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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

STEFAN JAYNES, et al.,

Plaintiffs,

v. **Civil Action No: 4:99cv146**

NEWPORT NEWS SCHOOL BOARD,

Defendant.

OPINION AND ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

FACTUAL BACKGROUND

Stefan Jaynes was born on November 24, 1990. Shortly after his second birthday, Stefan began losing speech and language skills in rapid progression. Brian and Juliana Jaynes ("Petitioners") took their son, Stefan, for an assessment by Dr. Frank, a pediatric neurologist. Dr. Frank diagnosed Stefan with autism. He stressed the importance of early intervention as the best hope for successful remediation, explaining that "[t]here's a window of opportunity and that window of opportunity is greatest between the age of discovery and as early as possible." Dr. Frank admonished the Petitioners to "immediately, immediately do something fast, now, right now. Let's get him in speech. Let's get him in OT [occupational therapy]. Let's get him with a psychologist. Let's go."

Based on that warning, the Petitioners contacted PACES, a special program designed for autistic children. They were informed that Stefan could not enroll in the PACES program until he was referred by local public school system. On October 8, 1993, the Petitioners placed the

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necessary referral for special education services with Newport News Public Schools (NNPS) and conveyed to school officials the urgency of Stefan's situation. NNPS did not begin the assessment process until December 15, 1993. At that time, NNPS asked Mrs. Jaynes to sign a consent to testing form, however, it did not inform Mrs. Jaynes of her due process rights and did not provide her with an Advisement of Parental Rights form.

On February 18, 1994, Stephan was deemed eligible to receive special education and speech-related services. On that date, school officials drafted and signed an Individualized Education Program (IEP). The IEP is the hallmark of the Individuals with Disabilities Education Act (IDEA). It provides a detailed assessment of a student's abilities and needs and then lays out a program to meet that student's educational goals.

There is a dispute over whether the Petitioners received notice of that IEP meeting. Notwithstanding that contest, the parties agree that the Petitioners did not attend the February meeting and were not made aware at any time during the month of February that NNPS drafted an IEP for Stefan. NNPS concedes that it did not follow-up with the Petitioners to inquire why they did not attend the meeting or to brief them on the results of the meeting.

The IEP provided for Stefan's placement into the Program for Educating Exceptional Preschoolers (PEEP), a program in the public school system for four and one half hours, three days per week. In addition, speech classes would be available to Stefan once a week for thirty minutes. The IEP did not contain a definitive date when these special education services would be available to Stefan. It only listed a date of "4/ /94." The IEP contained no criteria or evaluation data to determine how the program's goals and objectives would be reached. Also conspicuously missing from the IEP was any mention of PACES, either dismissing the

possibility of using the program as an alternative education source or suggesting enrollment in the program.

On March 31, 1994, the Petitioners signed the IEP. In signing the IEP, the Petitioners attested their receipt of the Advisement of Parental Rights Form, which explains parents' right to challenge the IEP. However, Mr. and Mrs. Jaynes testified during the administrative due process hearing that they did not receive the advisement of rights form at that time, nor were they informed by school officials of their due process rights through another medium. NNPS did not begin to implement any of the IEP programs on March 31 or during the month of April. On May 5, 1994, Ms. Jaynes questioned NNPS as to when Stefan would begin receiving services. Three weeks later, school officials responded to her inquiry by offering a revised plan for Stefan; a plan that called for a reduction in programming to only ninety minutes of home schooling once or twice per week. The Petitioners rejected that plan. Some time after their rejection, school officials admitting to altering the "4/ /94" date to read "5/26/94."

On October 10, 1994, school officials held a meeting to reevaluate Stefan's IEP. At that meeting, NNPS eliminated numerous programs from the IEP. NNPS provided no explanation or justification for striking these programs. Mrs. Jaynes was present at this meeting and signed the new IEP, once again attesting that she received an Advisement of Parental Rights Form. The Petitioners testified that just as in March, they did not receive an Advisement of Parental Rights Form at that time. Sometime later, that IEP was altered without the Petitioners' knowledge.

Several times throughout 1995, the Petitioners placed requests with the school to implement Stefan's IEP. They also petitioned for other services for their son. School officials offered no explanation for their noncompliance with the IEP and denied the Petitioners' other requests for services. On January 17, 1995, after noticing a severe decline in Stefan's condition, the Petitioners pulled their son out of PEEP and placed him exclusively with private tutors.

