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***A REVIEW OF CURRENT STATE LAW  
GOVERNING THE EDUCATION OF CHILDREN WITH DISABILITIES***

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# ***A Review of Current State Law Governing the Education of Children with Disabilities***

## ***ISSUE PRESENTED***

Under current state law what requirements must the state meet in delivering and funding special education, and how do the state requirements differ from the federal law requirements?

## ***BRIEF FINDING***

The current state statutes and rules impose virtually the same requirements on the state as does the federal law. However, the Washington State Constitution and selected court cases impose some additional funding duties on the state.

## ***INTRODUCTION***

This review looks at the requirements the state must meet for the delivery and the funding of special education under the current state law governing the education of children with disabilities.

# ***I. SUMMARY OF CURRENT STATE LAW GOVERNING THE EDUCATION OF CHILDREN WITH DISABILITIES***

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## ***A. ARTICLE IX OF THE WASHINGTON STATE CONSTITUTION***

The Washington Constitution provides that the paramount duty of the state is to make ample provision for the education of all children residing within its borders.<sup>1</sup> The Washington Supreme Court has found that this constitutional provision imposes a paramount duty upon the state, which in turn creates a correlative right on behalf of all resident children.<sup>2</sup>

## ***B. SELECTED COURT CASES***

### **1. *Seattle School Dist. v. State of Washington*, Case No. 53950 (*Wash. Super. Ct. 1977*), *aff'd in part.*, 90 *Wash.2d* 476, 585 *P.2d* 71 (1978).**

In 1976, the Seattle School District sued the state on the ground that the state had not fulfilled its duty under the Washington Constitution to provide an ample education to all resident children since the state relied on local districts' special excess levies for school funding.<sup>3</sup> Thurston County Superior Court Judge Robert Doran ruled that the state had in fact not met its constitutional obligations or duties.<sup>4</sup> This decision was subsequently upheld by the Washington Supreme Court.<sup>5</sup>

The Washington Supreme Court found that under the state constitution, the duty of the state to make ample provision for the education of children residing within its borders is the paramount duty of the state.<sup>6</sup> The court found in order to meet this duty the legislature must define a basic education program and then fully fund that program.<sup>7</sup> The court distinguished between providing a "basic education" program and a "total education" program.<sup>8</sup> The court found that a basic education program does not merely provide opportunities in academic subjects, but must provide broad educational opportunities necessary to meet the demands of modern society.<sup>9</sup>

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<sup>1</sup>. Wash. Const. art. IX, § 1.

<sup>2</sup>. *Seattle School Dist. v. State*, 90 *Wash.2d* 476, 510, 585 *P.2d* 71 (1978).

<sup>3</sup>. *Seattle School Dist. v. State*, Case No. 53950 (*Wash. Super. Ct. 1977*), *aff'd in part.*, 90 *Wash.2d* 476, 585 *P.2d* 71 (1978).

<sup>4</sup>. *Seattle School Dist. v. State*, Case No. 53950 (*Wash. Super. Ct. 1977*).

<sup>5</sup>. *Seattle School Dist. v. State*, 90 *Wash.2d* 476, 585 *P.2d* 71 (1978). Subsequently referred to as "*School Funding I*". This was a six to three decision. Of the nine justices who voted in this decision only three are still on the Washington Supreme Court. Those three voted in the majority, or concurred with the majority in this ruling.

<sup>6</sup>. *School Funding I*, at 511.

<sup>7</sup>. *School Funding I*, at 518-520.

<sup>8</sup>. *School Funding I*, at 519.

<sup>9</sup>. *School Funding I*, at 517-518.

