BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of High Desert Education Service District Early Intervention/Early Childhood Special Education	))))	FINDINGS OF FACT, CONCLUSIONS, AND FINAL ORDER Case No. 09-054-007

I. BACKGROUND

On February 19, 2009, the Oregon Department of Education (Department) received a letter of complaint from the parents of a child residing in and receiving services from the High Desert Education Service District ("ESD"). The parent requested that the Department conduct a special education investigation under OAR 581-015-2030.

Under federal and state law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act ("IDEA") and issue a final order within 60 days of receiving the complaint unless the circumstances of the investigation satisfy the requirements for an extension contained in OAR 581-015-2030(12). On February 27, 2009, the Department sent a *Request for Response* to the ESD identifying the specific allegations in the complaint to be investigated. On March 12, 2009, the ESD timely submitted a narrative *Response* to the allegations and sent the parent a copy. The parents did not submit any further documentation following the District's *Response.*

The Department's complaint investigator reviewed the information submitted by the District and the parents and determined that telephone interviews were needed. On March 10, 2009, the investigator conducted a telephone interview with one of the parents, and another telephone interview with the ESD's Supervisor of Early Intervention/Early Childhood Special Education. The Department's investigator reviewed and considered all of the documents and interviews.

I. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under OAR 581-015-2030 and 34 CFR 300.151-153. The allegations and the Department's conclusions are set out in the chart below. The Department based its conclusions on the Findings of Fact (Section III) and the Discussion (Section IV).

No.	Allegations	Conclusions
(1)	<u>Financial Responsibility for IFSP placement:</u> The parents allege that the ESD erred by refusing to pay for the child's attendance at two community preschools beginning in May 2008. The parents assert that, once the IFSP Team determined that the child should be placed at a "Community Site," the ESD should have begun paying for the child's attendance at two community preschools.	Substantiated, in part. The Department finds that the ESD was required to pay for the student's attendance at community preschools during the times that the ESD was providing ECSE and related services. However, the Department also finds that the ESD was not required, under IDEA or any federal regulation or state statute or rule, to pay for the child's

		attendance at a community preschool during the times when the child was not receiving ECSE or related services.
(2)	<u>Prior Written Notice, and Parent Participation, and Participants for IFSP Team Meetings and Reviews:</u> The parents allege that the ESD violated the IDEA when it: (a) did not notify the parents that the financial responsibility for the child attending Growing Tree would be discussed at the September 24, 2008 IFSP Team meeting, (b) did not send the parents Prior Written Notices indicating that the ESD would no longer be financially responsible for the child attending Growing Tree, and (c) excluded the parent from discussions concerning the financial responsibility for the child attending Growing Tree.	Not Substantiated. The Department finds that the ESD erred by failing to pay for the child's placement in a community preschool while the student was receiving ECSE and related services. Additionally, the Department finds that, because the ESD had no obligation to pay for the child's attendance at Growing Tree during times that the child was not receiving ECSE services, the ESD was not required to provide the parents Prior Written Notice of or involve them in the ESD's decision to stop paying for twelve hours of attendance per week at Growing Tree.
(3)	<u>IFSP Implementation</u> The parents allege that the ESD failed to pay for a portion of the child's placement in a community preschool during the time that the child was receiving ECSE services in that setting.	No Finding. The District acknowledged and corrected the miscalculation that resulted in the underpayment prior to the issuance of this Final Order.

III. FINDINGS OF FACT

Background

1. At the time of the filing of this complaint, the child was five years old and was eligible for Early Childhood Special Education ("ECSE") services from the ESD as a child with Down syndrome, with an initial eligibility date of October 4, 2006. During the telephone interview, one of the parents reported that the child first enrolled at Growing Tree Children's Center ("Growing Tree") in September of 2006. The child remained eligible for special education at all times during this investigation.

PWN, Parent Participation and Financial Responsibility

2. The child's May 5, 2008 IFSP states that the child's placement is a "Combination of community and ECSE preschool" and also identifies a placement of "Community Site." Under EI/ECSE services, the IFSP provides for "Specialized instruction in the areas of fine

and gross motor, communication, adaptive, social and cognitive," to be provided at the ECSE Center "2 ½ hours 2x week." The "ECSE Center" refers to the ESD's self-contained preschool classroom. Under "Other (non EI/ECSE) services" the IFSP provides for "Daycare" for "4 hours 3x week" at the community site, to be paid by "Parents." "Daycare" refers to Growing Tree, a preschool. The PWN dated May 5, 2008 states that the child's "needs can be met in the least restrictive environment in the community settings selected by the parents."