Sometime in 1996, the Petitioners learned that the IDEA conferred certain due process rights to parents to challenge the IEP. They filed a request for a due process hearing on January 14, 1997, alleging that NNPS committed several substantive and procedural violations of the IDEA. The Local Hearing Officer (LHO) presiding over the hearing found, *inter alia*, that NNPS "maintained a pattern and practice in this case of failing to follow the procedures set forth in the Individuals with Disabilities Education Act" and that it "seriously infringed upon the parents' participation in the IEP process." The LHO ordered NNPS to indemnify the Petitioners in the amount of $117,979.78, for the educational expenses incurred from October 8, 1993 to August, 1998.

NNPS appealed that decision to a State Hearing Officer (SHO). The SHO affirmed the decision of the LHO but decreased the amount of the award. The SHO found that the Petitioners were barred by the statute of limitations from recovering any expenses dating back more than two years prior to their request for a due process hearing. The SHO's damages figure only includes education expenses from January 14, 1997, the day Petitioners requested a due process hearing, to present.

The Petitioners now bring suit in this Court seeking summary judgment for the full amount of damages awarded by the LHO. NNPS responded by filing a Motion to Dismiss.

DISCUSSION

I. Are the Petitioners Time-Barred by the Statute of Limitations from Bringing a Cause of Action Against NNPS for Violating the IDEA?

The IDEA requires that states receiving federal funds for the education of disabled students provide such students with a "free appropriate education." 20 U.S.C. § 1421(1). An integral part of the IDEA is a provision for a due process hearing, which provides a forum for an independent assessment of the quality of the IEP, followed by a procedure for judicial review of that administrative decision. *See id.* at § 1415(b)(2).

Violations of the IDEA may arise in one of two situations. Either a school district in creating and implementing the IEP can run afoul of the Act's procedural requirements or a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits. *See Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). The Petitioners raise a host of alleged IDEA violations, both substantive and procedural. They allege, *inter alia*, that the IEP drafted in February, 1994 contained substantive deficiencies; that NNPS amended Stefan's October 1994 IEP without their knowledge or involvement; and that NNPS failed to fully implement the February IEP. Without discussing the merits of each claim, the court must disregard these causes of action, along with several other causes of action, because they occurred outside the statute of limitations and, therefore, are time-barred.

A cause of action under the IDEA based on misconduct that occurred prior to July 1, 1995 is subject to a one-year statute of limitations. The Plaintiffs did not file for a due process hearing until January 14, 1997. Therefore, Plaintiffs are estopped from recovering damages for any violations caused by NNPS prior to July 1, 1995. Violations that occurred on or subsequent

to July 1, 1995, are subject to a two-year statute of limitations. *See* Va. Code. Ann. § 8.01-248. It follows that the Plaintiffs may pursue a claim against NNPS for any cause of action that arose after June 30, 1995.

It appears from the record that both the LHO and the SHO misapplied the statute of limitations. The LHO failed to recognize the applicability of the statute of limitations to the case. The SHO's decision, by contrast, was overinclusive, finding not only that the statute of limitations barred recovery for claims arising prior to July 1, 1995, but that it also barred all claims arising between July 1, 1995 and January 14, 1997 (when the Petitioners requested a due process hearing). The application of the statute of limitations is a matter of law, not a finding of fact. Therefore, the legal findings of the agency officials are not entitled to the deferential standard discussed *infra*.

The Petitioners dispute the assertion that the statute of limitations bars recovery for injuries sustained prior to July 1, 1995. They contend that the inability of NNPS to provide a beneficial education program for Stefan is a continuous violation of the IDEA. They argue that they suffer an injury today and will continue to suffer harm with each day that their son is not receiving a "free appropriate public education," and therefore, their claim is not time-barred. The Petitioners then reason that the damages from the pre-July 1, 1995 violations should be included in the damages calculus in the current case because they are part of the same continuous violation. Following that logic, the Petitioners reason that they are entitled to the full award entered by the LHO.

To support their "continuous violation" theory, the Petitioners note that the IDEA is a broad-sweeping remedial program designed to afford a education to *all* students with disabilities.

The legislative history contains extensive accounts of the widespread exclusion of handicapped children from meaningful educational opportunities. *See generally*, 121 Cong. Rec. 19486 (statement of Sen. Williams) ("1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education."); *Rowley*, 458 U.S. at 197 n. 20 (providing extensive statistics and anecdotal evidence on paucity of educational opportunities for disabled students). Impressing the need to remedy this inequity in the educational system on the states, Congress designed the IDEA to extend the "maximum benefits to handicapped children and their families." *Rowley* 458 U.S. at 194 n.18. To further that goal, it conferred "a broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives." *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919 (1st Cir. 1983). They assert that this broad grant of power includes the right to find a continuous violation of the IDEA, a contention which, if adopted, would essentially eviscerate the statute of limitations.

