

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Douglas County ESD)
EI/ECSE (Area 3))
)
)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 09-054-046

I. BACKGROUND

On November 19, 2009, the Oregon Department of Education (Department) received a letter of complaint from advocates on behalf of the parent and a child receiving services from the Douglas County Education Service District (ESD).The complaint requested that the Department conduct a special education investigation under OAR 581-015-2030 (2009).

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 exceptional circumstances require an extension.¹ On December 2, 2009, the Department sent a *Request for Response* to the ESD identifying the specific allegations in the complaint to be investigated. On December 16, 2009 the ESD timely submitted a narrative *Response* to the allegations along with documents. On December 18, 2009, the Department provided a copy of the ESD’s response and supporting documents to the complainants. On December 27, 2009, the complainants provided a *Reply* to the ESD’s *Response*; the complainants also provided additional information to the Department by e-mail. The Department provided a copy of the *Reply* to the ESD. Due to ESD staff unavailability during the winter holiday break beginning in December of 2009, the Department extended the investigation timeline in this case by seven days.²

The Department’s complaint investigator reviewed the information submitted by the ESD and the parents, and determined that interviews were needed. On January 6, 2010, the complaint investigator interviewed the complainants by telephone. However, due to ESD staff unavailability during the holiday break beginning in December of 2009, ESD staff interviews could not be completed until January 11, 2010. On that day, the complaint investigator interviewed the ESD’s EI/ECSE program coordinator, preschool teacher/supervisor, special education specialist-integration consultant, and speech language pathologist (SLP)/service coordinator. The complaint investigator also interviewed a teacher for the hearing impaired who provides services through another regional ESD. During the on-site interviews, at the complaint investigator’s request, the ESD also provided the child’s eligibility determination statements and evaluations conducted in arriving at the child’s eligibility category. The complaint investigator also made a follow-up call to ESD staff on January 13, 2010. The Department’s investigator reviewed and considered all of the documents and interviews.

¹ OAR 581-015-2030 (12); 34 CFR 300.151-153 (2009).

² After informing the parties that the timeline for the issuance of a final order would be extended by seven days, to January 29, 2010, the Department realized that the length of the extension was based on an erroneous receipt date. Based on the actual receipt date of November 19, 2009, the timeline for issuance of the final order has been extended by eleven days; consistent with the original communication to the parties, the order will still be issued by January 29, 2010.

II. 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>Free Appropriate Public Education (FAPE)</p> <p>The complaint alleges that the ESD failed to provide FAPE to the child, beginning with the child's IFSP dated March 30, 2009.</p>	<p>Not Substantiated.</p> <p>The March 30, 2009 IFSP contains adequate services and specially designed instruction to provide FAPE to the child in the ESD's CDS preschool. The Department also concludes that the placement offered by the ESD in the September 10, 2009 IFSP meeting and in the October 6, 2009 IFSP did not constitute denial of FAPE.</p>
(2)	<p>Placement Decisions and Least Restrictive Environment (LRE)</p> <p>The complaint alleges that the ESD, beginning with the child's March 30, 2009 IFSP:</p> <p>a. failed to provide LRE when it placed the child in a "Special Needs" classroom denying the child's right to be educated with non-handicapped peers.</p> <p>b. failed to provide for the parent's meaningful input into the child's education;</p>	<p>Not Substantiated.</p> <p>a. Based on observations of the integration consultant and consultation with the PDHH teacher, the ESD reasonably concluded that child needed more adult supervision than could be provided in a community preschool.</p> <p>The next placement, finalized in the September 10, 2009 and October 10, 2009 IFSPs, did not violate the requirement of LRE. The child was offered a placement in a community preschool with mostly typical peers.</p> <p>b. The parent was afforded the opportunity to both attend and participate in all IFSP meetings, beginning with the March 30, 2009 IFSP meeting and ending with the December 14, 2009 IFSP meeting.</p>