Once the state has defined a basic education program, the state must fully fund the program it has defined by means of dependable and regular tax sources.<sup>10</sup> The Court found that a financial crisis does not change this constitutional duty of the state.<sup>11</sup> The state may not depend on special excess levies to fund the program.<sup>12</sup> However, local special excess levies may be used to fund enrichment programs that go beyond the basic education program.<sup>13</sup>

**2. Seattle School District v. State of Washington, Case No. 81-2-1713-1 (Wash. Super. Ct. 1983). (School Funding II)**

The legislature changed the funding of certain education programs defined as basic education in 1981. As a result of the changes, some school districts turned to the courts.<sup>14</sup> This second school funding case was heard in the Superior Court of Thurston County by Judge Robert Doran, who had heard the first "school funding" case. The conclusions of School Funding II were not appealed. Those conclusions of Judge Doran include the following:

The program of education that the legislature is required to define and fund includes adequate special programs for children with disabilities.<sup>15</sup> The content of such special education programs is determined by the unique need, individual abilities, and limitations of the students with disabilities as provided in properly formulated individualized education programs (IEPs).<sup>16</sup> Currently, the content of the specific special education program, including hiring decisions and staffing ratios, is left to the judgment of the

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<sup>10</sup>. School Funding I, at 520.

<sup>11</sup>. School Funding I, at 526.

<sup>12</sup>. School Funding I, at 520.

<sup>13</sup>. School Funding I, at 526.

<sup>14</sup>. Seattle School District v. State, Thurston County Super. Ct. Case No. 81-2-1713-1 (1983). Subsequently referred to as "School Funding II".

<sup>15</sup>. School Funding II, Conclusion of Law 36, p. 66.

<sup>16</sup>. School Funding II, Conclusion of Law 42, p. 67.

individual school district and to parents of special education students, through the IEP process.<sup>17</sup>

Basic education programs, including those for children with disabilities, must have funding that reflects actual costs and numbers of students eligible for the education programs.<sup>18</sup> Once the legislature has established full funding for education programs required by the constitution, it may not reduce such funding merely to save money.<sup>19</sup>

The legislature is required to review, evaluate, and revise its definition of basic education, and its funding, on an ongoing basis to insure that current needs of the state's students are met.<sup>20</sup> Nothing mandates the legislature to establish staffing ratios, program content, course requirements, or hours of attendance.<sup>21</sup>

### **3. Washington State Special Education Coalition v. State of Washington, Case No. 81-2-1713-1 (Wash. Super. Ct. 1987). (School Funding III)**

The third school funding case specifically addressed the funding of special education.<sup>22</sup> This third case was heard in the Superior Court of Thurston County by Judge Robert Doran, who heard the first two "school funding" cases. The conclusions of School Funding III were not appealed. Those conclusions of Judge Doran include the following:

The legislature decides the method of funding the basic education program, including special education.<sup>23</sup> There is no perfect funding formula, and the formula must evolve and undergo change in order to reflect changing public policy and factual patterns.<sup>24</sup> However, whatever method used must satisfy the constitutional duty to fund fully.<sup>25</sup> The duty to fund fully requires the state to provide sufficient funds in a manner that enables every school district to provide appropriate special education programs that meet the unique needs of children with disabilities as determined in their properly formulated IEPs.<sup>26</sup> A "minimally appropriate program is not what the constitution mandates nor what the legislature intended to provide children with disabilities.<sup>27</sup> What is required is an "appropriate education".<sup>28</sup>

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<sup>17</sup>. School Funding II, Finding of Fact 11.15, p.37.

<sup>18</sup>. School Funding II, Conclusion of Law 45, p. 68.

<sup>19</sup>. School Funding II, Conclusions of Law 14 and 31, pp. 62, 65.

<sup>20</sup>. School Funding II, Conclusion of Law 9, p. 61.

<sup>21</sup>. School Funding II, Finding of Fact 11.15, p.39.

<sup>22</sup>. Washington State Special Education Coalition v. State, Case No. 81-2-1713-1 (Wash. Super. Ct. 1987). Subsequently referred to as "School Funding III".

<sup>23</sup>. School Funding III, Oral Opinion p. 33; Conclusion of Law 1.19, p. 13.

<sup>24</sup>. School Funding III, Oral Opinion p. 28; Conclusion of Law 1.14, p. 12.

<sup>25</sup>. School Funding III, Oral Opinion p. 16, 28; Conclusions of Law 1.3, 1.14.

<sup>26</sup>. School Funding III, Oral Opinion p. 16-17; Conclusion of Law 1.3, 1.14.

<sup>27</sup>. School Funding III, Oral Opinion p. 17; Conclusion of Law 1.5, p. 10.

<sup>28</sup>. Id.