The Petitioners take this policy statement too far. Under the Plaintiffs' "continuous injury" theory, a parent whose first grade child was the victim of an IDEA violation could bring a claim up until the child's senior year of high school. This is problematic in several respects. To begin, the school district would be deprived of the opportunity to remedy the inadequacies in the IEP, thereby mitigating its damages. As one court explained, "the purpose of requesting a due process hearing is ... to put the school district on notice of a perceived problem." *Thompson v. Board of Special Sch. Dist. No. 1*, 144 F.3d 574, 579 n.3 (8th Cir. 1998) (quotations omitted). Further, the school district, without notice of the claim for decades, would most assuredly suffer prejudice in preparing a defense. Documents may be lost or destroyed, witnesses may be

unreachable, memories may have long since faded. Such an end-run of the statute of limitations would create an undue burden on school districts. Congress did not intend to impose such high costs on school districts as the price of affording disabled students the opportunity for an appropriate education.

A proper application of § 8.01-248 allows the Petitioners to pursue any claims that arose after June 30, 1995, when the two-year statute of limitations began. Any claims of substantive or procedural errors by NNPS that occurred prior to July 1, 1995 are barred by the statute of limitations and are not actionable.

II. Is the Failure of NNPS to Notify the Petitioners of Their Right to a Due Process Hearing, Standing Alone, Sufficient to Sustain a Cause of Action Under the IDEA?

One of the hallmarks of the IDEA is meaningful parental participation in the formulation and implementation of the IEP. The Supreme Court in *Rowley* stressed the importance of the parental participation provision in serving as a check on states' compliance with the mandates of the IDEA, finding that "Congress placed every bit as much emphasis upon compliance with procedures giving parents a large measure of participation at every stage of the administrative process" as it did on the substance of the program implemented. 458 U.S. at 205-06.

Recognizing that this right is nothing more than an empty promise if parents remain unaware of the availability of a due process hearing, Congress directed the states to disseminate written information to families of qualified students explaining the procedural safeguards provided by the IDEA, including availability of a due process hearing. At bottom, states must inform parents of their right to a due process hearing on three separate occasions:

(A) upon initial referral for evaluation;

(B) upon each notification of an individual education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6) of this section.

20 U.S.C. § 1415(d)(1). The failure to comply with this notice provision constitutes a procedural violation of the Act. The rationale underlying a state's liability under the IDEA for its failure to notify parents of their due process rights is that "[u]nless school systems apprise parents of their procedural protections ... parental participation will rarely amount to anything more than parental acquiescence, because parents will presume they have no real say, and the participatory function envisioned by *Rowley* will go unfulfilled. *Hall*, 774 F.2d at 634.

The issues presented before the *Hall* Court parallel those raised in the present case. The plaintiffs in *Hall* petitioned the school district to evaluate their son, who suffered from severe dyslexia, and to prepare a corresponding IEP. The school district conducted tests and provided some remedial education services. Yet through that extensive process, it completely "failed to inform the family of their procedural rights, despite its clear statutory obligation to do so." *Id.* at 635. The most steps taken by the school district to fulfill their duty under the IDEA was school official's passing remark to the parents that they could "have their son undergo another evaluation." *Id.* There was no discussion of a due process hearing, no mention of a forum to object to the IEP, no comments on the ability to challenge the school district's actions. The *Hall* Court held that these omissions constituted "adequate grounds by themselves for holding that the school failed to provide [a fair and appropriate education]." *Id.*

The same procedural errors abound in the instant case. The LHO held that NNPS failed to inform the Petitioners of their procedural rights. The Petitioners began working with school

officials in the fall of 1993. The LHO found that over the course of those two years, through the drafting of two IEPs, through extensive evaluations and testing, NNPS kept the Petitioners in the dark about their right to challenge Stefan's education plan.

The findings of the LHO are afforded great deference by reviewing courts. While the IDEA vests district courts with the power to review administrative agency decisions, this power is "by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Hartmann v. Loudon Co. Bd. of Educ.*, 116 F.3d 996, 1000 (4th Cir. 1997). Agency findings are considered "prima facie correct." *Id.* at 1000-01. The level of review conducted by district courts is "akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it." *Doyle*, 953 F.2d at 105. If the court is not going to follow a finding, it is "required to explain why it did not." *Id.*

The findings of the LHO imposing liability of NNPS are adequately supported by the record. Mr. Jaynes testified that he never received the Parental Rights in Special Education Form until "after we pulled Stefan out (of the school system), maybe a year after we pulled Stefan out." [T. 156]. Mr. Jaynes continued to state that he did not learn until sometime in 1996 that he had the right to a due process hearing. Within two months of learning of his rights, Mr. Jaynes initiated the process of obtaining a hearing. [T. 107]. The testimony of Mrs. Jaynes was substantially similar. She concurred with her husband that they never received the Parental Rights in Special Education form when they signed the IEP. They did not even see such a form until "after Mrs. Stanton got involved," in 1996. [T. 82].

