shifting provision itself evidence unambiguous congressional intent to make expert fees part of the "costs" available to a prevailing parent under 20 U.S.C. § 1415(i)(3)(B). *Id.* At 302-04. Accordingly, the consultant's services were not compensable under the fee-shifting provision. However, *Arlington* says nothing about the permissible scope of the relief that may be granted pursuant to 20 U.S.C. § 1415(i)(2)(C)(iii)-the governing IDEA provision here.⁷¹

Meridian Joint Sch. Dist., 2013 WL 6181820 at page 4.

The Idaho District Court in *Meridian* went on to emphasize that 20 U.S.C. §1415(i)(2)(C)(iii) authorizes a court to award such relief as is appropriate for IDEA violations:

As stated above, 20 U.S.C. §1415(i)(2)(C)(iii) authorizes "such relief as the court determines is appropriate." Unlike the fee-shifting provision at issue in *Arlington*, the text of §1415(i)(2)(C)(iii) evinces clear congressional intent that the district courts should have broad discretion to craft appropriate

⁷¹ 20 U.S.C. §1415(i)(2)(C)(iii) provides that "[I] any action brought under this paragraph, the court--... (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

remedies for IDEA violations. Indeed, that is precisely what the United States Supreme Court held in *Burlington*. 471 U.S. at 369. While the Court may not award expert fees as part of costs claimed under the IDEA's fee-shifting provision, here, the Court may include such fees as part of the relief if "appropriate."

In this case, Maria and José requested reimbursement of the expert fee and costs incurred because the trial court directed each side to produce an expert to address the appropriateness of the remedy ordered by the administrative court, i.e., the compensatory program. CP 8018. The one year delay in implementing the compensatory award, delay that was only resolved when the OSPI threatened to withhold the District's special education funding (CP 7247), was a key reason a progress report was relevant to the trial court. This is a completely different situation from that addressed by the U.S. Supreme Court in *Arlington*. In *Arlington*, unlike in this case, the parents sought reimbursement for the costs they incurred in hiring experts to testify on their behalf at the due process hearing. Here, Maria did not seek reimbursement for Dr. Marlowe's fees to present expert testimony at the 2010 due process hearing. Instead, Maria and José sought reimbursement solely for the expense required to procure Dr. Marlowe's expert testimony at the judicial review hearing four years later to satisfy the request of the reviewing court that each side produce a witness to address remedies. CP 8018; CP 7776. Based on these circumstances, an award to Maria and José for these limited expenses is appropriate under section 1415(i)(2)(C)(iii).

6. The relief awarded to Maria and José is not contrary to the purpose of the IDEA.

The District's argument that the relief ultimately secured by Maria and José is contrary to the purpose of the IDEA is inaccurate. Further, the decision on the merits is not under review. A request for fees should not result in a second major litigation "revisiting the merits of the underlying action."⁷²

The IDEA is founded on the premise that each school district bears the obligation to educate special needs students, often at substantial cost.⁷³ It is undisputed that the District is the local education agency responsible for providing a FAPE to José. To ensure compliance with the IDEA, a school district must be held responsible for its past transgressions. Otherwise, this would create an enormous loophole in the District's obligation to educate children and would substantially weaken the IDEA's protections.

Administrative hearing officers are empowered to "grant such relief as [they] determine is appropriate."⁷⁴ One of the potential remedies is compensatory education. "[C]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational

⁷² See, e.g., *Comm'r. INS v. Jean*, 496 U.S. 14, 163 (1990) (quoting *Hensley v. Eckerhart*, 461 U.S. 424 at 437 (1983)).

⁷³ See *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 262 (3d Cir. 2007).

⁷⁴ See 34 CFR §300.516(c)(3); and *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985).

agency's failure over a given period of time to provide [a FAPE] to a student.”⁷⁵ The Ninth Circuit has explained that compensatory education services can be awarded as appropriate equitable relief in special education due process hearings.⁷⁶ Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA. Both the federal Office of Special Education Programs and courts have established that hearing officers have the authority to craft compensatory education awards.^{77, 78}

⁷⁵ *Department of Educ. v. Zachary B. ex rel. Jennifer B.*, Civ. No. 08-00499 JMS/LEK, 2009 WL 1585816 (D. Hawaii June 5, 2009).

⁷⁶ See 20 U.S.C. § 1415 (i)(2)(B)(iii) providing that a court that grant such relief as it determines appropriate; *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F. 3d 1489, 1496-97 (9th Cir. 1994).

⁷⁷ The federal Office of Special Education Programs (“OSEP”) provides information, guidance and clarification regarding implementation of the IDEA in OSEP Memos, Dear Colleague Letters, and OSEP Policy Letters. See, e.g., *Letter to Riffel*, 34 IDELR 292 (OSEP 2000) (discussing a hearing officer’s authority to grant compensatory education services; *Letter to Anonymous*, 21 IDELR 1061 (OSEP 1994) (advising that hearing officers have the authority to require compensatory education); *Letter to Kohn*, 17 IDELR 522 (OSEP 1991). IDELR reports are attached as Appendix B to this Brief.

⁷⁸ See, e.g., *Reid v. District of Columbia*, 401 F. 3d 516, 522, (D.C. Cir. 2005); *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, (D.D.C. 2008); *Diatta v. District of Columbia*, 319 F. Supp. 2d 57, (D.D.C. 2004)(finding that the hearing officer erred in determining that he lacked authority to grant the requested compensatory education); *Harris v. District of Columbia*, 1992 WL 205103, (D.D.C. Aug.6, 1992)(declaring that hearing officers possess the authority to award compensatory education, otherwise risk inefficiency in the hearing process by inviting appeals); *Cocores v. Portsmouth Sch. Dist.*, 779 F. Supp. 203, (D.N.H. 1991) (finding that a hearing officer’s ability to award relief must be coextensive with that of the court).

Compensatory education services are an appropriate equitable remedy when, as here, the school district has failed in its responsibility to provide a disabled child with a an appropriate education as required by the IDEA. The remedy is designed to deliver the services the student should have received pursuant to the IDEA's guarantee of a FAPE. As a result, the particular form of award provided will vary case by case.⁷⁹

Compensatory education can also serve to remedy procedural violations. This form of remedy is especially appropriate where the procedural errors result in a delay in the provision of education services required by a student's IEP.⁸⁰

Compensatory education may be provided in the form of a private placement. For example, the Eleventh U.S. Circuit Court of Appeals specifically found that nothing in the IDEA precludes an award of compensatory education in the form of a private placement. The Eleventh Circuit affirmed an award of compensatory education that removed authority for the provision of education from the school district and required the school district to pay for a private placement for up to four years.⁸¹

⁷⁹ See *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), cert denied, 499 U.S. 923 (1991); and *Branham v. Government of the District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

⁸⁰ *Pittston Area School District*, 45 IDELR 110, 106 LRP 11345 (March 1, 2006) attached as part of Appendix B to this Brief.

⁸¹ *Draper, supra*.

Compensatory education awards have a particular impact on low-income special needs students, such as José Garcia. This is so because compensatory education is often awarded where parents could not afford to front the costs of a child's private education.⁸² Accordingly, low-income families, disproportionately likely to have a disabled child, are particularly in need of a compensatory award to compensate for past deprivation of educational services.

In this case, the administrative law judge made an award of compensatory education after hearing the testimony of 30 witnesses over an extended period that included 19 days of evidence and involved the review of hundreds of pages of documents. The award the ALJ crafted purposely did not rely on the District's willingness to comply with the IDEA in the future. Development and implementation was removed from the District and placed in the hands of outside experts. CP 7244. The ALJ recognized the District had proven indifferent both to the needs of José as a disabled student and to the rights of his mother to participate in the educational process. For example, District staff admitted to creating official IEP documents that made it appear Maria had attended and participated in IEP meetings that were never held. CP 26; CP 8176 at ¶15; CP 8182. The independent administration of the compensatory education program was a vital protective feature of the award made by the administrative court and affirmed by the Superior Court. CP 8187.

⁸² See *Miener v. State of Missouri*, 800 F. 2d 749, 753 (8th Cir. 1986).

