

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. 09-054-014
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I. BACKGROUND

On March 18, 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 March 27, 2009, the Department sent a *Request for Response* to the ESD identifying the specific allegations in the complaint to be investigated. On April 9, 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 May 6, 2009, the investigator conducted telephone interviews with the ESD’s Supervisor of EI/ECSE programs and an ESD Autism Specialist. On May 8, 2009, the investigator conducted a telephone interview with one of the parents. 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)	<p><u>Placement and Least Restrictive Environment in ECSE</u></p> <p>The parents allege that the ESD improperly changed the child’s</p>	<p>Not Substantiated.</p> <p>The Department finds that the ESD’s failure to advise the parents in November</p>

	<p>placement in September of 2008 from the existing community preschool placement (the School of Enrichment) and offered two placements, neither of which satisfied the least restrictive environment provisions of the IDEA.</p>	<p>of 2007 that reimbursement would be unavailable unless the Department approved the School of Enrichment was not possible because the ESD did not determine until later that it would reimburse the parents for such tuition retroactive to November of 2007.</p> <p>The Department also finds that the parents' concern about regression is only speculative at this time, especially in light of the child's acknowledged, excellent progress. Thus, the Department does not sustain the allegation that the ESD improperly offered two additional placements in October of 2008.</p>
(2)	<p><u>IFSP Content and Implementation of IFSP :</u></p> <p>The parents allege that the ESD has failed to provide FAPE and has inappropriately refused to provide and pay for intensive therapies for a minimum of 20 hours a week, as first requested by the parents on November 27, 2007 and again in September of 2008. The parents specifically allege that the ESD has failed to provide services, including speech, occupational therapy, and inclusion specialist services, that were reasonably calculated to advance the student's achievement of annual goals and that the ESD erred by not reimbursing the parents for the costs of sending the child to a community preschool that is not approved by the Department.</p>	<p>Not Substantiated.</p> <p>During the investigation of these allegations, the Department determined that the parents challenged the ESD's refusal to reimburse the parents' costs relating to the enrollment of the child in the School of Enrichment. Because the community preschool chosen by the parents is not approved by the Department, the ESD is not required to reimburse the parents for the child's attendance at the community preschool during the times that ECSE services were being provided. Therefore, the Department does not substantiate the claim that the ESD is not providing services constituting FAPE in this case.</p>

III. FINDINGS OF FACT

Background

1. At the time of the filing of this complaint, the child was four years old and was eligible for Early Childhood Special Education ("ECSE") services from the ESD as a child with Autism Spectrum Disorder ("ASD"), an eligibility determined on May 24, 2007. The child's initial eligibility for Early Intervention services, under the category of Developmental Delay, was established on November 22, 2006.
2. The child's present IFSP is dated March 3, 2009. This Placement Decision provides a placement of "Community preschool." The "Other (non EI/ECSE) Services" portion of the IFSP specifies that the child will attend the School of Enrichment for "4 hours 5 days/week." This IFSP describes the following EI/ECSE services: (a) "3 hours/week (per ECSE calendar)" of "Specialized Instruction in the areas of: Cognitive, Communication, Social/Emotional, Fine Motor" to be provided by the ECSE Inclusion Staff at the community preschool; (b) "60 minutes/week (per ECSE calendar)" of "Speech Language Services" to be provided by the ECSE Speech Language Pathologist at the community preschool; and, (c) "60 min/month per ECSE calendar" of Occupational Therapy ["OT"] to be provided by the ECSE Occupational Therapist at the community preschool. In total, 4.25 hours of direct services are provided by the ESD staff at the community preschool site under this IFSP.
3. The March 3, 2009 Placement Decision indicates that the IFSP team placed the child in a community preschool setting. The Placement Decision document states that the team selected this placement because "the team agrees that [the child] can meet [the child's] goals and objectives in [the child's] current community preschool site where there are typically developing peer models."
4. The child's March 3, 2009 IFSP provides the following goals: (a) in the area of "Social or emotional goals," a goal that the child "will independently engage in imaginary play activities with [the child's] peers in both structured play settings and non-structured play settings;" (b) in the area of "Fine motor goals," a goal that the child "will independently write [the student's] name using a three finger tripod grasp to hold writing implement," and a goal that the child "will hold scissors and paper appropriately for cutting, cut a two inch paper into two, cut on a straight line (within $\frac{1}{4}$ "), cut out shapes with straight and curved lines with physical assist and verbal prompts;" and, (c) in the area of "Receptive communication goals," a goal that the child "will be able to recall past event[s] that occurred on the same day," a goal that the child "will independently answer why and how questions during unstructured activities regarding emotion," and a goal that the child "will improve [the child's] generalization and abstract thinking skills" The foregoing goals also include several short term objectives related to each goal.
5. The child's March 14, 2008 IFSP, adopted a little more than one year before the parents filed the complaint in this case, also provided for placement in a community