The LHO did not enter a finding as to the specific date upon which NNPS first apprised the Petitioners of their due process rights. A search of the hearing transcripts sheds little light on

the issue, as neither party elicited testimony regarding the exact date when NNPS furnished the Petitioners with the requisite notice of their due process rights. The most precise date in the record is the year 1996. Fortunately, the exact date that notice was received bears little impact on the statute of limitations analysis. If the Petitioners did not receive the Parental Rights in Disabled Education Form until some date after June 30, 1995, their claim is subject to the two-year statute of limitations, as opposed to the one-year statute of limitations. The Petitioners filed their request for a due process hearing on January 14, 1997, which would be considered timely regardless of whether notice was received in January of 1996 or in December of 1996. Therefore, Petitioners may bring a cause of action against NNPS for violating their procedural rights, because they had not received the requisite notice as of July 1, 1995.

This is not to say that liability may only be grounded under this theory. Petitioners may have evidence of additional IDEA violations that would result in a damages award. However, further inquiry into the validity of those claims is not necessary at this time, because the remedy would remain unchanged. The damage award in IDEA cases is limited to the amount of money expended for educational purposes, irrespective of the number of violations committed by the state. This Court finds that NNPS committed at least one violation by failing to inform the Petitioners of their due process rights as required in the IDEA. Even though Petitioners may have several causes of actions, recovery on this lone ground will afford them full relief.

III. Are the Petitioners' Damages Limited to Expenses Incurred During the Time Period That is Not Barred by the Statute of Limitations or Do The Damages Consist of All Educational Expenses?

When a court finds that the state failed to provide an appropriate education to a disabled student, it may "grant such relief as [it] determines is appropriate," including awarding damages

for costs associated with securing a private placement that meets the child's educational needs. The Supreme Court in *School Committee of Town of Burlington v. Massachusetts Dept. of Educ.*, explained that such a remedy is necessary to promote the remedial nature of the IDEA. 471 U.S. 359 (1985). To find otherwise would leave parents with the Hobson's choice of either "go[ing] along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement" and thereby forego the right to a free education. *Id.* at 370.

After months of delays in NNPS's implementation of Stefan's IEP, Dr. Frank told the Jayneses, "you're losing your child." He instructed them to "[g]et him out of there now or he's going to go into an institution." On that warning, the Petitioners made arrangements for private tutors to preserve what skills Stefan had left. The failure of NNPS to inform Petitioners of their right to challenge the substance of the IEP and the implementation of the IEP prevented the Petitioners from requesting a due process hearing to compel implementation of the IEP or to receive reimbursement for their expenses.

This raises the issue of calculating damages. Petitioners claim that the injury is the inability to bring suit for violations that occurred prior to July 1, 1995, which are now barred by the statute of limitations. They are seeking the full amount of damages they would have received if they were able to bring those claims and could succeed on the merits. While expectation damages would serve to make the Petitioners whole for the injuries caused by the procedural violations in this case, such an award would have the effect of eviscerating the statute of limitations. It would essentially allow Petitioners to accomplish through the backdoor what they could not achieve from the front. There may be other causes of action available to the Petitioners

to recover damages for the period preceding July 1, 1995. However, such relief is not available under an IDEA claim. *See Hall*, 744 F.2d at 633 n.3 ("The Act permits a reimbursement remedy, but it does not create a private cause of action for damages for educational malpractice.") (quoting *Anderson v. Thompson*, 658 F.2d 1205, 1211-13 (7th Cir. 1981).

The Petitioners are entitled to indemnity for expenses incurred within the two-year statute of limitations period. That is to say, they may recover for educational outlays beginning in July 1, 1995 through today. This Court believes that such an award properly compensates Petitioners for the injuries caused by NNPS's procedural violations and insulates NNPS from liability for damages that accrued outside the statute of limitations. Accordingly, the Court **GRANTS** the Petitioners' Motion for Summary Judgment in part and **DENIES** Defendant's Motion to Dismiss.

The parties may agree upon the amount of such damages by stipulation, without prejudice to their appellate rights regarding the Court's decision upon the motions. If no such stipulation is received within twenty (20) days of this Order, the Petitioners shall submit a verified claim for damages within thirty-five (35) days of this Order, to which claim the Defendant may reply within eleven (11) days of service upon it. If neither party requests a hearing upon the amount of damages within eleven (11) days of the filing of the Defendant's reply, the Court shall fix damages based upon the pleadings.

The Clerk is **REQUESTED** to send a copy of this order to all counsel of record.

It is so **ORDERED**.

Henry Coke Morgan

HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
September, 7, 2000

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