E. MARIA AND JOSÉ ARE ENTITLED TO AN AWARD OF THEIR REASONABLE ATTORNEYS' FEES AND COSTS ON APPEAL.

When attorney “fees are allowable at trial, the prevailing party may recover fees on appeal as well.”⁸³ As demonstrated above, the trial court properly awarded Maria and José attorney’s fees and costs pursuant to 20 U.S.C. § 1415(i)(3) and WAC 392-172A-05125. CP 8200-8205. Maria and José expect to be the prevailing parties during this review, as well. Indeed, they have already prevailed on the extensive motion practice before this Court establishing that the District waited too long to appeal the Order on Judicial Review dated August 30, 2013. CP 8052-8082. Because of this, and because they expect to prevail on the trial court fee issue that remains before this court, Maria and José request that this Court award them their reasonable fees and costs incurred on appeal.⁸⁴

IV. CONCLUSION

The Superior Court’s review of the administrative record lasted from January 2011 through September 2013, and resulted in affirming the administrative court’s determination that José was denied a free, appropriate public education. CP 8081, ¶ 1. Such a determination “is the most significant of successes possible under the [IDEA].”⁸⁵ Where a student obtains excellent results, the attorney fee award should not be

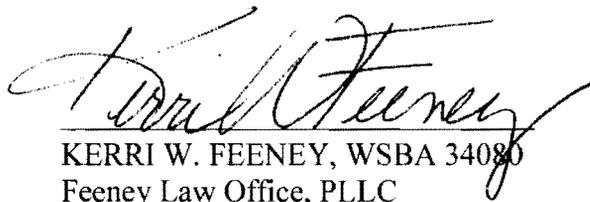
⁸³ *Bevan v. Meyers*, 183 Wn. App. 177, 334 P.3d 39, 45 (2014). *See also* RAP 18.1

⁸⁴ *See, e.g., Hacienda La Puente Unified Sch. Dist. of Los Angeles v. Honig*, 976 F.2d 487, 496 (9th Cir. 1992) (holding that “prevailing parties on appeal . . . are entitled to an additional fee award” under the IDEA).

⁸⁵ *Park v. Anaheim*, 464 F.3d 1025, 1036 (9th Cir. 2006).

reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit; the result is what matters.⁸⁶ Indeed, the purpose of the IDEA fee-shifting provision is to enable parents and disabled children to effectuate the civil rights provided by the statute.⁸⁷ In this case, the total requested reflects the considerable time and energy Respondents' counsel expended for *more than four years* trying to obtain the statutorily mandated education for José Garcia, a low-income, disabled student. The trial court was actively involved in determining the reasonable rates and hours of Respondents' attorneys, and did not abuse its discretion in setting the relevant lodestar sums. Accordingly, Maria and José request that the fee and cost judgments entered by the trial court be upheld and awarded in full, and further request that this Court award them their reasonable fees and costs incurred on appeal.

DATED this 10th day of February, 2015.



KERRI W. FEENEY, WSBA 34080
Feeney Law Office, PLLC

and

ARTIS C. GRANT, JR., WSBA 26204
Grant & Associates

Attorneys for Respondents
Maria Sanchez and José Garcia

⁸⁶ See *Hensley, supra*, 461 U.S. at 435 (construing 42 U.S.C. § 1988).

⁸⁷ See *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 856 (3rd Cir. 2006).

CERTIFICATE OF SERVICE

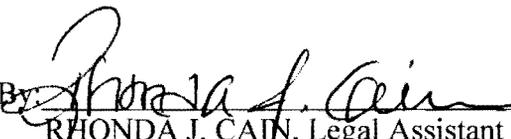
The undersigned hereby certifies under penalty of perjury that on February 10th, 2015, a true and correct copy of the foregoing Brief of Respondents Maria Sanchez and José Garcia was served on opposing counsel in the manner(s) noted below:

Joni R. Kerr
800 NE Tenney Road
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U.S. Mail, First Class Postage Prepaid

Jeanie R. Tolcacher
Lyon Weigand & Gustafson P.S.
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Yakima, Washington 98907

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By: 
RHONDA J. CAIN, Legal Assistant
Feeney Law Office, PLLC
1177 Jadwin Avenue, Ste. 104
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APPENDIX A

1
2
3
4
5
6
7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF YAKIMA

9 GRANDVIEW SCHOOL DISTRICT NO. 200,

10 Petitioner

11 vs.

12 MARIA SANCHEZ and JOSÉ GARCIA,

13 Respondents

NO. 11-2-00084-1

MARIA SANCHEZ' AND JOSÉ
GARCIA'S SUPPLEMENTAL
DESIGNATION OF CLERK'S PAPERS
ON APPEAL

Ct. of Appeals No. 32413-3-III

[Clerk's Action Required]

14
15 Maria Sanchez and José Garcia, respondents in the Superior Court and respondents on
16 appeal, designate the following documents for transmission to the Court of Appeals, Division III,
17 of the State of Washington, Cause No. 32413-3-III, pursuant to RAP 9.6, as a supplementation to
18 those clerk's papers previously designated. The clerk shall assemble the copies and number each
19 page of the clerk's papers in chronological order of filing and prepare an alphabetical index to
20 the papers. The clerk shall promptly send a copy of the index to each party.
21

22 **SUPPLEMENTAL CLERK'S PAPERS**

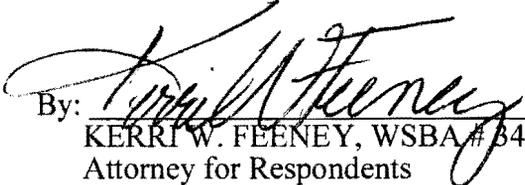
Subnumber	Filing Date	Document
157	2/10/2014	Re-Note for Motion Docket
	2/14/2014	Court Hearing Minutes
160	2/14/2014	Order Presenting Findings & Conclusions re Fees and Costs
	2/20/2014	Court Hearing Minutes
166	3/6/2014	Petitioner's Motion for Reconsideration

26
RESPONDENTS' SUPPLEMENTAL DESIGNATION
OF CLERK'S PAPERS - 1

Subnumber	Filing Date	Document
168	3/11/2014	Respondents' Opposition to Petitioner's Motion for Reconsideration of Order Re: Attorney's Fees and Costs
169	3/11/2014	Declaration of Kerri W. Feeney in Support of Respondents' Opposition to Petitioner's Motion for Reconsideration

DATED this 6th day of February, 2015.

FEENEY LAW OFFICE PLLC

By: 
 KERRI W. FEENEY, WSBA # B4080
 Attorney for Respondents

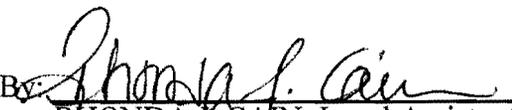
CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on Friday, February 6, 2015 I sent a copy of the attached Supplemental Designation of Clerk's Papers via U.S. mail, first class postage pre-paid, to Ms. Joni Kerr and Ms. Jeanie R. Tolcacher, counsel for Appellant Grandview School District No. 200, at the following addresses:

Joni R. Kerr
 Law Offices of Joni R. Kerr, PLLC
 800 NE Tenney Road
 Suites 110-123
 Vancouver, WA 98685

Jeannie R. Tolcacher
 Lyon, Weigand & Gustafson, PS
 P.O. Box 1689 222 North Third Street
 Yakima, WA 98907

Dated this 6th day of February, 2015.

By: 
 RHONDA J. CAIN, Legal Assistant

APPENDIX B

21 IDELR 1061

21 LRP 2775

**Letter to Anonymous
Office of Special Education Programs**

N/A

August 29, 1994

Related Index Numbers

100.005 Contract Interpretation

200.030 FAPE Generally

Judge / Administrative Officer

Thomas Hehir, Director

Case Summary

What are a state educational agency's (SEA's) and/or a local educational agency's (LEA's) responsibilities with regard to remediation and compensatory education?

Compensatory education is appropriate in cases where a student with disabilities has previously been denied FAPE, and both a state educational agency (SEA) and an impartial due process hearing officer have the authority to require compensatory education if it is necessary to provide FAPE to a student who has been denied FAPE. Part B does not require remediation as a part of providing FAPE to a child.