preschool. Under "Other (non EI/ECSE) services," the IFSP states that the student will attend the School of Enrichment for "4 hrs/4x wk."¹ This IFSP also describes the following EI/ECSE services: (a) "90 min/mo as per ECSE calendar" of "Specialized Instruction in the areas of: Cognitive, Adaptive, Communication, Social/Emotional, [and] Fine Motor" to be provided by the ECSE Inclusion Staff at the community preschool; (b) "90 min/mo as per ECSE calendar" of "Speech/Language Services", to be provided by the ECSE Speech Language Pathologist at the community preschool; and (c) "60 min/mo per ECSE calendar of Occupational Therapy," to be provided by the ECSE Occupational Therapist at the community preschool. This IFSP states that the child would no longer attend both a community preschool and the ESD's ECSE preschool due to fatigue resulting from attendance at both programs.

6. The child's May 14, 2008 IFSP and associated Prior Notice of Special Education Action show that the ESD acknowledged some difficulty in delivery of the child's IFSP services during March and April of 2008 due to staffing turnover. The ESD increased the child's OT services beginning May 14, 2008 through June 7, 2008 and provided OT and Speech/language services during an Extended Year Service ("ESY") from July 7, 2008 through July 31, 2008.
7. The child's June 11, 2008 IFSP meeting resulted in a few changes to the IFSP, including a change in the ESD's Service Coordinator assigned to the child, and suspension of family consultation during the summer with quarterly consultations thereafter.
8. The child's September 3, 2008 IFSP meeting resulted in several changes to the IFSP, including an agreement to complete an occupational therapy evaluation and an increase in services to focus on the child's social skills. The meeting resulted in other minor changes to the IFSP, including the change of the service coordinator and an agreement "to wait a few weeks to allow the ECSE staff to observe and work with [the child] in [the] preschool setting before meeting to modify goals and objectives."

Placement and Least Restrictive Environment in ECSE

9. ESD staff and the parents agree that, no later than the May 14, 2008 IFSP meeting, ESD staff advised that, if the community preschool attended by the child (School of Enrichment) did not obtain approval by the Department, the ESD would not be able to continue reimbursement. The parties also agree that at the May 14, 2008 IFSP meeting, the ESD agreed to reimburse the parents for tuition at the School of Enrichment for "3x per week, 4 hours each per preschool becoming ODE [approved]." Specifically, the ESD agreed to reimburse the parents for the cost of 12 hours of weekly attendance at the community preschool for the period from

¹ The School of Enrichment is referred to on the March 14, 2009 IFSP as the Child Development and Enrichment Preschool of Bend.

November of 2007 through June of 2008. The ESD has already reimbursed the parents for this tuition.

10. At the child's October 29, 2008 IFSP team meeting, the ESD offered to provide services at two community preschool programs other than the School of Enrichment because the School of Enrichment had not obtained approval from the Department as the parents and ESD staff had anticipated it would. The parent's chose to keep the child at the School of Enrichment despite the fact that the ESD advised that it could not continue reimbursement to the parents. During the telephone interview, the parent stated that they were completely unaware of any issues with reimbursement until April or May of 2008. The parent also stated that if they had known there was an issue with reimbursement back in November of 2007, when making the decision of which community preschool to choose for the child, the child would not have enrolled in the School of Enrichment. The parents represent that they would have enrolled the child in an ODE approved preschool.
11. The ESD offered two Department-approved community preschools other than the School of Enrichment to the parents so that reimbursement could continue. Since that time, the ESD has determined that, even if a community preschool is approved by the Department, the ESD is not authorized to make tuition reimbursement for hours other than those when the student is receiving early childhood special education or related services.
12. During the telephone interview, the parent clarified that the parent believes that the other two community preschools offered by the ESD likely satisfy the LRE requirement, but the class size is smaller at the existing community preschool site. The parents are concerned with the possibility of regression if the child changes to a new community preschool and believe that they are faced with this problem because the ESD did not inform them in November of 2007 that the School of Enrichment was not approved by the Department.