No.	Allegations	Conclusions
	<p>c. failed to provide a continuum of placement options that included full inclusion of the child in the general education setting; and</p> <p>d. failed to ensure the child's placement was determined by the appropriate persons, including the parent.</p>	<p>The parent and at least one of the complainants attended all IFSP meetings.</p> <p>c. The ESD staff considered many options (such as a speech group, or the available community preschools) once it became apparent that the PDHH class would not continue in the 2009-10 school year. At the IFSP meetings in September and October of 2009, the ESD also presented more options, including community preschool placements, after considering the observations of the child during the summer of 2009 by the teacher at the private placement.</p> <p>d. The Department finds that the child's placement was determined by the appropriate persons, including the parent, on all occasions when the child's placement was considered between March 30, 2009 and the filing of this complaint.</p>
(3)	<p>IFSP Meeting Procedures and Team Participants</p> <p>The complaint alleges that the March 30, 2009 IFSP did not include input from all IFSP team participants required when changes in the IFSP are indicated.</p>	<p>Not Substantiated.</p> <p>See Conclusions 2(b) and 2(d) above.</p>
(4)	<p>Prior Written Notice (PWN)</p> <p>The complaint alleges that the PWN dated May 9, 2009 does not reflect the changes in placement and services included in the March 30, 2009 IFSP.</p>	<p>Stipulated. No further action required.</p> <p>The ESD agrees that the notice does not contain the changes made in the child's IFSP on March 30, 2009 or the options considered in making those changes.</p>

No.	Allegations	Conclusions
(5)	<p>Implementation of IFSP</p> <p>The complaint alleges that the ESD:</p> <ul style="list-style-type: none"> a. failed to implement the child's March 30, 2009 IFSP in a timely manner; b. failed to provide ESY services as indicated on the child's March 30, 2009 IFSP; c. failed to provide support for personnel at the child's private school. 	<p>Not Substantiated.</p> <ul style="list-style-type: none"> a. The ESD appropriately implemented the components of the March 30, 2009 that could be implemented during the 2008-09 school year. b. The child's IFSP Team discussed ESY and determined no ESY would be offered during the summer of 2009, and the complainants have not offered any contrary evidence. c. The consultation services provided at the private placement of the child is consistent with the services listed in the child's IFSPs, beginning with the October 6, 2009 IFSP and continuing in the December 14, 2009 interim IFSP.
(6)	<p>Assistive Technology</p> <p>The complaint alleges that the ESD failed to ensure that assistive technology devices and technology services provided in the child's March 30, 2009 IFSP were available to the child while enrolled in private school.</p>	<p>Not Substantiated.</p> <p>The investigation revealed that the March 30, 2009 IFSP referred only to the child's hearing aids when it stated assistive technology devices and services. Additionally, the request for an FM system was made only one day before the filing of the complaint in this case, denying the ESD a reasonable opportunity to respond to this request.</p>
(7)	<p>Requested Corrective Action</p> <ul style="list-style-type: none"> a. The complaint requests reimbursement for the private placement of the child, beginning September 1, 2009. b. The complaint also requests that the Department require the ESD to follow procedures for the development of a child's IFSP, including the issuance of Prior Written Notices. 	<p>No Corrective Action ordered.</p>

III. FINDINGS OF FACT

Background:

1. The child in this case is presently 4 years old and is eligible for ECSE services from the ESD. The child's biological parent and the complainants, who provide care for the child in their home the majority of each week, were involved in communications and meetings with the ESD regarding the special education of the child. The child's initial eligibility form is dated August 23, 2006 and identifies the child's disability as "developmental delay." An April 9, 2008 eligibility form states eligibility as "hearing impairment" (disability code 20). During the 2008-09 school year, the child received services in the ESD's Program for the Deaf and Hard of Hearing (PDHH), a preschool classroom with four other hearing impaired children, a teacher, and an adult sign interpreter.