Full Text

Appearances:

Inquirer's Name Not Provided

Text of Inquiry

I am writing in regards to federal policy on compensatory education for []. [] was diagnosed with a mixed type of cerebral palsy, all four limbs and []'s speech are affected. In spite of this, [] has put incredible effort into getting through school. However, due to misclassification for eight years, and even after due process and an OCR complaint, [] was still misclassified. I cannot afford an attorney, and our Protection and Advocacy System here in Rhode Island would not help us. I know that I just could not seem to say or do the right thing to get [] what []

needed. [] was mainstreamed in the third grade (I guess this is what they call full inclusion now), when [] was above grade level (1983). [] was denied assistive technology (typing) and never received any curriculum modification or remediation when [] failed. []'s decoding skills in 1991 were at the second grade level. [] was placed in all the low ability classes. The school system did not modify []'s program for []'s visual perceptual learning difficulties. [] was only classified for orthopedic impairment, despite the fact that [] had difficulty learning, walking, speaking, a high frequency hearing loss, and scoliosis. [] was put in "resource monitoring" but this never addressed []'s individual needs. This was possibly due to the fact that []'s junior high resource teacher was only certified for pre-K through grade six. But even the OT [] was supposed to receive was stopped. I took [] for evaluations. The evaluations were ignored. They blamed all []'s poor grades on []'s physical handicap. [] had a medically diagnosed learned disability by []. It was ignored. [] did not receive an appropriate education designed to meet []'s individual needs. I filed every level of complaint, and called every agency I could find. I asked for an extended school year and was denied. I was trying to get the school system and the state to address []'s academic needs. It was a confusing mess. I was so afraid that in spite of []'s normal ability, that []'s life would be ruined. [] was 19 when graduated from high school, the receiving school (we have no high school in our district) said [] should be tutored in math and science. This was denied by my district. [] was accepted into college without even taking the SATs, finished first year of a junior college, and will be 21 in September of this year. [] had to withdraw from algebra in college. [] having difficulty. *I am asking for clarification from your office on remediation and compensatory education as the responsibility of the state of Rhode Island.* I feel that [] was discriminated against due to []'s handicapping condition in spite of IDEA and Section 504.

Enclosed please find a document which I have received from the Rhode Island Department of

Education (May 4, 1994) on this issue. Thank you for any help you can give us.

Text of Response

This is in response to your letter to the Assistant Secretary for the Office of Special Education and Rehabilitative Services (OSERS) Judith E. Heumann, which has been referred to the office of Special Education Programs (OSEP) for response. In your letter, you asked for clarification on remediation and compensatory education as the responsibility of the State of Rhode Island.

OSEP's position has been that compensatory education is an appropriate means for providing a free appropriate public education (FAPE) to a child with disabilities who has previously been denied FAPE. In certain instances, compensatory education may be the only means through which children who are forced to remain in an inappropriate placement, due to their parents' financial inability to pay for an appropriate placement, would receive FAPE. Enclosed are letters to [] and [] explaining the Department's position on compensatory education. [omitted] As you can see from these policy clarifications, both a State educational agency (SEA) and an impartial due process hearing officer has the authority to require compensatory education if it is required to provide FAPE to a child with disabilities who has been denied FAPE.

With respect to the obligation of a SEA or local educational agency (LEA) to provide remediation for [] educational performance, Part B of the Individual's with Disabilities Education Act (Part B) does not require remediation as a part of providing FAPE to a child.

I hope that this information is helpful to you. If I may be of further assistance, please let me know.

Thomas Hehir

Director

Office of Special Education Programs

17 IDELR 522

17 LRP 1319

**Letter to Kohn
Office of Special Education and
Rehabilitative Services**

N/A

February 13, 1991

Related Index Numbers

100.005 Contract Interpretation

**168. EDUCATION FOR ALL HANDICAPPED
CHILDREN ACT (EHA)**

200.030 FAPE Generally

160.045 Evaluation/Testing

Judge / Administrative Officer

Robert R. Davila, Assistant Secretary

Case Summary

Is compensatory education a proper means to provide FAPE to a child with disabilities who was previously denied an appropriate education?

Compensatory education is a proper method to provide FAPE to children with disabilities who were entitled to, but were denied, FAPE. Moreover, compensatory education may be the only means to provide FAPE to children with disabilities who have been forced to remain in inappropriate public placements due to their parents' financial inability to pay for private placements.

Full Text

Appearances:

Ms. Margaret A. Kohn
Bogan and Eig
Attorneys at Law
Suite 330
1400 Sixteenth Street, N.W.
Washington, DC 20036

Text of Inquiry

I am writing for a policy interpretation of the

Education of the Handicapped Act concerning compensatory education for handicapped children who have been denied appropriate special education services or programs. Having represented many handicapped children in due process hearings conducted pursuant to the EHA, I seek clarification of the authority of an independent hearing officer to award compensatory education services to a child, upon a finding that the school system failed, in the past, to provide the child a free appropriate public education. In addition, may compensatory education services take the form of summer school programming as well as or instead of additional months or years of special education added on at the end of the child's eligibility for special education.

I have found that it is often most advantageous for a student who has been denied appropriate special education services over an extended period of time to attend a specialized special education summer school program in addition to the school year program. The added content frequently allows the child to catch up on some of the skills and learning she or he would have already been able to master had the previous educational programs been appropriate. The earlier the intervention, the more constructive and profitable the services are likely to be. To require the delivery of compensatory education services be withheld until after age 21 is fiscally imprudent, and counter productive for many children. It is not consistent with the basic tenet of special education---that decisions about programming for a handicapped child be designed to meet his/her unique individual needs. Hearing officers, as well as courts, need a variety of remedial options so that the individual needs of the handicapped student can be met and so that society can benefit most from the education provided.

This issue is especially important in school systems with limited special education summer school offerings. The opportunity to attend a summer school program that is not designed to meet the needs of the handicapped student may be all that is available to a handicapped student, unless a hearing officer has the power and authority to require the school district to

provide compensatory education in the form of special education summer school.

I look forward to your response.

Text of Response

This is in response to your letter to the Office of Special Education Programs (OSEP) concerning: (1) the authority of hearing officers under Part B of the Individuals with Disabilities Education Act (Part B) to award compensatory education services to a child, upon a finding that the school system failed, in the past, to provide the child a free appropriate public education (FAPE); and (2) the provision of compensatory education services in the form of summer school programming as well as or instead of additional months or years of special education added on at the end of the child's eligibility for special education.

Your concerns raise several issues, namely, whether: (1) compensatory education is an appropriate method for providing FAPE to a child with disabilities for whom FAPE has previously been denied; (2) a hearing officer has the authority to award compensatory education to a child with disabilities who has previously been denied FAPE; and (3) a hearing officer, upon awarding compensatory education to a child with disabilities who has previously been denied FAPE, can determine its scope. We will address the above issues separately.

In response to the first issue raised, OSEP's position, which is supported by several court decisions,¹ is that compensatory education is an appropriate means for providing FAPE to a child with disabilities who had previously been denied FAPE. A major purpose of Part B is to insure that all children with disabilities are provided FAPE. 34 C.F.R. § 300.1. Compensatory education effectuates this purpose by providing the FAPE which the child was originally entitled to receive. Further, compensatory education may be the only means through which children are forced to remain in an inappropriate placement due to their parents' financial inability to pay for an appropriate private placement would

receive FAPE.

The second issue raised by your letter concerns the authority of a hearing officer to award compensatory education to a child with disabilities who had been denied FAPE.

Under Part B, parents have the right to initiate a hearing on any matter relating to the provision of FAPE for their child. 34 C.F.R. §§ 300.504(a)(1) and (2); 300.506(a). The due process hearing provisions of Part B: (1) enumerate criteria for appointment of impartial hearing officers (34 C.F.R. § 300.507); (2) specify hearing rights (34 C.F.R. § 300.508); (3) require that findings of fact and decisions, with the deletion of personally identifiable information, be made available to the public (20 U.S.C. § 1415(d); and (4) prescribe a 45-day timeline for issuance of hearing decisions, unless an extension of the 45-day timeline is granted (34 C.F.R. § 300.512).