Sufficient funding must be provided and distributed in a manner that is based as closely as possible to the actual cost of the special education needs identified in the properly formulated IEPs of the children with disabilities.<sup>29</sup> When the allocation formula is based on statewide averages, it does not reflect the actual percentage distribution of children with disabilities, or differences among districts and therefore funding for a program in one district is more than adequate, while less than adequate in another.<sup>30</sup> Funding based on statewide averages requires a sufficient "safety net" that would provide supplemental funding to ensure full funding for those districts that were inadequately funded because of the use of statewide averages.<sup>31</sup> In order to obtain "safety net" funds, a district would have to demonstrate to the state that the district operates an efficient special education program; the IEPs are properly formulated; and the district is making an effort to provide the special education program within the funds generated by the formula.<sup>32</sup>

The legislature may, but is not constitutionally required, to fund special education by means of a single formula.<sup>33</sup> Nothing mandates the legislature to establish any specific program or classroom operation ratios or staffing levels.<sup>34</sup> Currently, the content of the specific special education program, including hiring decisions and staffing ratios, is left to the judgment of the individual school district and to parents of special education students, through the IEP process.<sup>35</sup>

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<sup>29</sup>. School Funding III, Oral Opinion p. 16-17; Conclusion of Law 1.3, p. 10.

<sup>30</sup>. School Funding III, Oral Opinion p. 23; Finding of Fact 1.13,

<sup>31</sup>. School Funding III, Oral Opinion p. 26, p. 30-31; Conclusion of Law 1.16, p. 12.

<sup>32</sup>. School Funding III, Oral Opinion p.31; Conclusion of Law 1.17, p. 12-13.

<sup>33</sup>. School Funding III, Oral Opinion p. 35; Conclusion of Law, 1.18, p. 13.

<sup>34</sup>. School Funding III, Oral Opinion p. 14-15; Finding of Fact 1.10, p.3.

<sup>35</sup>. School Funding III, Oral Opinion p. 14-15; Finding of Fact 1.10, p.3.

## **C. CURRENT STATE STATUTES AND RULES**

The state statutes governing special education for children with disabilities are currently contained in Chapter 28A.155 RCW, and the corresponding rules are in Ch. 392-171 WAC. The first major Washington State law (Chapter 66, 1971 1st extraordinary session) to require access to public schools for children with disabilities was passed in 1971 guaranteeing that all children with disabilities have the opportunity for an appropriate education at public expense as guaranteed to them by the state constitution.<sup>36</sup>

The current state statutes and rules impose requirements upon local school districts in the following areas:

### **1. Full Educational Opportunity**

Each local school district must provide a description of the resources necessary to meet the district's full educational opportunity goal.<sup>37</sup>

### **2. Identification and Evaluation**

Local districts must conduct activities to locate, evaluate, and identify all children ages 0-21 who are suspected of having a disability, regardless of the severity of the disability, residing within the boundaries of the district and currently receiving no special education services.<sup>38</sup> Under current state statute and rule, "children with disabilities" are those children who have or may have one or more disabilities and need special education and related services.<sup>39</sup> The rules provide definitions and specific eligibility criteria for fourteen categories of disabilities: (1) developmentally disabled<sup>40</sup>; (2) seriously behaviorally disabled<sup>41</sup>; (3) communication disorder<sup>42</sup>; (4) orthopedically impaired<sup>43</sup>; (5) health impaired<sup>44</sup>; (6) specific learning disability<sup>45</sup>; (7) mental retardation<sup>46</sup>; (8) multidisabled<sup>47</sup>; (9) deaf<sup>48</sup>; (10) hard of hearing<sup>49</sup>; (11) visually disabled<sup>50</sup>; (12) deaf-blind<sup>51</sup>; (13) autism<sup>52</sup>; (14) traumatic brain injury<sup>53</sup>. State funding formula categories are slightly different.

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<sup>36</sup>. RCW 28A.155.010 (1992 & Supp. 1993); WAC 392-171-300 (1993).

<sup>37</sup>. WAC 392-171-691(4)(j) (1993).

<sup>38</sup>. WAC 392-171-336 (1993).