FAPE, Placement Decisions, LRE and IFSP Meeting Procedures and Team Participants

2. Prior to the child's March 30, 2009 IFSP, the ESD determined that all of the other children in the PDHH classroom were leaving for the 2009-10 school year and that the ESD could not continue the PDHH preschool classroom with just one child. The ESD then scheduled an IFSP meeting for March 30, 2009 and arranged for the ESD's integration consultant to observe the child in the PDHH classroom during March of 2009. The integration consultant observed the child in the PDHH classroom and consulted with the child's PDHH teacher and SLP/service coordinator. Based on the observations and consultations the integration consultant concluded that placement of the child in the ESD's community preschool options would not be appropriate. The integration consultant noted that the child is highly distractible, displayed aggressive behaviors, and needed more adult supervision than could be offered in the ESD's community preschool sites. The community preschool options available to the ESD include a preschool offering a traditional, structured day for the children, a preschool with a mixture of structure and child-directed activities during the day, and a preschool that is only child-directed during the school day.
3. The integration consultant verbally advised the child's SLP/service coordinator that the appropriate placement would be in the ESD's Child Development Services preschool (CDS preschool) rather than another ESD preschool with an approximate 50-50 mix of children with and without IFSPs. The CDS preschool generally consists of only children with IFSPs, although the needs of the children in the class vary with the changing enrollment in ESD preschools and the ESD's placement of children into particular preschool classes. Prior to the March 30, 2009 meeting, the SLP/service provider discussed a variety of placement options with the PDHH teacher, noting that options other than the CDS preschool did not appear viable.
4. During the March 30, 2009 IFSP meeting (attended by the parent, the complainants, the PDHH teacher, and the SLP/service coordinator), ESD staff presented the CDS preschool as the only viable option for the child. The SLP/service coordinator briefly addressed other options, including a "speech-language group" and community preschool options, stating that they were not appropriate for the child. No meeting minutes were taken of the March 30, 2009 IFSP meeting.
5. The child's March 30, 2009 IFSP lists the ESD's CDS preschool, two times each week for 2.5 hours each time, as the only placement option considered, and as the selected placement. At the March 30, 2009 meeting, ESD staff briefly mentioned other options and

noted these options were not viable. Neither the parent nor the complainants challenged this conclusion. The March 30, 2009 IFSP contains the following EI/ECSE services, all to be provided in the CDS preschool: 1. "Instruction to address audition, language and cognitive need;" 2. "Audition LAB services;" 3. "Speech/Language Therapy;" 4. "Transportation;" 5. "Specialized instruction to address audition, language, and cognitive needs;" 6. "Speech therapy;" 7. "Audition Services;" and 8. "Sign Language interpreter." The March 30, 2009 IFSP also lists the following supplemental services, adaptations, and accommodations, all to be provided at the CDS preschool: 1. "Sign Language;" 2. "Visual Cues;" and 3. "Preferential Seating." The March 30, 2009 IFSP states that ECSE services will not be provided with typical peers because the child's "hearing impairment requires specialized instruction in the areas of language, cognition, and social skill development." The child's March 30, 2009 IFSP also lists two goals in the following areas (the short term objectives are omitted herein): 1. "Receptive communication" – (a) The child "will follow 2 step directions with concepts," and (b) the child "will identify nursery rhymes by use of audition only by picking the correct one out of a field of 5;" and 2. "Expressive communication" – The child "will use three word utterances with intelligible speech."