Part B and its legislative history evince the importance attached by the Congress to the procedural safeguards as a method of ensuring that FAPE is made available to children with disabilities. Therefore, OSEP's position is that Part B intends an impartial hearing officer to exercise his/her authority in a manner which ensures that the right to a due process hearing is a meaningful mechanism for resolving disputes between parents and responsible public agencies concerning issues relating to the provision of FAPE to a child.² Although Part B does not address the specific remedies an impartial hearing officer may order upon a finding that a child has been denied FAPE, OSEP's position is that, based upon the facts and circumstances of each individual case, an impartial hearing officer has the authority to grant any relief he/she deems necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he/she is entitled.

The decision of the impartial hearing officer is binding unless an aggrieved party appeals through applicable administrative or judicial procedures. 34 C.F.R. §§ 300.509-300.511.

The third issue raised by your letter asks whether

compensatory education may take the form of summer school programming as well as or instead of additional months or years of special education added on at the end of the child's eligibility for special education.

The scope of compensatory education ordered in an impartial hearing officer's decision must be consistent with a child's entitlement to FAPE, but should not impose obligations that would go beyond entitlement. Therefore, a hearing officer who concludes that a child with disabilities is entitled to compensatory education may order, as a means of redressing the denial of FAPE to that child, that compensatory education include or take the form of summer school programming.

I hope the above information is helpful. If we may provide further assistance, please let me know.

Robert R. Davila

¹ See, *Lester H. v. K. Gilhool and The Chester Upland School District*, 916 F.2d 865 (3rd. Cir. 1990); *Burr by Burr v. Ambach*, 863 F.2d 1071 (2nd. Cir. 1988); *Meiner v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986) and *Campbell v. Talladega County Board of Education*, 518 F. Supp. 47 (N.D. Ala. 1981).

² OSEP's position is in concert with recent court and State educational agency decisions. See, *Burr by Burr v. Ambach*, 863 F.2d 1071 (2nd. Cir. 1988); (court of appeals reinstated hearing officer's award of compensatory education to a child with disabilities); and *Auburn City Board of Education*, 16 EHLR 390 (1989) (hearing officer awarded tutorial services to child with disabilities who had been denied FAPE, holding that he had the authority, just as a federal or state court would have, to grant the relief sought).

34 IDELR 292

101 LRP 85

Letter to Riffel

Office of Special Education Programs

N/A

August 22, 2000

Related Index Numbers

220.015 Discontinuation of Services

100.003 Beyond Age of Entitlement

100.005 In General

Judge / Administrative Officer

Kenneth R. Warlick, Director

Case Summary

The purpose of a compensatory education award is to remedy the failure to provide services the student should have received in high school when he or she was entitled to FAPE, OSEP explained. Compensatory services are often appropriate as a remedy even after the period when a student is otherwise entitled to FAPE because, like FAPE, compensatory education can assist a student in the broader educational purposes of the IDEA, including obtaining a job or living independently.

Full Text

Appearances:

Dear Dr. Riffel:

This responds to your April 27, 2000 letter, in which you sought additional explanation March 20, 2000 letter regarding compensatory education services under Part B of the Individuals with Disabilities Education Act (IDEA). Our March 20, 2000 letter clarified the authority of your office, the Illinois State Board of Education (ISBE), to award compensatory education to a student with disability as a result of adjudicating the complaint filed on the student's behalf. We noted in our March 20, 2000 letter that the student's right to receive compensatory education, as a remedy for a previous denial of a free appropriate public education (FAPE) under the IDEA,

is independent of any current right to FAPE.

Specifically, we noted that the remedy was appropriate because ISBE had already determined, under the IDEA, that the student, [] had been denied FAPE and had not been provided with the services listed in []'s individualized education program (IEP). We stated that ISBE's mandate to the school district to reconvene her IEP team to determine the appropriateness of compensatory education services, for the period that ISBE determined that [] had been denied FAPE, was appropriate. However, we also noted that the student's receipt of a regular high school diploma (a terminating event under the IDEA to the right to FAPE), did not negate the student's independent right to compensatory education services because ISBE determined that the school district denied FAPE to the student. Your April 27, 2000 letter sought further clarification and authority on this last point.

Despite the additional information provided, we find no provision in Part B that limits the authority of the State educational agency (SEA) in identifying the appropriate remedy for a student who has been denied FAPE, including an award of compensatory services. Because the basis of the compensatory services remedy is the past denial of educational and related services that were not originally provided, compensatory education as a remedy is available even after the right to FAPE has terminated. Thus, the student's election to graduate with a regular high school diploma does not alter the student's right to the compensatory education remedy identified by ISBE.

However, we concur with ISBE in its statement that Part B does not authorize a school district to provide a student with compensatory education, through the provision of instruction or services, at the postsecondary level. *See* 34 C.F.R. Sec. 300.25. If a student is awarded compensatory education to cure the denial of FAPE during the period when the student was entitled to FAPE, the compensatory education must be the type of educational and related services that are part of elementary and secondary school education offered by the State.

Compensatory educational and related services, as a remedy to redress the denial of FAPE, is available to both judicial officers and SEAs. *See* 20 U.S.C. Sec. 1415(e)(2); 34 C.F.R. Sec. 300.660(b)(1) ("corrective action appropriate to the needs of the child"), and 34 C.F.R. Sec. 300.662(c). The independence of the remedy of compensatory services is consistent with the primary statutory and regulatory purpose set forth under the IDEA, namely, "[t]o ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." *See* 20 U.S.C. Sec. 1400(d); 34 C.F.R. Sec. 300.1(a).

Federal circuit courts of appeal have confirmed the independence of the right to compensatory education as an equitable remedy to address the denial of FAPE from the right to FAPE generally, which latter right terminates upon certain occurrences (including reaching the age at which the right to FAPE ends or graduating with a regular high school diploma). *See generally, Board of Educ. of Oak Park v. Illinois State Board of Educ. et al.*, 79 F.3d 654, 660 (7th Cir. 1996) (noting "[c]ompensatory education is a benefit that can extend beyond the age of 21 [the terminating FAPE age in Illinois.]; *Murphy v. Timberlane Regional School Dist.*, 22 F.3d 1186 (1st Cir.) (affirming award of two years of compensatory education to former student after student had reached the [otherwise terminating-FAPE] age of 21 given finding that FAPE had been denied to student), *cert. denied*, 115 S.Ct. 484 (1994); *Appleton Area School Dist. v. Benson*, 32 IDELR 91 (E.D. WI 2000) (authorizing award of compensatory education to a student who graduated with a regular high school diploma). *See also, School Comm. of Town of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70, 105 S.Ct. 1996, 2002-03 (1985).

A student's decision to graduate with a regular high school diploma does not automatically relieve a school district of its responsibility to provide that

student with compensatory education and related services awarded to the student. The purpose of the award is to remedy the failure to provide services that the student should have received during []'s enrollment in high school when [] was entitled to FAPE. Compensatory services are often appropriate as a remedy even after the period when a student is otherwise entitled to FAPE because, like FAPE, compensatory services can assist a student in the broader educational purposes of the IDEA, namely to participate in further education, obtain employment, and/or live independently. For example, if a student was denied services on []'s IEP (such as speech services or additional reading or math instruction), [] may not have ever achieved the proficiency necessary to utilize the skills consistent with the broader purposes of the IDEA. The fact that the student has graduated or reached the age at which the right to FAPE would ordinarily end does not necessarily negate the relevancy of, and the need for, compensatory services.

Regarding your request for further clarification, while we agree that this student no longer is entitled to FAPE, by reason of []'s decision to graduate with a regular high school diploma, we find nothing in the regulation at 34 C.F.R. Sec. 300.122(a)(3) that would relieve a school district of its obligation to provide a student with compensatory education in the form of services that would address the services that [] was denied during the period of []'s entitlement to FAPE.

There is nothing in this clarification, however, which requires or authorizes a school district to provide a student with compensatory services at the junior-college level, unless such services also would be considered elementary and secondary school education in Illinois. Rather, we understand the purpose of the ISBE's decision was to mandate that the school district reconvene the IEP team for this student to determine the need for compensatory services based on those services that the student had been denied.