<sup>39</sup>. RCW 28A.155.020 (1992 & Supp. 1993); WAC 392-171-310(3) (Supp. 1993).

<sup>40</sup>. WAC 392-171-381, 392-171-382, 392-171-383 (1993).

<sup>41</sup>. WAC 392-171-386 (1993).

<sup>42</sup>. WAC 392-171-391 (1993).

<sup>43</sup>. WAC 392-171-396 (1993).

<sup>44</sup>. WAC 392-171-401 (1993).

<sup>45</sup>. WAC 392-171-406 through 418 (1993).

<sup>46</sup>. WAC 392-171-421 (1993).

<sup>47</sup>. WAC 392-171-431 (1993).

<sup>48</sup>. WAC 392-171-436 (1993).

To find out whether the child has a disability and the nature and extent of the special education and related services needed, an individual evaluation of a child must be done.<sup>54</sup> One of the purposes of the evaluation includes identification of the specific disability the child has.<sup>55</sup> The initial evaluation must be conducted by a team.<sup>56</sup> The state rules do not specify the number of individuals that make up a team, but the team must include at least one special education teacher and at least one person qualified to conduct individual diagnostic assessment in the area of suspected disability.<sup>57</sup> When the child is suspected of having a specific learning disability the team must also include the student's regular education teacher; a special education teacher having experience with learning disabled students; and a school psychologist.<sup>58</sup>

The evaluation must consist of procedures used selectively with an individual child and cannot consist of tests administered to all children in a class, grade, or school.<sup>59</sup> The individual tests administered must accurately reflect the student's aptitude or achievement level and not simply a lack of skill in speaking, motor, or sensory skills.<sup>60</sup> The evaluation must be tailored to assess specific areas of educational need and not merely provide a single general intelligence quotient.<sup>61</sup> The evaluation is not required to include observation of the child in the regular classroom. The school district may be required to pay for an independent evaluation, if the district's evaluation is found to be inappropriate.<sup>62</sup>

Reevaluations must be conducted at least every three years or more frequently if requested by a parent or teacher, or IEP committee.<sup>63</sup> The reevaluation team must consist of at least one special education teacher and at least one person qualified to conduct individual diagnostic assessment in

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<sup>49</sup>. WAC 392-171-441 (1993).

<sup>50</sup>. WAC 392-171-446 (1993).

<sup>51</sup>. WAC 392-171-451 (1993).

<sup>52</sup>. WAC 392-171-452 (1993).

<sup>53</sup>. WAC 392-171-454 (1993).

<sup>54</sup>. WAC 392-171-311(1) (1993).

<sup>55</sup>. WAC 392-171-311(1)(d); 392-171-366(1)(b) (1993). (Differs from federal law.)

<sup>56</sup>. WAC 392-171-351(1) (1993).

<sup>57</sup>. WAC 392-171-351(1) (1993).

<sup>58</sup>. WAC 392-171-351(1) (1993).

<sup>59</sup>. WAC 392-171-311(1) (1993).

<sup>60</sup>. WAC 392-171-351(6) (1993).

<sup>61</sup>. WAC 392-171-351(9) (1993).

<sup>62</sup>. WAC 392-171-371 (1993).

<sup>63</sup>. WAC 392-171-512 (1993).



the area of a suspected disability.<sup>64</sup> Additionally, the evaluation team must include a representative from each professional area involved in identified deficits or other eligibility criteria pertinent to the most recent classification of the student.<sup>65</sup> The purposes of reevaluation includes determining whether the student is appropriately classified as having a particular disability,<sup>66</sup> and also determining the appropriateness of the individualized education program.<sup>67</sup>

### 3. Individualized Education Program

If the evaluation shows that a child needs special education and related services, a written individualized education program (IEP) must be developed for the child.<sup>68</sup> The IEP must be developed in a group meeting by an educator qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities, the teacher of the child, the parents or guardians of the child, and when appropriate, the child.<sup>69</sup> Additionally, the state rules require the meeting to include a member of the student's assessment team, a person knowledgeable about the placement options and other individuals at the discretion of the district or parent.<sup>70</sup>