6. The complainants state that the SLP/service coordinator and the integration consultant (who did not attend the March 30, 2009 IFSP meeting) are the only ones who supported the placement into the CDS preschool at the March 30, 2009 IFSP meeting. However, the Department finds that all present at the March 30, 2009 IFSP meeting were either in agreement with or expressed no objection to the CDS preschool placement during the meeting. The complainants expressed concerns that the placement in the CDS was only for two days per week and requested an opportunity to observe the CDS classroom; the child attended the PDHH three days per week during the 2008-09 school year. ESD staff explained that the purpose of such an observation would be to see the structure and routines of a CDS preschool, noting that the special education needs of the children in the class would vary from year to year and that the exact composition of the class could not be predicted. The parent and the complainants did not state they did not want the child to attend a CDS preschool.
7. On May 15, 2009, one of the complainants and the parent observed a CDS preschool classroom during free play time. The complainants have described the class observed on May 15, 2009 as a "Special Needs Class containing 14 children; 7 w/ autism, 4 w/ developmental delays (incl. Downs Syndrome) and 3 with hearing loss." The teacher of that class reports that the parent and complainants did not speak to the teacher at the time of the observation. Additionally, ESD staff report that the class observed had one teacher, three instructional assistants (and other service providers intermittently), and twelve children on IFSPs, and two community children not on IFSPs. ESD staff also state that there were no autistic children in the class at the time of the observation. The Department does not find evidence to support the complainants' characterization of the classroom composition. In any event, the CDS preschool classroom observed by the complainants and the parent would not necessarily have consisted of the same children when the 2009-10 school year began because the needs of the children placed in the CDS classroom vary with the enrollment. The ESD staff monitors the progress of children in CDS preschool classrooms and makes appropriate changes as a child progresses or their needs are ascertained. If the child in this case had been enrolled in a CDS preschool class, the child would have received the services and instruction included in the child's IFSP, including those specific to the child's hearing impairment.

8. On August 27, 2009, the ESD learned that the complainants had placed the child in three summer camps over the summer at a community school that does not meet the definition of a private preschool and is not approved by the Department as a contractor for EI/ECSE services. The ESD also learned on that date that the complainants were going to enroll the child in that preschool in the upcoming 2009-10 school year. The ESD's 2009-10 school year began on September 8, 2009. Upon learning of the child's upcoming private enrollment the ESD scheduled an IFSP meeting for September 3, 2009.
9. The September 3, 2009 IFSP meeting was attended by the parent, the complainants, the SLP/service coordinator, the integration consultant, the former PDHH teacher, the preschool teacher/supervisor, and a teacher from the child's private placement. At that meeting, the ESD staff discussed the need to revise the IFSP if the child remained at the private placement and discussed that there were limitations on the services the ESD could provide at a private placement not approved by the Department. The teacher at the private placement and the PDHH teacher, who had been retained by the complainants during the summer of 2009 to observe the child over the summer, stated that the child had made progress at the summer camp run by the private placement. Additionally, the teacher from the private placement stated that the child's IFSP goals could be met in the private placement. Based on the verbal progress reports, the ESD modified the child's goals and services at the September 3, 2009 IFSP meeting and concluded that the CDS preschool no longer represented an appropriate placement. The IFSP team did not reach a decision concerning the appropriate placement during the September 3, 2009 IFSP meeting because they ran out of time. The ESD scheduled a continuation of the IFSP meeting for September 10, 2009.
10. The child began attending the private placement on September 1, 2009.
11. The September 10, 2009 IFSP meeting was attended by the parent, the complainants, the SLP/service coordinator, the PDHH teacher, and the preschool teacher/supervisor. At that meeting, the team discussed the ESD's offer to place the child in a community preschool approved by the Department. This placement is listed on the child's placement page as the "state-authorized community preschool." This community preschool, noted in Finding of Fact #2, above, is a preschool offering a traditional, structured day for the children, and would be attended primarily by children not receiving special education and related services; the child would have attended the placement for two days per week. The placement page completed at the September 10, 2009 IFSP meeting notes that in the "state-authorized community preschool" the ESD would provide "hearing aids, visual supports, direct PDHH service, CD integration consult, [and] speech therapy." The placement page also identifies the benefits of the approved community preschool placement as "typical role models, tuition paid by CD, [and] meets needs of IFSP goals." The parent and complainants asked that they have the opportunity to observe the proposed placement, so the IFSP team made no decision about placement pending that observation and scheduled another IFSP meeting.
12. On September 28, 2009, the parent and complainants wrote a letter to the ESD. This letter does not mention the proposed placement in an approved community preschool other than to state that "the private contracted pre-school had no openings and you indicated it was not the appropriate placement," apparently referring to the March 30, 2009 IFSP meeting. The letter concludes that they had placed the child in a private placement where the child "receives instruction with typically developing children where [the child] hears intelligible

speech, and can initiate and participate in conversation with peers. He will attend 4 days a week for 3.5 hrs. a day.”