3. Based on review of the child's IFSPs beginning with the May 5, 2008 IFSP and the telephone interviews in this case, the Department finds that neither Growing Tree community preschool nor the Child Development and Enrichment Center of Bend ("CDECB"), now known as the School of Enrichment, is a "private school" as that term is defined in OAR 581-015-2450(4).

4. The child's IFSP was revised following an IFSP meeting on September 2, 2008. The PWN dated September 2, 2008 notes a change in the services coordinator because the child "is now receiving services in a community setting;" the "Inclusion Specialist" became the child's service coordinator at that meeting. Under "Other (non EI/ECSE) services," the September 2, 2008 IFSP states that the child will attend Growing Tree Preschool for "4 hours 3x week" and that the child will attend CDECB for "4 hours 2x week." Under "EI/ECSE services", the child's September 2, 2008 IFSP provides for "Specialized instruction in the areas of fine and gross motor, communication, adaptive, social and cognitive," "Speech Services," and "Occupational Therapy (OT)." All of the listed services were to be provided in one of the community settings, Growing Tree or CDECB.

5. The child's IFSP was again revised following an IFSP meeting on September 24, 2008. The placement is stated as "Community Site" and notes that the child's "Special Ed services (consult and direct) will be provided in the community settings" and that "The team decided that [the child] will receive … therapies and specialized instruction in community preschools." Under "EI/ECSE services," the IFSP provides for "Specialized instruction in the areas of fine and gross motor, communication, social and cognitive," "Speech and Language Services," and "Occupational Therapy (OT)." All of the listed services were to be provided in one of the community settings, Growing Tree or the School of Enrichment, formerly known as CDECB. Under "Other (non EI/ECSE) services," the IFSP states that the child will attend Growing Tree Preschool and the School of Enrichment and that both will be paid by the family. The PWN dated September 24, 2008 states that "the annual IFSP meeting occurred. Goals were reviewed and modified per team discussion to meet [the child's] current needs. Occupational Therapy was increased from 40 minutes/month to 60 minutes/month as team agreed that [the child] demonstrates a need for additional time to work on … goals in the area of prewriting and fine motor." The PWN also states that the "team discussed having the community preschool staff implement the IFSP and the ECSE staff providing consultative services only," but "[t]he team agreed that direct services provided by the ECSE staff continues to be valuable in helping [the child] meet … educational goals."

6. Based on the telephone interviews in this case, the September 2, 2008 IFSP, and the September 2, 2008 PWN, the Department finds that the purpose of the September 2, 2008 IFSP meeting was to change the ESD's service coordinator in this case. At the time of the meeting, the child was about to attend an additional community preschool (CDECB) in lieu of the ESD's self-contained preschool, the IFSP states this under "Other (non EI/EICSE) services." The IFSP also provided that the parents would pay for CDECB preschool and that the ESD would pay for Growing Tree preschool. One of the parents clarified during the

telephone interview that they are not alleging that they did not receive notice or discuss the change that the ESD would pay for Growing Tree preschool at the September 2, 2008 IFSP meeting.

7. Based on the telephone interviews in this case and on e-mail messages provided by the ESD with their *Response*, the Department finds that, during the September 24, 2008 IFSP meeting attended by the parents, the IFSP team discussed the issue of who would pay for the community preschool sites and that the IFSP team, without objection from the parents, determined that the ESD would both provide the services included in the IFSP under EI/ECSE services and would reimburse the parents hourly for tuition during the time that the ESD's staff provided services to the child at the community preschool sites. The direct services by the ESD's ECSE staff on the child's September 24, 2008 IFSP totaled 240 minutes each month. After the September 24, 2008 IFSP meeting one of the parents contacted the ESD by telephone, asking for an increase in the hourly reimbursement rate. The ESD increased the hourly rate, retroactive to September 8, 2008, from $6.35 to $6.50 per hour.

IV. DISCUSSION

1. Financial Responsibility for IFSP Placement

The parents allege that the ESD erred by refusing to pay for the child's attendance at two community preschools beginning in September 2008. The parents assert that, once the IFSP Team determined that the child should be placed at a "Community Site," the ESD should have begun paying for the child's attendance at the community preschools. The Department finds that the ESD was not required to pay for the child's attendance at either community preschool during the times when the child was not receiving ECSE or related services.