We address here briefly your comments that the student is undergoing due process proceedings as

well. Under Part B, a parent or a public agency may initiate an impartial due process hearing on any matter related to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. *See* 34 C.F.R. Sec. 300.507(a). Within 45 days from the receipt of the hearing request, the hearing officer must provide the parties a copy of the final decision. Although the Part B regulations do not comprehensively list all of the specific remedies available to a hearing officer if he or she finds that a child has been denied FAPE, we have stated that an impartial hearing officer has the authority to grant any relief he or she deems necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he or she is entitled. *See, e.g.,* OSEP Kohn Letter (February 13, 1991) reprinted at 17 EHLR 522 (noting "OSEP's position is that Part B intends an impartial hearing officer to exercise his or her authority in a manner which ensures that the due process hearing is a meaningful mechanism for resolving disputes between parents and responsible public agencies concerning issues relating to the provision of FAPE to a child. ..."). A copy of this letter is enclosed.

In this matter, we understand that the student requested a due process hearing after ISBE issued its decision on the complaint filed on behalf of the student under ISBE's state complaint procedures. While we have not reviewed the due process complaint, we assume that the student sought to enforce ISBE's determination, since the student prevailed as a result of the complaint filed on []'s behalf with ISBE. Therefore, there is nothing in the Part B regulations that would permit ISBE to delay enforcement and implementation of its decision.

We hope that you find this explanation helpful in clarifying your concerns. If you would like further assistance, please contact either JoLeta Reynolds, at (202) 205-5507, or Greg Corr at (202) 205-9027.

Statutes Cited

20 USC 1415(e)(2)
20 USC 1400(d)

Regulations Cited

34 CFR 300.25
34 CFR 300.660(b)(1)
34 CFR 300.1(a)
34 CFR 300.122(a)(3)
34 CFR 300.507(a)

45 IDELR 110

106 LRP 11345

**Pittston Area School District
Pennsylvania State Educational Agency**

1704

March 1, 2006

Related Index Numbers

100.015 Required

175.007 Identification Procedures

192. EXIT FROM SPECIAL EDUCATION

200.035 Procedural Violations as Denial

Judge / Administrative Officer

ZIRKEL

Judge / Administrative Officer

ROGAN

Judge / Administrative Officer

SKIDMORE

Case Summary

Parents who invoked their right to a second due process hearing in response to a district's decision to exit their son from special education were entitled to an award of 32 hours of compensatory education for family counseling directed at the student's educational benefit, an appeals panel decided. The parents had disputed the issue of the student's eligibility for special education two years earlier. They claimed that two panel members should recuse themselves because they had participated in the case, which was being appealed in court. The panel rejected the parents' argument, stating that the prior decision had no effect on their ability to decide the current case. The panel found the parents' failure to disclose to the student's new district his prior history with special education contributed to the confusion of the case. However, the district committed prejudicial procedural errors, which included unduly delaying an IEP meeting, failing to have a regular education teacher on the IEP team, failing to provide the placement prescribed by the student's IEP, failing to issue a Notice of Recommended Educational Placement or invoke a

hearing to compel an evaluation, and failing to have the parents participate in the eligibility decision. The panel noted that "it may be that the student does not need special education, but the district must do more in terms of careful consideration [of the issue]."

Full Text

Appearances:

Background

The Student resides with his Parents¹ in the Pittston Area School District (hereinafter referred to as the District).

Prior to kindergarten, when the Parents resided in another district, they arranged for various evaluations and services via mental health agencies. In first grade, based on a parental referral, a multi-disciplinary team (MDT) in the other district determined that the Student was not eligible for special education services. In grade 5, based on the Parents initiation of various evaluations, the MDT in the previous district again concluded that he did not evidence a need for special education. However, after the Parents hired an attorney and arranged for an independent educational evaluation (IEE) at the previous district's expense, the MDT in grade 6 concluded that he qualified under the classifications of specific learning disability (SLD) and other health impairment (OHI) and developed an IEP that provided consultative learning support in the regular education environment. Upon the Parents request, the previous district provided refinements to the IEP and additional, specialized evaluations. In grade 7, the IEP team concluded that the Student, based on the various educational evaluations and in-class performance no longer needed an IEP. The previous district issued a Notice of Recommended Educational Placement (NOREP) exiting the Student from special education. The Parents filed for a due process hearing. On 8/27/03, after a postponement for further evaluations, including another IEE, the hearing officer concluded that the Student was not entitled to special education eligibility and, thus, compensatory education. On 9/26/03, the appeals panel affirmed the hearing

officer's decision.²

On or about 1/3/04, when the Student was in grade 8, the Parents moved and enrolled him in the District.³ Without informing the District of the appeals panel decision, the Parents preceded the enrollment with a request for an evaluation for special education, providing copies of the previous IEEs.⁴ They additionally requested evaluations for occupational therapy (OT) and assistive technology (AT).⁵

On 1/14/04, the IEP team met and developed an IEP labeled as a work in progress. Said IEP included a goal with objectives for organizational skills; grammar/writing, reading, and math computation; school behaviors; and modified history. The specified placement was part-time learning support, which was 21-60% outside of the regular education classroom.⁶ On 1/21/04, the Parents signed the NOREP as approved.⁷ Yet, the District placed him in special education classes for all five of his major subjects.⁸

Later in January, the Parents arranged for another IEE by the same private evaluator who had been the principal source of their reliance for the previous hearing and appeals panel decision. Said IEE reported, inter alia, a WISC-IV full-scale IQ of 105 and WIAT-II scores that only included a severe discrepancy for written expression. The IEE also included a summary of the previous hearing officer and appeals panel decisions; a diagnosis of SLD in written expression and OHI; and a recommendation for a completely mainstreamed placement in a regular education college-preparatory curriculum with various accommodations.⁹

On 2/2/04, the intermediate unit's OT evaluation was inconclusive, although it did not recommend OT services.¹⁰ On 3/5/04, the AT evaluation determined that the Student did not need AT services, although finding that his handwriting skills were poor and his keyboarding skills were good.¹¹

On 2/17/04, the Parents reported dissatisfaction with the Student's placement, requesting more integration.¹² When the special education teacher

replied on 3/15/04 that, based on the Student's performance, he was ready to move into regular classes for certain subjects, the Parents requested an IEP meeting, insisting on placement of the IEE's mainstreaming recommendation in the IEP.¹³ On 3/29/04, the IEP team revised the IEP to provide for inclusion, with goals/objectives and accommodations in regular grade 8 science, social studies, and algebra.¹⁴

On 5/3/04, the Student fractured his skull in a skateboarding accident.¹⁵

On 5/12/04, the IEP team developed an IEP for grade 9 that included goals/objectives for written expression, note taking, organizational skills, regular science and algebra (with accommodations and supports), and vocational choices. The separate learning support services were limited to written expression (i.e., less than 21% of the school day).¹⁶

On 6/24/04, the Student received his eighth-grade report card, which showed final grades that included a B in social studies and C's for science, algebra, and language arts.¹⁷

On 8/30/04, the Parents disenrolled the Student from the District and enrolled him in the Achievement House Charter Cyber School.¹⁸ The 9/13/04 IEP that the Cyber School developed with the Parents included goals/objectives for organizational skills, reading, math, and written expression; a transition plan; and a few technological programs such as Balametries and Dragon Naturally Speaking.¹⁹ In an attachment, the Parents expressed various specific areas for revision that, in sum, seemed to suggest that they did not accept this IEP as is.²⁰ On 9/15/04, they conditioned their approval of the IEP upon fulfillment of their various specified conditions.²¹

On 10/1/04, either by way of confirmation or reconsideration, the Milton Hershey School informed the Parents of the denial of the Student's application for admission because [a]fter carefully reviewing all of the information submitted, we have determined that [the Student's] documented needs are beyond the scope of our programs.²²

On 12/24/04, the Cyber School issued a revised IEP²³ along with a NOREP, which the Parents subsequently signed as disapproved.²⁴