13. The IFSP team next met on October 6, 2009; the meeting was attended by the parent, the complainants, the EI/ECSE program coordinator, the SLP/service coordinator, and the PDHH teacher. At this IFSP meeting, the parent and complainants expressed concern about the state-authorized community preschool, including the credentials of the teacher and that the class occurs only two days each week. ESD staff advised that an opening in the 3-day program had just become available and offered that opening to the child with the same services and supports previously offered for the 2-day program. The parent and complainants rejected the placement offered by the ESD and chose to place the child in a private placement. ESD staff discussed, and noted on the placement page, that the ESD would not be able to provide direct support in the private placement. However, the ESD continued to provide consultation services with the private placement and the SLP services included in the October 6, 2009 IFSP and the December 14, 2009 “interim” IFSP, detailed below.
14. The IFSP team next met on December 14, 2009. At that IFSP meeting (attended by the parent, complainants, private placement teacher, SLP/service coordinator, PDHH teacher, integration consultant, EI/ECSE program coordinator, and EI/ECSE regional coordinator), meeting notes indicate the team discussed “clarification of services.” ESD staff advised that the placement of the child in the private placement, a preschool not approved by the Department, constituted a refusal of services. The ESD stated that, although no services should be provided by the ESD in light of the parent’s placement of the child into an unapproved private setting, the consultation and SLP services being provided to the child would continue until resolution of the complaint which the complainants had filed on November 19, 2009. The team discussed changes to the October 6, 2009 IFSP required due to errors contained in that IFSP.
15. At the December 14, 2009 meeting, the ESD staff explained that the “description of the child’s needs and goals would indicate that [the child] had a significant need for specialized instruction in a preschool setting, sign language interpretation during that instruction, and services from specialists (speech-language pathologist, integration specialist, PDHH teacher) provided to the staff on site. To propose less than that array of services would be a violation of FAPE. Therefore, when the parents had refused the placement at the state-authorized preschool, where the services could be provided, in essence they were refusing all services. There should not have been an agreement to select a non-authorized site where the educational needs of the child could not be met.”
16. The complainants requested that current services continue, and the ESD agreed that they could be continued while the complaint was being resolved and that this would be specified on an interim IFSP. When the complainants asked for additional services beyond the current services (including additional speech-language therapy and an FM system for hearing impaired children), ESD staff stated that no additional services would be provided at this point. Due to time constraints, the team was not able to finish composing the IFSP; the ESD staff agreed to complete the interim IFSP and provide a copy to the parent and the complainants.
17. The interim IFSP, dated December 14, 2009, provides the following EI/ECSE services: “Integration consultation to staff at community preschool not authorized by the state” for 60

minutes once a month at that private placement; "Consultation for Audition needs for 45 minutes once a month at the private placement;" "Home visit to address audition and language needs for 45 minutes twice each month, at the home of the parent or complainants;" and "Speech therapy" for 30 minutes twice a month at the ESD's site. The interim IFSP also includes, as Other (non EI/ECSE) Services: "Community Preschool not authorized by the state." The interim IFSP also states that supplementary services, adaptations, and accommodations will be provided by the private placement staff at the private placement. The interim IFSP states that the "Goals are continued from the 10/6/09 IFSP." On the placement page, the interim IFSP lists the placement options discussed as: "Child Development Preschool with specialized instruction to address audition, social, and communication needs;" "Community Preschool authorized by the state with specialized instruction to address audition, social, and communication needs;" and "Consultation services to parent or parent-selected preschool." The interim IFSP states that the team rejected the CDS preschool placement and selected the community preschool authorized by the state but states that "[a]ll team members agree that [the child] requires the services and the level of services proposed on the IFSP." The IFSP also indicates that the current service providers agreed with the child's placement in an approved community preschool as the child's ECSE placement for specialized instruction to address audition, communication and social needs. The IFSP further noted that the parent had unilaterally placed the child in a preschool that is not approved by the state and that the parent rejected the placement selected by the IFSP team. The placement page also states that consultation services will be provided but that "[t]his service is an Interim Only plan starting the week of 1-4-10 to 2-1-10."