The IEP must indicate the current levels of educational performance of the child; annual goals to be accomplished, including short-term instructional objectives; a timetable delineating the specific special educational services to be provided; the extent the school will integrate the student into the regular educational programs; and the criteria and procedures for annually measuring the progress of the child.<sup>71</sup> Additionally, the state rules require a statement of the needed transition services, designed within an outcome-oriented process, that provides movement from school to post school activities, and a current medical evaluation for each orthopedically impaired and health impaired preschool student.<sup>72</sup>

The state rules note that federal law does not require any district or teacher to be held accountable if a student does not achieve the growth projected in the annual goals and objectives.<sup>73</sup> The IEP must be reviewed at least annually, and when appropriate be revised.<sup>74</sup>

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<sup>64</sup>. WAC 392-171-351(1) (1993).

<sup>65</sup>. WAC 392-171-351(1) (1993).

<sup>66</sup>. WAC 392-171-514(1), 392-171-516, 392-171-517, 392-171-518 (1993).

<sup>67</sup>. WAC 391-171-514, 392-171-516, 392-171-517, 392-171-519 (1993).

<sup>68</sup>. WAC 392-171-456 (1993).

<sup>69</sup>. WAC 392-171-456(1)(a)-(d) (1993).

<sup>70</sup>. WAC 392-171-456(1)(e)-(g) (1993).

<sup>71</sup>. WAC 392-171-461(1)(b)-(d), (g), (h) (1993).

<sup>72</sup>. WAC 392-171-461 (a), (e), 392-171-321 (1993).

<sup>73</sup>. WAC 392-171-461(4) (1993).

<sup>74</sup>. WAC 392-171-456(8) (1993).

#### 4. Free Appropriate Public Education

Each school district must provide the opportunity of a free and appropriate educational program to every student with disabilities between the ages of 3 and 21.<sup>75</sup> There is no exclusion for children with exceptionally severe disabilities.

School districts may extend appropriate special education programs to include children of preschool age.<sup>76</sup> However, school districts must provide special education programs to disabled students of preschool age when the district provides education programs to non-disabled students of preschool age.<sup>77</sup>

An "appropriate education" means special education and related services provided at public expense; under local school district supervision and direction; meeting the standards of the Office of the Superintendent of Public Instruction; provided in conformity with an individualized education program directed to the unique needs, abilities, and limitations of the student with a disabling condition.<sup>78</sup> No express standard prescribing the level of education necessary to achieve a FAPE is prescribed.

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<sup>75</sup>. WAC 392-171-325 (1993).

<sup>76</sup>. RCW 28A.155.070 (1992 & Supp. 1993).

<sup>77</sup>. WAC 392-171-325(2) (1993).

<sup>78</sup>. RCW 28A.155.020 (1992 & Supp. 1993); WAC 392-171-310(1) (1993).

## **5. Least Restrictive Environment**

School districts must assure that, to the maximum extent appropriate, children with disabilities, are educated with children who are not disabled.<sup>79</sup> Although the districts must also ensure the availability of a continuum of alternative placements.<sup>80</sup>

## **6. Due Process**

School districts must establish specific procedural guarantees.<sup>81</sup> These guarantees include free access for parents to examine all records relating to their child's identification, evaluation and placement; and written notice to parents before the school either initiates, changes, or refuses to initiate or change the child's identification, evaluation or placement.<sup>82</sup> Additionally, written parental consent must be obtained prior to assessment or initial placement, and parents have the right to a hearing before a neutral hearing examiner to challenge their child's identification, evaluation, placement or provision of services.<sup>83</sup> The results of the hearing may be appealed in a state or federal district court by either party.<sup>84</sup> Reasonable attorney fees may be available to parents.<sup>85</sup>

## **7. Confidentiality of Information**

School districts must assure the protection of the confidentiality of any personally identifiable data, information, and records.<sup>86</sup>

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<sup>79</sup>. WAC 392-171-471 (1993).

<sup>80</sup>. WAC 392-171-476 (1993).

<sup>81</sup>. WAC 392-171-521 through -564, 392-171-586 through -641 (1993).

<sup>82</sup>. WAC 392-171-596, 392-171-521 (1993).

<sup>83</sup>. WAC 392-171-531, 392-171-536 (1993).