The 12/27/04 IEE arranged by the Cyber School²⁵ concluded that there are strong indications that [the Student's] mother suffers from Munchausen By Proxy (MBP)²⁶ and that the Student was eligible under the classification of Personality Disorder, with a secondary classification of AD/HD.²⁷ The evaluator recommended, inter alia, child agency involvement for the suspected MPB, a full psychiatric evaluation for the suspected personality disorder, and a neurological evaluation for possible traumatic brain injury (TBI).²⁸

On 1/3/05, the Parents re-enrolled the Student in the District.²⁹ The District placed him in special education classes for approximately half of the school day.³⁰ Yet, the District used the IEP³¹ that provided for a less restrictive placement for grade 9.³²

On 2/26/05, the Parents requested an IEP meeting.³³

On 3/16/05, the District requested the Parents permission to reevaluate the Student, but the Parents declined based on the already available evaluation results, and they repeated their request for an IEP meeting.³⁴

Instead, on 3/22/05, the District arranged a curriculum meeting in which the Parents and the Student selected his recommended courses all apparently regular college prep classes for grades 11 and 12.³⁵

On 4/21/05, in preparation for the scheduled IEP meeting, the Parents requested a copy of an evaluation report (ER) based on the previous³⁶ IEE³⁷ and information on how the District would provide special education i.e., supports and accommodations for the Student's placement in the regular classes.³⁸

On 5/31/05, the Parent filed a complaint with the Pennsylvania Department of Education (PDE), alleging that the District did not provide a copy of the requested ER to the Parents and did not provide the Parents with IEP progress reports.³⁹

On 6/3/05, the IEP team met with an Office of Dispute Resolution facilitator, who recorded the various parental requests, including transition planning and AT software plus an aide for written expression.⁴⁰ The resulting IEP for grade 11, which the District sent to the Parents on 6/28/05,⁴¹ included goals/objectives for written expression, organizational skills, and accommodations in regular education classes; a transition plan; and itinerant learning support.⁴² The District did not provide a NOREP.⁴³

On 6/7/05, the Student's report card included final grades of B in developmental (i.e., special education) science, developmental English, and developmental math.⁴⁴

On 7/1/05, the County's department of children and youth services informed the Parents in writing of their closing of the case based on no current evidence of child abuse or neglect issues.⁴⁵

On 7/13/05, the District requested parental permission for an evaluation,⁴⁶ but the Parents declined to sign it, requesting instead, on 7/27/05, a permission form for a neuropsychological evaluation for suspected TBI.⁴⁷

Meanwhile, on 7/26/05, PDE issued its complaint investigation report, concluding that the District was in compliance with regard to the two alleged violations.⁴⁸

On 8/8/05, the Parents secured, and provided the District with, a medical prescription for the requested neuropsychological evaluation.⁴⁹

On or about 8/15/05, the Parents requested a due process hearing.⁵⁰

On 9/2/05, at the Parents request, the hearing officer granted postponement of the initial hearing session, which had been scheduled for 9/26/05, and also ordered the District to implement, as the stay-put, the January 2005 IEP that was developed at the [Cyber School] and that is in the possession of the School District.⁵¹ Instead, the District did not implement any IEP, including its 6/3/05 IEP, for the first few months of grade 10.⁵²

On 10/7/05, the Parents signed a permission

form for a reevaluation.⁵³

On or about 10/26/05, the parties reached an interim agreement pending the reevaluation; thus, the hearing officer granted their joint request for a second postponement, this time rescheduling the hearing for 12/16/05.⁵⁴

On 11/8/05, the District proposed limiting the IEP to a goal with objectives in written expression, delivered, in addition to the supports in regular classes, in a daily period in lieu of study hall.⁵⁵ The Parents signed the NOREP as approved.⁵⁶ The District then provided the Student with the specified additional period of specialized instruction in written expression.⁵⁷

On 12/8/05, the District issued a reevaluation report (RR) based on the school psychologist's review of existing evaluation data,⁵⁸ concluding that the Student met the criteria for SLD but that he did not need special education.⁵⁹

On 12/15/05, the hearing officer granted the parties joint request for a postponement until 1/4/06 due to a pending snowstorm.⁶⁰

On 1/26/06, after conducting hearing sessions on 1/4/06 and 1/6/06, the hearing officer issued his decision, ordering the District to provide the Student with 32 hours of compensatory education.⁶¹

The Parents and District each filed timely exceptions.

Discussion

We first address three threshold matters, starting with the Parents request that panel members Rogan and Zirkel recuse themselves. Reflecting the Parents continuing confusion, this request is based on the sole reason that these two panel members participated in a decision currently on judicial appeal,⁶² thereby purportedly establishing a conflict of interest in violation of the IDEA's impartiality requirements. This basis for recusal borders on being frivolous. First, we did not have actual or constructive knowledge that said decision was on judicial appeal; once we have rendered a decision, neither the appeals

panel system nor our own work patterns are geared to ascertaining this information. Second, it is of no moment to us whether our decisions are or are not on appeal; unless a case is remanded to us with directions for us to take some further action, which has happened very rarely, such matters are beyond our purview. Third, the Parents reason that the prior decision's purportedly crucial relationship to this case creates a fatal conflict of interest, which fails to take into consideration that 1) the prior decision does not have a res judicata or estoppel (i.e., issue preclusion) effect on the current case, 2) consistency does not equate to partiality, and, in any event, 3) there is nothing about our participation in the prior decision and its judicial appeal status that interferes with our impartial judgment in the present case. The Parents offer no legal support for their contention, because there is none. The boundaries for impartiality of hearing and review officers under the IDEA understandably extend well beyond the conduct that the Parents target here.⁶³

As the next threshold issue, we address the Parents request that we take additional evidence in this case. Their proffered reason, which is that the hearing officer rejected their request for an IEE and AT evaluation as untimely, does not come close to meeting the applicable standard of a compelling justification.⁶⁴ The distance is all the more remote, because we find the evidence quite ample to conclude that, in light of the previous evaluations, the Student is not entitled to either of the requested evaluations at public expense.⁶⁵ Additionally, we commend the hearing officer for running an efficient and effective hearing which, as evidenced most recently by these requests for recusal and additional evidence, the Parents would otherwise prolonged into what appears to be a never-ending battle.⁶⁶

To complete these threshold matters, in rejecting the various attachments that the Parents attached to their exceptions, we repeat the admonition that it is patently improper to attempt to provide evidence in this way.⁶⁷ Obviously, the hearing is the proper place for such proffers of documents. If the panel

determines that either side provides the requisite compelling justification for its request for additional evidence, there will be an opportunity to do so with proper procedures, but such unilateral attempts at doing an end run around the hearing/review process are clearly out of bounds.⁶⁸

In their exceptions, the Parents claim that the hearing officer legally erred by not awarding them at least 9 hours of compensatory education per week, based on [t]he last agreed upon IEP [which] is dated 9/14/04 and lists 9 hours a week in the regular classroom.⁶⁹ The problems with this logic include whether said IEP provides for the stated number of hours in regular education and how these hours, rather than the time allocated for special education, constitutes FAPE and the denial thereof. However, we need not delve into such problematic premises. The reason is that this claim is fatally flawed because the two parties did not both agree to this IEP. The Parents rejected it via the accompanying NOREP,⁷⁰ and, ultimately controlling in any event, the District was not a party to this IEP. Moreover, the Parents legal citations do not support their claims. Specifically, of the four panel decisions that the Parents cite in their exceptions, two do not address compensatory education,⁷¹ and the other two merely illustrate the flexible equitable nature of this form of relief, which is tailored to the particular circumstances of the case.⁷²

In its exceptions, the District claims that the hearing officer erred as a matter of law by failing to conclude that the Student was ineligible under Chapter 14/IDEA, thereby precluding compensatory education. The District points to our previous decision.⁷³ However, such reliance is inapposite for two separate reasons.