Prior Written Notice

18. The ESD does not dispute the allegation that the PWN issued on May 9, 2009 does not reflect the changes in placement and services included in the March 30, 2009 IFSP. The ESD states that this PWN does not contain specific information regarding the changes on the March 30 IFSP. Rather, it indicates the action is "to review current goals and develop a new IFSP."

Implementation of IFSP

19. The March 30, 2009 IFSP makes clear that the child's services designated as beginning on March 30, 2009 and ending on June 4, 2009 were to occur in the PDHH classroom, a preschool classroom the child attended the entire 2008-09 school year. It is also clear that the placement of the child in a CDS preschool was to begin September 8, 2009, the first day of the 2009-10 school year. The services and instruction in the March 30, 2009 IFSP were provided in the PDHH classroom from March 30, 2009 to the end of the 2008-09 school year on June 4, 2009. Because the ESD determined in March of 2009 that it could not continue the PDHH preschool due to insufficient enrollment for the 2009-10 school year, the March 30, 2009 IFSP identifies a CDS preschool as the child's placement at the beginning of the 2009-10 school year with the services identified in the prior IFSP to continue. The complainants *Reply* states that the March 30, 2009 IFSP was not implemented in a timely manner, noting that "[b]etween 5/15/09 and 9/3/09, there was no contact from [the SLP/service coordinator]." The complainant's *Reply* also states that "[e]xpecting [the child's] attendance to resume on 9/8/09 without any contact and based on the 5/15/09 decision seems presumptuous."

20. The child received ESY services during the summer of 2008 because the child had only recently received hearing aids and the team believed the child needed ESY services at that time. At the March 30, 2009 IFSP meeting, the team discussed ESY services and determined that ESY was not needed. The March 30, 2009 IFSP indicated that the child required ESY services; the “yes” box was checked next to the question on the Oregon Standard IFSP: “Does the child require extended year services?” However, the other information contained in the IFSP concerning ESY services support the conclusion that this box was erroneously marked, likely due to the fact that the box would have appropriately been checked on the child’s previous IFSP issued prior to the summer of 2008, when the child received ESY services.
21. The ESD provided the consultation services included in the child’s October 6, 2009 IFSP. The consultation to classroom staff was provided by ESD staff, including the PDHH teacher and the integration consultant, at the private placement.

Assistive Technology

22. The child’s March 30, 2009 IFSP indicates that the child requires assistive technology devices and services. However, this refers only to the child’s hearing aids, which are provided by the parent. No other assistive devices were discussed or requested at the March 30, 2009 IFSP meeting. The complainants, in a conversation with the integration consultant, first suggested obtaining an FM system to assist the child in the private placement on November 18, 2009. The complainants did request that the ESD provide an FM system for the child to use in the private placement at the December 14, 2009 IFSP meeting. ESD staff noted that the FM system may be inappropriate in the small group setting and may be too loud for the child but could be useful in situations such as circle time and story time. The ESD stated it would not be providing any additional services, including the FM system, pending a decision on the complaint filed with the Department.

IV. DISCUSSION

FAPE

The complaint alleges that the ESD failed to provide FAPE to the child beginning with the child’s IFSP dated March 30, 2009.

OAR 581-015-2850 is entitled “Free Appropriate Public Education (FAPE) for ECSE.” Subsection (1) of that rule provides that “[c]ontractors and subcontractors must provide ECSE and related services to all resident children from three years of age until the age of eligibility for public school.”

OAR 581-015-2700 defines ECSE as:

“free, specially designed instruction to meet the unique needs of a preschool child with a disability, three years of age until the age of eligibility for public school, including instruction in physical education, speech-language services, travel training, and orientation and mobility services. Instruction is provided in any of the following settings: home, hospitals, institutions, special schools, classrooms, and community childcare or preschool settings, or both.”