<sup>84</sup>. WAC 392-171-561 (1993).

<sup>85</sup>. WAC 392-171-564 (1993).

<sup>86</sup>. WAC 392-171-636 (1993).

## **8. Personnel**

School districts must assure standards for regular and special education personnel.<sup>87</sup> Districts must provide for a system of personnel development to ensure an adequate supply of qualified regular and special education personnel to meet the needs of children with disabilities.<sup>88</sup>

## **9. Use of Federal Funds**

A school district must annually submit an application to the Office of the Superintendent of Public Instruction to receive federal funds.<sup>89</sup> The application must provide a description of how the district intends to use the federal funds.<sup>90</sup>

## **10. Private Schools**

The state must ensure that each school district provides children with disabilities in private schools and facilities genuine opportunities to participate in special education and related services consistent with their needs.<sup>91</sup> Disabled students enrolled in any private school subject to sectarian control or influence must be provided services in a manner that does not benefit the private school at public expense.<sup>92</sup>

When a school district or public agency properly places a child with a disability in a private school, the placement is done at public expense.<sup>93</sup> There are no exclusions for high tuition costs. When the parents of a child with a disability places the child in a private school, the placement is not done at public expense unless it is shown that the state failed to make a FAPE available.<sup>94</sup> The state rules contain no exclusions for high tuition costs.

## **11. Recordkeeping and Reporting**

The local district must provide the following data, which the state will report to the federal government:

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<sup>87</sup>. WAC 392-171-701, 392-171-955 (1993).

<sup>88</sup>. WAC 392-171-900, 392-171-940 (1993).

<sup>89</sup>. WAC 392-171-691 (1993).

<sup>90</sup>. WAC 392-171-691(4)(k) (1993).

<sup>91</sup>. WAC 392-171-688, 392-171-651 (1993).

<sup>92</sup>. WAC 392-171-661(b) (1993).

<sup>93</sup>. WAC 392-171-501 (1993).

<sup>94</sup>. WAC 392-171-507 (1993).

- a. The number and type of personnel employed that provide special education and related services, by profession or discipline.<sup>95</sup> This count can include regular education teachers who deliver special education and related services.
- b. The number of children with disabilities, by placement option, receiving special education and related services.<sup>96</sup>

## **12. Evaluation of Programs**

The Superintendent of Public Instruction must annually monitor selected local school district special education programs to determine the district's compliance with state and federal laws and to provide technical assistance for improving the quality of its special education program.<sup>97</sup> Additionally, the Superintendent of Public Instruction must conduct fiscal/program audits of school district special education programs.<sup>98</sup>

## **13. Advisory Panel**

The Special Education State Advisory Council is created as required by the federal law.<sup>99</sup>

## **14. Transition of Students**

Each local school district must provide the transition services necessary for the smooth transition for infants and toddlers participating in the early intervention program moving to programs in the K-12 education system.<sup>100</sup> Additionally, each IEP must include a statement of the needed transition services for children with disabilities moving from the K-12 education system to post-school activities, unless the multidiscipline team determines that services are not needed in this area.<sup>101</sup>

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<sup>95</sup>. WAC 392-171-925(1),(2) (1993).

<sup>96</sup>. WAC 392-171-691(4)(i) (1993).

<sup>97</sup>. WAC 392-171-731 (1993).

<sup>98</sup>. WAC 392-171-741 (1993).

<sup>99</sup>. WAC 392-171-305 (1993).

<sup>100</sup>. WAC 392-171-835 (1993).

<sup>101</sup>. WAC 392-171-461(e)(f) (1993).

## 15. Compliance

The Office of Superintendent of Public Instruction resolves complaints and monitors compliance of programs, regardless of whether the programs receive federal funds under the IDEA.<sup>102</sup> The Office of the Superintendent of Public Instruction may apply appropriate sanctions to any school district of the state failing to comply with the state or federal requirements, including withholding any portion of state or federal aid to the district until compliance is assured.<sup>103</sup>

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<sup>102</sup>. WAC 392-171-731 through -756 (1993).

<sup>103</sup>. RCW 28A.155.100 (1992 & Supp. 1993); WAC 392-171-731 through -736 (1993).