First, distinguishable from the present case, the prior district had issued a NOREP exiting the Student from special education, thereby putting his eligibility directly at issue. In contrast, in the present case, the District committed a cumulatively prejudicial series of procedural errors,⁷⁴ starting with 1) repeatedly failing to provide the IEP-prescribed placement,⁷⁵ 2)

unduly delaying an IEP meeting,⁷⁶ 3) failing to have a regular education teacher on the next IEP team,⁷⁷ 4) failing to include the IEP team in the reevaluation,⁷⁸ and 5) failing to have the Parents participate in the eligibility determination.⁷⁹ The culmination was the District's failure to provide the requisite notice whether via a NOREP or other document⁸⁰ before changing the Student's placement from IEP to non-eligibility status.⁸¹ It may well be that lack of such notice alone just as one or even more of the preceding prejudicial violations could be harmless error, but in this case the cumulative effect is prejudicial.

This conclusion does not excuse the Parents behavior upon initially enrolling the Student. Indeed, their selectively slanted view of the relevant prior determinations tainted the initial status of the Student.⁸² However, upon the re-enrollment a year later, the District had at least constructive knowledge of the appeals panel 9/26/03 decision based on the intervening IEE.⁸³ Moreover, despite further reminders of this allegedly invalidating information prior to the Parents filing for this latest hearing,⁸⁴ the District neither issued a NOREP exiting the Student nor filed for a hearing to challenge the Parents refusal to provide permission for the first two District-requested reevaluations.⁸⁵ Rather, for this entire re-enrollment period, the District provided him with successive IEPs. The District's claim that the non-IEP registration meeting somehow made him a regular education student is patently unacceptable.

Second, the previous appeals panel decision was more than two years ago. The intervening period provided not only the possibility for a changed level of need for the Student but also evidence that this possibility was not merely theoretical.⁸⁶ In contrast with the District's automatic conclusion based on the Student's purportedly satisfactory performance in regular education⁸⁷ and the Parents equally untenable opposite conclusion based on the successive IEEs,⁸⁸ the eligibility question remains at least partially open. The following reasons arranged from general to specific support a colorable claim of possible

eligibility as SLD in written expression despite the Student's relatively good grades;⁸⁹ 1) the District continued to provide for him not only special education classes but also accommodations and supports in regular education classes;⁹⁰ 2) the Student's grades for language arts were C and B respectively in special, not regular, education, classes;⁹¹ and 3) the various evaluations continued to show a severe discrepancy in written expression,⁹² and the District's services continued to address this area as a need.⁹³ It may be that the Student does not need special education, but the District must do more in terms of careful consideration of the continuum of special education and the reasonable implementation of the requisite determination process to resolve this exiting issue. Thus, we agree with the hearing officer's decision not to directly and definitively address the issue of the Student's eligibility.

In sum, we conclude that both the Parents and the District have contributed to the undue confusion in and prolongation of this case. The nominal but not de minimis award of 32 hours of compensatory education is equitable, particularly in light of the Parents less than forthcoming sharing of information upon initially enrolling the Student in the District and the District's far from complete compliance with the IDEA, with particular weight to the re-enrollment period. However, based on Student's unclear need for special education and the District's interim provision of written expression services, we add special tailoring to equitably fit this special case; the 32 hours must be used for family counseling directed toward the Student's educational benefit.⁹⁴

We can only express the distant hope that the Parents and District reach reasonable and cooperative closure with regard to the education of the Student without further reliance on the IDEA's ponderous process of dispute resolution.⁹⁵

Order

Accordingly, this 1st day of March 2006, the Panel, by a unanimous decision, affirms the hearing officer's order with one modification:

The 32 hours of compensatory education is for family counseling directed at the Student's educational benefit.

In accordance with 22 Pa. Code § 14.162(o), the parties are advised that this matter may be appealed to the Commonwealth Court of Pennsylvania or to the appropriate federal district court.

¹Parents is used herein generically, with the understanding that the Student's mother was the active representative, apparently on behalf of both of them.

²District exhibit (D)-1 (Special Educ. Opinion No. 1413 (2003)).

³Parents exhibit (P)-5. Another registration form is dated 1/14/04. D-2.

⁴D-3.

⁵D-5.

⁶D-6. The Parent participated along with an advocate. *Id.* at 1.

⁷D-7.

⁸Noted Transcript (NT) at 177.

⁹D-8/P-1. She also recommended a transition plan upon age 14. *Id.* at 35. The corresponding WISC-III IQ was 112 in her 2001 IEE, and the WIAT-II results revealed a parallel pattern in terms of the severe discrepancy for written expression. *Id.* at 11-12.

¹⁰D-9/P-21.

¹¹D-11/P-2.

¹²D-10.

¹³D-12.

¹⁴D-6. The District implemented the specified integration in accordance with this IEP revision. NT at 190.

¹⁵See, e.g., P-3.

¹⁶D-14. The Parent participated with the assistance of two advocates. *Id.* at 1. The IEP lacked a transition plan; the reason was, according to the special education teacher, that the District only provided transition at age 16. NT at 184.

¹⁷P-4.

¹⁸D-15. Their notification letter reported that the Milton Hershey School had denied admission to the Student because they could not meet his needs psychologically and educationally, requesting that the District contact said school to support reconsideration and reversal of that rejection. *Id.*

¹⁹P-18. The basis for this proposed IEP was the last IEE (*supra* note 8 and accompanying text), which put them on notice of the previous appeals panel decision. NT at 21 and 52.

²⁰P-18, at 35-36.

²¹P-19.

²²D-21.

²³P-31.

²⁴P-20. By the time of their signing the NOREP, the Parents had re-located the Student to the District. NT at 128.

²⁵NT at 59. However, it was not the neuropsychological evaluation that the Parents had requested. *Id.*

²⁶D-16/P-25, at 15.

²⁷*Id.* at 24. Acknowledging that the Parents disallowance of further testing precluded determining eligibility in terms of specific learning disability, the evaluator nevertheless opined that more important than any probable Learning Disabilities are [the Student's] suspected Personality Disorder (NOS). *Id.* at 22. Coming closer to but still not congruent with the IDEA classifications, she recommended an IEP for ED-Other Health Issues and L.D.-ADHD. *Id.* at 24.

²⁸*Id.* Her report also included, within the detailed background section, a summary of the previous hearing officer and appeals panel decisions. *Id.*

²⁹P-5. The Cyber School, which was understaffed, had problems with implementation, not just formulation, of the specialized services for the Student. See, e.g., NT at 35-36.

³⁰NT at 87 and 93.

³¹See *supra* note 16 and accompanying text.

³²See, e.g., NT at 135 and 147. Moreover, the District did not issue progress reports in terms of the IEP goals/objectives. *Id.* at 136.

³³P-27.

³⁴D-17. The District's special education director sent the Parents a letter explaining the delay. P-6. The Parents provided the District with the Cyber School's IEE. NT at 100.

³⁵D-18. The parties mutually agreed that this was not an IEP meeting. *Id.*

³⁶See *supra* note 9 and accompanying text.

³⁷D-19, at 2.

³⁸*Id.* at 3.

³⁹D-23.

⁴⁰D-20/P-8. The District did not include a regular education teacher on the IEP team. NT at 281.

⁴¹D-22, at 2.

⁴²D-21/P-9A. The Parent participated along with an advocate. *Id.* at 1. The accommodations included modified instruction in the regular classroom with the help of the educational assistants. *Id.* at 5; see also *id.* at 9 and 13.

⁴³NT at 97. As part of the investigation, the District informed PDE that it had treated the Student as a regular, not special, education student for data-reporting purposes. *Id.* at 336.

⁴⁴P-10.

⁴⁵P-30.

⁴⁶D-22.

⁴⁷D-24/P-11. The Parents also requested a NOREP for the latest IEP. *Id.*

⁴⁸D-23. For the first alleged violation, which concerned the ER, PDE appeared to conclude that the Parent received the IEE and that the District was not obligated to produce an ER based on it. For the second alleged violation, PDE cited the 9/26/03 appeals panel decision to conclude, also not without ambiguity, that no progress reporting was required beyond the regular report cards. *Id.* at 4.

⁴⁹P-12. The District did not respond to this

renewed request. NT at 101.

⁵⁰D-25. The hearing officer reported that ODR received the request on 9/13/05. Hearing Officer exhibit (HO)-2, at 1.

⁵¹HO-1, at 1. Under the circumstances, the hearing officer reasonably premised this order on the Parents assertion that there was a January 2005 IEP and that it was in the possession of the District. The evidence during the subsequent hearing disproved both assertions. See, e.g., NT at 285.