IFSP Content and Implementation of IFSP

13. During the telephone interview, the parent clarified that they are not requesting 20 hours of direct, intensive services (such as Applied Behavioral Analysis one-to-one intensive therapy) but are satisfied with the provision of services by the ESD. The parents also clarified that they are "in 100% agreement" that that child is making satisfactory progress toward the IFSP goals and objectives in the present circumstances and that FAPE is being provided. The complaint, rather, is that the parents do not believe the ESD is providing FAPE because the ESD is not paying tuition for the child's enrollment in the community preschool that the parents chose, the School of Enrichment.

IV. DISCUSSION

1. Placement and LRE in ECSE

The complaint alleges that the ESD improperly attempted to change the child's placement in October of 2008 from the existing community preschool placement to either of two other community preschools, neither of which satisfied the requirement of LRE. As clarified during the investigation of these allegations, the parents allege that the ESD, by failing to inform them in November of 2007 that the School of Enrichment was not ODE approved and that the lack of approval may impact reimbursement, has placed the parents in the position of being forced to choose between continuing the child in the present community preschool placement and receiving reimbursement from the ESD for the some of the costs of the preschool. The parents are concerned with possible regression if the child changes to a new community preschool.

Setting aside the issue of whether the Department can address ESD actions which took place more than one year before the filing of the complaint in this case, the Department finds that the failure to advise the parents in November of 2007 that reimbursement might be impacted by the non-approved status of the School of Enrichment was not possible. The ESD did not determine until May of 2008 that the ESD would reimburse the parents for tuition at the School of Enrichment retroactive to November of 2007. Since that decision in May of 2008, the ESD has correctly determined that it cannot reimburse tuition for community preschools, approved or not, beyond the hours during which the ESD provides direct services in the community preschool. The Department also notes that any concerns that the parents have concerning regression and the child's potential need for extended school year services should be discussed with the child's IFSP team. The Department does not sustain the allegation that the ESD improperly offered two additional placements in October of 2008.

2. IFSP Content and Implementation of IFSP

The complaint alleges that the ESD has failed to provide FAPE by inappropriately refusing to provide and pay for intensive therapies for a minimum of 20 hours a week and that the ESD has failed to provide services. During the investigation of this complaint, the parents clarified that they are not requesting 20 hours of direct, intensive services (such as ABA 1:1 intensive therapy) but are satisfied with the provision of services by the ESD. The parents also clarified that they are "in 100% agreement" that that child is making excellent progress toward the goals and objectives in the present circumstances; the Department issues no findings with regard to the content or implementation of the student's IFSP. The complaint, rather, is that the parent does not believe the ESD is providing FAPE because the ESD is not paying tuition for the child's enrollment in the School of Enrichment.

The Department finds that if the child were attending a community preschool approved by the Department, the ESD would be responsible for paying for the services as well as the child's placement during times when the child is receiving ECSE and related services in accordance with the IFSP. However, OAR 581-015-2265(1) prohibits public

agencies that provide EI/ECSE services from contracting with non-approved preschools. In this case, the ESD is precluded from reimbursing the parents for the child's attendance at the School of Enrichment because the preschool is not approved by the Department. Therefore, the ESD is not required to reimburse the parents for the child's attendance at the community preschool, including those times that ECSE services were being provided at the location. Therefore, the Department does not substantiate the claims concerning the ESD's failure to provide FAPE in this case.

V. CORRECTIVE ACTION²

In the Matter of High Desert ESD
Case No. 09-054-0014

Because none of the allegations were substantiated, no corrective action is ordered in this case.

Dated: May 14, 2009

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

Mailing date: May 14, 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.

² 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).