The child has been receiving ECSE and related services in a community preschool setting since the implementation of the September 2, 2008 IFSP on September 8. During those times when the child is receiving ECSE and related services in accordance with the IFSP, the ESD is responsible for paying for the services as well as the child's placement while those services are provided. In this case, the ESD is required to reimburse the parents for the child's attendance at community preschools during the times that ECSE services were being provided from September 8, 2008 to the filing of this complaint on February 19, 2009. Therefore, the Department substantiates the claim that the ESD erred by not reimbursing the parents for the cost of attendance at community preschools while ECSE services were being provided. Prior to the issuance of this order, the ESD reimbursed the parents for the prorated amount of tuition corresponding to the timeframe in question. Because the Department has determined that the ESD has already reimbursed the parents for the appropriate costs of attendance, the Department does not order any corrective action in response to this finding.

The parents also assert that the ESD is required to pay for the child's attendance at Growing Tree and CDECB during the times that the child was not receiving ECSE and related services. The parents base their assertion on the child's May 5, 2008 and September 24, 2008 IFSPs which list the child's placement as "Community Site." The Department notes that the May 5, 2008 IFSP also includes the placement of "Combination of community and ECSE preschool."

OAR 581-015-2850 requires the ESD "to provide ECSE and related services to all resident children from three years of age until the age of eligibility for public school." OAR 581-015-

2845 requires the ESD to provide ECSE services in the least restrictive environment. The IDEA does not require the public agency, the ESD, to pay for a child's attendance at a community preschool unless the IFSP team has determined that this placement is necessary in order to provide special education and related services.[1] 71 FR 46589 (August 14, 2006). In this case, the program is paying for the child's service provision.

On the May 5 and September 24, 2008 IFSPs, the child's attendance at the community preschools during times when ECSE services were not being provided is listed under the heading "Other (non EI/ECSE) services," and the IFSPs indicate that the parents will pay that share of the child's attendance costs. The child's September 2, 2008 IFSP also lists the child's attendance at Growing Tree during the times that the child was not receiving ECSE services in the "Other (non EI/ECSE) services" section but indicates that the ESD will pay the attendance costs. Although the IFSP states that the ESD will pay for the costs of attendance in question, that attendance was excluded from the list of "EI/ECSE services" in the September 2 IFSP. The Department finds that the child's attendance at the community preschools when no services were being provided was properly excluded from the list of ECSE and related services.

Additionally, the Department finds that the ESD was not required, under IDEA, to pay for the child's attendance at Growing Tree during those times that special education and related services were not being provided. Therefore, the ESD's failure to provide reimbursement for those costs of attendance does not constitute a violation of the IDEA. Under OAR 581-015-2030, the Department is authorized, through the complaint investigation process, to address violations of the IDEA. The Department finds that the ESD's failure to reimburse the parent for the cost of attendance at Growing Tree when no services were being provided does not constitute a violation of the IDEA. Therefore, the Department has no authority to enforce the ESD's agreement to pay for the costs of attendance in question.

In summary, the Department finds that the ESD erred by failing to pay for the child's placement in the community preschools for all of the times that the student was receiving ECSE and related services from September 8, 2008 until February 19, 2009. The ESD has subsequently remedied this error. The Department also finds that, despite statements to the contrary in the September 2, 2008 IFSP, the ESD was not required under IDEA to pay for the child's attendance at the community preschools when services were not being provided.

2. PWN and Parent Participation

The parents allege that the ESD failed to notify the parents of changes to the child's IFSP concerning financial responsibility for the enrollment of the child in two community preschool programs. Specifically, the parents allege that the ESD – without discussion or an IFSP meeting – changed the child's IFSP on September 24, 2008 regarding the financial responsibility for the enrollment of the child in two community preschool programs. The parents also allege that the ESD failed to issue a Prior Written Notice detailing the proposed changes before the implementation of the changes. One of the parents clarified during the telephone interview that they do not allege that they did not receive notice or discuss the change that the ESD would pay for Growing Tree preschool at the September 2, 2008 IFSP meeting. On this basis, the Department will address the allegations only with respect to the September 24, 2008 IFSP.