⁵²See, e.g., NT at 238, 252, and 273. The District did not have the purported IEP but, upon its request, only received the 9/13/04 version from the Cyber School. *Id.* at 306. The District did not implement this 9/13/04 IEP because, according to its special education director, I would still need to evaluate whether or not [the Student] needed those services in this environment. *Id.* at 309. She alternatively asserted that it was impossible to implement said IEP. See, e.g., *id.* at 348. She did, however, admit to the need and feasibility of addressing the goal with regard to written expression. *Id.* at 349.

⁵³P-26.

⁵⁴HO-2, at 2.

⁵⁵D-31/P-14. The participating advocates for the Parents included the Cyber School's former principal. NT at 65.

⁵⁶P-9B and P-15. The Parents then representative was instrumental in having the Parents approve this NOREP. See, e.g., NT at 43.

⁵⁷See, e.g., NT at 168-69. However, there was no evidence that a certified special education teacher either designed or implemented said instruction.

⁵⁸D-30/P-22. The report also included new test data. For example, it included based on the District's school psychologist testing the Student on 11/7-8/05, a WISC-IV full-scale IQ score of 111 and WIAT-II scores showing a severe discrepancy for written expression. She based the conclusion regarding the need for special education on the Student's grades, which were As and Bs except for a C in Spanish for

the first quarter of grade 10, and his achievement test results, which were approximately average as compared to other students of his age. *Id.* The Spanish teacher had reported problems with spelling, homework, and organization skills. NT at 362.

⁵⁹There were no signatures or other evidence that the requisite team made the final determination of eligibility.

⁶⁰HO-2, at 2.

⁶¹Hearing Officer Decision, at 13. Additionally, he denied the Parents request for an IEE and AT evaluation. *Id.* He calculated the compensatory education based on one hour per week for the period since the Student's reenrollment in the District, minus four weeks for the reasonable rectification reduction. *Id.* at 11.

⁶²See *supra* note 2.

⁶³See, e.g., Elaine Drager & Perry Zirkel, Impartiality under the Individuals with Disabilities Education Act, 86 Educ. L. Rep. (West) 11 (1994).

⁶⁴See, e.g., Special Educ. Opinions Nos. 1535 (2004), 1434 (2003), 1392 (2003) 1099 (2001); 1012 (2000), and 954 (1999). The standard is a rigorous one, as evidenced by our rejection of the proffered reasons in all these cases. For other examples of rejections, see Special Educ. Opinions Nos. 1657 (2005), 1555 (2004), 1487 (2004), 1040 (2000), and 1018 (2000).

⁶⁵Certainly, the Parents are entitled to arrange and pay for such IEEs at their own expense, which the District must then consider. 34 C.F.R. § 300.502(c). However, the evidence did not meet the requisite standards for these IEEs at public expense. *Id.* §§ 300.502(b) and 300.502(d).

⁶⁶The successive foes have included but not been limited to the previous school system, the District, the Cyber School, and the Parents attorney. The series of IEPs that have defied the Parents satisfaction appears to be endless.

⁶⁷See, e.g., Special Educ. Opinions Nos. 1648 (2005) and 1434 (2003).

⁶⁸In their answers to the District's exceptions, the Parents persist in their improper attempt to add to the record of the case, attaching their selection of the Student's most recent report card grades and asserting, for example, that the District used [a] nonexistent IEP to inflame the Parent's former inclusionist attorney to strong arm the Parent and that Parent has disabilities and gets confused easily.

⁶⁹Parents exceptions, at 2.

⁷⁰See *supra* text accompanying note 24.

⁷¹Special Educ. Opinions Nos. 1585 (2005) and 1267 (2002).

⁷²Special Educ. Opinions Nos. 1431 (2003) and 1233 (2002).

⁷³See *supra* note 2 and accompanying text.

⁷⁴Cf. Special Educ. Opinion No. 1485 (2003) (notable role of procedural errors in an eligibility decision).

⁷⁵See *supra* text accompanying notes 6-8 and 30-32. Moreover, the District failed to take adequate action in response to the hearing officer's stay-put order. See *supra* text accompanying notes 51-52.

⁷⁶See *supra* text accompanying notes 33 and 40.

⁷⁷See *supra* note 40. For other such limited violations, see *supra* notes 32 and 57.

⁷⁸Compare *supra* text accompanying note 58, with 34 C.F.R. § 300.533(a). The requisite participants also include other qualified professionals, as appropriate. *Id.* Contrary to the Parents assertions, however, a meeting of the group is not required. *Id.* § 300.533(b).

⁷⁹Compare *supra* note 59, with *id.* § 300.534. This step is separable from the preceding and overlapping step, and the inclusion of information from the Parents in the previous step (*id.* 300.533(a)(1)(i)) obviously does not suffice to constitute said participation at this ultimate step.

⁸⁰The District similarly did not provide a NOREP for the previous IEP, despite parental requests. See *supra* note 47 and text accompanying note 43.

⁸¹*Id.* § 300.503. Contrary to the District's argument, the reevaluation report did not suffice for this purpose in light of the cumulative procedural defects, including but not limited to those concerning the report itself. District's answers to exceptions, at 4-5.

⁸²See *supra* note 4 and accompanying text.

⁸³See *supra* text accompanying note 9.

⁸⁴See *supra* notes 28 and 48.

⁸⁵See *supra* text accompanying notes 34 and 47.

⁸⁶See *supra* text accompanying notes 22 and 27.

This evidence was not definitive, but it provided reason to suspect eligibility that fits with the level of the special education director's thought-to-be-exceptional characterization. NT at 282. The fatal problem, however, with this characterization is that the Student at the time of the special education director's recent tenure with the District had an IEP and, thus, the issue was one of possible exiting, not possibly entering, the status of being eligible. Interestingly, she testified that she was pleased that our program allows students to be NOREP'd out of our program. NT at 337.

⁸⁷Similarly, due to the different processes, the PDE complaint resolution is not at all binding in this forum. See, e.g., Special Educ. Opinion Nos. 1221 (2202) and 826 (1998); see also *Grand Rapids Pub. Sch. v. P.C.*, 308 F. Supp. 2d 815 (W.D. Mich. 2004); *Letter to Douglas*, 35 IDELR ¶ 278 (OSEP 2001).

⁸⁸Repeating the reliance no less than four times in the answers to the District's exceptions does not make the claim any stronger. The first IEE, per our previous decision, is of no weight here. See *supra* text accompanying note 1. The second IEE echoed the first one, adding only quantity, not quality. See *supra* note 9 and accompanying text. The third IEE was inconsistent with the first two; not congruent with the IDEA; and more focused on the family's pathology than the Student's eligibility. See *supra* notes 25-28 and accompanying text. Meriting due consideration, these IEEs are no more controlling than the opposite PDE complaint determination.

⁸⁹In contrast, we do not find sufficient specific evidence to support OHI based on AD/HD.

⁹⁰*See supra* text accompanying notes 14, 16, 42, and 55.

⁹¹*See supra* text accompanying notes 14, 17, and 44.

⁹²*See supra* text accompanying notes 9 and 59.

⁹³*See supra* text accompanying notes 42 and 55. Even in her insufficient impossibility rationale, the special education director admitted this need. *See supra* note 52.

⁹⁴Just as long as the service is ultimately for the Student's educational benefit, it is within the discretion of the therapist whether the counseling focuses on the Parent(s), the Student, or the family, which are all within boundaries of FAPE. See, e.g., 34 C.F.R. §§ 300.7(a), 300.7(b)(7), and 300.7(b)(12)(ii).

⁹⁵*Honig v. Doe*, 484 U.S. 305, 322 (1988) (citing *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 370 (1985)).

Regulations Cited

34 CFR 300.533(a)
34 CFR 300.533(a)(1)(i)
34 CFR 300.533(b)
34 CFR 300.534
34 CFR 300.503
34 CFR 300.7(a)
34 CFR 300.7(b)(7)
34 CFR 300.7(b)(12)(ii)

Cases Cited

308 F. Supp. 2d 815
35 IDELR 278
484 U.S. 305
471 U.S. 359