In this case, the parties do not dispute that FAPE was provided when the child attended the ESD's PDHH preschool, a preschool designed specifically for hearing impaired children, during the 2008-2009 school year. Therefore, the initial question is whether the IFSP and placement developed by the child's IFSP Team on March 30, 2009 offered FAPE. The Department concludes that the March 30, 2009 IFSP contained adequate services and specially designed instruction to provide FAPE to the child. Additionally, the Department concludes that the ESD did not violate the IDEA by offering to place the child in the CDS classroom. The child's IFSP Team based the placement in a CDS preschool, to begin on the first day of the 2009-10 school year, on the ESD staff's observation revealing that the child was highly distractible, displayed aggressive behaviors, and needed more adult supervision than could be offered in the ESD's community preschool options. The March 30, 2009 IFSP provides a justification statement, noting that ECSE services will not be provided with typical peers because the child's "hearing impairment requires specialized instruction in the areas of language, cognition, and social skill development." The Department notes that the PDHH class did not provide instruction with typical peers but with four other hearing impaired children, a teacher, and a sign language interpreter. However, all of the child's IFSP Team members agreed that the PDHH classroom provided FAPE to the child. Additionally, the observation of a CDS classroom by the parent and one of the complainants and their dissatisfaction therewith does not mean that a CDS preschool classroom would not provide FAPE to the child. The make-up of the CDS classroom observed on May 15, 2009 would not necessarily be the same make-up of the CDS classroom during the 2009-10 school year.

Based on these findings, the Department agrees that the IFSP Team's determination that the nature and severity of the child's special education and related service needs were such that placement in the CDS classroom was appropriate. The March 30, 2009 IFSP clearly shows that the ESD would have provided a full array of services and instruction in the CDS preschool and that such an arrangement would have satisfied the ESD's obligation to provide the child FAPE in the least restrictive environment. Therefore, the Department does not substantiate the allegation that the IFSP and placement offered by the ESD in the March 30, 2009 IFSP denied the child a FAPE.

The next issue relevant to the District's alleged denial of FAPE is whether the placement developed over the course of the IFSP meetings on September 3, 2009, September 10, 2009, and October 6, 2009 offered FAPE in the least restrictive environment. At the September 3, 2009 IFSP meeting, immediately prior to the beginning of the 2009-10 school year, the IFSP team included a teacher from the private placement who had taught the child in summer camp during the summer of 2009. The teacher from the private placement and the PDHH teacher believed that the child's IFSP goals could be met in the private placement. Based on the reports of the teacher at the private placement and the PDHH teacher the IFSP Team determined that the placement in a CDS preschool was no longer appropriate.

At the next IFSP meeting on September 10, 2009, the ESD proposed a placement in an approved community preschool. The IFSP Team chose not to finalize the placement until the parent and complainants had an opportunity to observe the placement. At the October 6, 2009 IFSP meeting, the complainants expressed concerns about the community preschool's teacher and about the fact that the child would only attend the program 2 days per week. The ESD staff advised that an opening was available in the community preschool's 3-day program and offered that placement. The October 6, 2009 IFSP clearly shows that the ESD would have provided a full array of services in the community preschool. Additionally, this placement would have been in a setting with an enrollment consisting mainly of typical peers. However, at that time, the

child had already enrolled in the private placement, and had attended the private placement since September 1, 2009. The decision to enroll the child in the private placement was a decision made by the parent, was beyond the control of the ESD, and constituted a refusal of the IFSPs and placements developed during September and October of 2009. The Department finds that the IFSPs and placements offered following the September 10, 2009 and October 6, 2009 IFSP meetings were reasonably calculated to provide the child with an educational benefit. Accordingly, the Department is unable to conclude that the ESD failed to provide FAPE to the child beginning with the March 30, 2009 IFSP.

Placement Decisions and Least Restrictive Environment

The complaint alleges that beginning with the March 30, 2009 IFSP, the ESD failed to provide LRE.