[1] In some instances, ESDs are required to pay for a child's placement while the child is receiving services from members of the community preschool staff under the direction of ESD staff. The Department does not find these circumstances present in this case.

The Department finds that, consistent with the discussion above, the ESD's agreement to pay for the child's attendance at Growing Tree for four hours, three days a week was not a requirement of the ESD's obligation to provide the child with a free and appropriate public education.

The parents assert that the ESD erred by failing to send the parents a meeting notice or Prior Written Notice regarding the ESD's intent to discuss the financial arrangements concerning the child's attendance in two community preschools.[2] However, the meeting notice and Prior Written Notice provisions in IDEA do not obligate ESDs to provide parents notice of changes to the child's educational program that are not components of the ESD's obligation to the child under IDEA. OAR 581-015-2745 and OAR 581-15-2755. In this case, the Department finds that the ESD's offer to pay for the child's attendance, for twelve hours per week, at Growing Tree was not required under IDEA, the applicable federal regulations, or Oregon statutes and rules implementing IDEA; therefore, the ESD was not required to notify the parents of their intent to discuss the issue at the September 24, 2008 meeting.

The parents also allege that the ESD excluded the parents from discussions concerning the ESD's decision to stop paying for the child's attendance at Growing Tree for four hours, three days a week. Consistent with the analysis above concerning parental notices, the Department finds that the ESD was not obligated to pay for the child's attendance at Growing Tree and, thus, was not required to discuss the financial arrangements concerning Growing Tree with the parents at the September 24, 2008 IFSP meeting.

Additionally, based on telephone interviews and e-mail messages provided by the ESD, the Department finds that during the September 24, 2008 IFSP meeting, attended by the parents, the IFSP team did discuss the issue of who would pay for the community preschool sites. The Department also finds that the IFSP team, without objection from the parents, determined that the ESD would both provide the services included in the IFSP under EI/ECSE services and would reimburse the parents hourly for the amount of time the ESD's ECSE staff provided services at community preschool sites attended by the child.

Because the ESD was not required under IDEA to pay for the child's attendance at Growing Tree during those times when the child was not receiving ECSE and related services through the ESD, the Department finds that the ESD was not required to discuss the issue with the parents or provide them with notice of the change. Therefore, the Department does not substantiate the parents allegations that: 1) the ESD failed to properly notify the parents of the meeting, 2) the ESD did not send a Prior Written Notice detailing the changes in the financial arrangements, and 3) the ESD denied the parents an opportunity to participate in the IFSP decision-making process.

3. IFSP Implementation

The parents allege that the ESD failed to pay for a portion of the child's placement in a community preschool during the time that the child was receiving ECSE services in that setting. The District acknowledged and corrected the miscalculation that resulted in the underpayment prior to the issuance of this Final Order. The Department issues no finding with regard to this allegation.

[2] The Department notes that the ESD did send a meeting notice and a Prior Written Notice related to the September 24, 2008 IFSP Team meeting but that neither of those notices made reference to the changes in financial arrangements that were discussed at that meeting and later implemented by the ESD.

V. CORRECTIVE ACTION[3]

In the Matter of High Desert ESD
Case No. 09-054-007

#	Action Required	Submissions[4]	Due Date
(1)	Reimbursement: The ESD has already satisfied their obligation under the IDEA to pay for the student's placement at a community preschool while the student was receiving ECSE services from September 8, 2008 until February 19, 2009.	None	**N/A**

Dated: April 20, 2009

_____
Nancy J. Latini, Ph.D.
Assistant Superintendent
Office of Student Learning & Partnerships

Mailing date: April 20, 2009

APPEAL RIGHTS: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this Order with the Marion County Circuit Court or with the Circuit Court for the County in which you reside. Judicial review is pursuant to the provisions of ORS 183.484.

[3] The Department's order shall include any necessary corrective action as well as documentation to ensure that the corrective action has been completed. OAR 581-015-2030 (13). The Department expects and requires the timely completion of corrective action and will verify that the corrective action has been completed as specified in any final order. OAR 581-015-2030 (15). The Department may initiate remedies against a party who refuses to voluntarily comply with a plan of correction. OAR 581-015-2030 (17 & 18).
[4] Corrective action plans and related documentation as well as any questions about this corrective action should be directed to Rae Ann Ray, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone – (503) 947-5722; e-mail: raeann.ray@state.or.us; fax number (503) 378-5156.