OAR 581-015-2845(1)(b) provides, in part:

- “(1) Contractors or subcontractors must ensure that:
 - (b) To the maximum extent appropriate to the needs of the child, ECSE services are provided in the least restrictive environment as defined in OAR 581-015-2240, including home and community settings in which children without disabilities participate.”

OAR 581-015-2240, in discussing LRE, provides:

- “School districts must ensure that:
 - (1) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who do not have a disability and
 - (2) Special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

The previous discussion, concerning the parent’s allegation that the ESD failed to offer the student a FAPE from March 20, 2009 until the filing of this complaint, is also relevant to the Department’s conclusion on this allegation. The March 30, 2009 IFSP placement in the CDS preschool did not violate the requirement of LRE. At the time, based on observations of the integration consultant and consultation with the PDHH teacher, the child’s IFSP Team reasonably determined that the child needed a level of adult support that warranted placement in the CDS classroom. Thus, the Department does not substantiate the allegation that placement in the March 30, 2009 IFSP violated the LRE requirements for the ECSE classroom.

The next placement, finalized in the September 10, 2009 and October 10, 2009 IFSPs, also did not violate the requirement of LRE. After considering the observations of the teacher from the private placement and the PDHH teacher that occurred over the summer, the IFSP Team reasonably determined that the child’s early childhood special education and related services could be provided in a community preschool with mostly typical peers. Accordingly, the Department does not substantiate the allegation that the ESD failed to offer the child a

placement in the least restrictive environment to the child beginning with the child's March 30, 2009 IFSP.

The complaint also alleges that beginning with the child's March 30, 2009 IFSP the ESD failed to provide for the parent's meaningful input into the child's education, that the ESD failed to ensure the child's placement was determined by the appropriate persons, including the parent and that the March 2009 IFSP did not include input from all IFSP team participants required when changes in the IFSP are indicated.

OAR 581-015-2750(2) provides:

“For a child age three and older, contractors or subcontractors must provide parents with an opportunity to participate in meetings with respect to the identification, evaluation, IFSP, placement of the child, the provision of a free appropriate public education and transition to school age or other services. For IFSP and placement meetings, contractors and subcontractors must also follow requirements of OAR 581-015-2755.”

OAR 581-015-2755 sets forth the further requirement that the contractor or subcontractor take steps to ensure that one or both of the parents of a child with a disability are present at each IFSP or placement meeting.

In this case, there is no doubt that the parent was afforded the opportunity to both attend and participate in all IFSP meetings, beginning with the March 30, 2009 IFSP meeting and ending with the December 14, 2009 IFSP meeting. The parent and at least one of the complainants attended all IFSP meetings. The fact that the parent or complainants disagreed with the placement options offered by the ESD does not mean that the parent did not meaningfully participate. The parent and complainants were at the meetings and clearly had the opportunity to discuss any issues they wished to discuss. Additionally, the IFSP meetings from March 30, 2009 through December 14, 2009 were attended by appropriate ESD staff. The Department does not substantiate the allegations that the ESD failed to provide for the parent's meaningful input into the child's education, that the ESD failed to ensure the child's placement was determined by the appropriate persons, including the parent, and that the March 2009 IFSP did not include input from all IFSP team participants required when changes to the IFSP are indicated.

The complaint also alleges that beginning with the child's March 30, 2009 IFSP the ESD failed to provide a continuum of placement options that included full inclusion of the child in the general education setting. The investigation revealed that ESD staff considered many options once it became apparent that the PDHH class would not continue in the 2009-10 school year. At the March 30, 2009 IFSP Team meeting, multiple placement options were briefly discussed and dismissed by ESD staff as unsuitable options (including a speech group, and the available community preschools) with no objection by the parent or the complainants. The IFSP Team appropriately considered a range of placement options but concluded that the CDS preschool was the appropriate option at the March 30, 2009 IFSP meeting. At the IFSP meetings in September and October of 2009, the ESD presented more options, including community preschool placements, after considering the observations of the child during the summer of 2009 by the teacher at the private placement. The Department does not substantiate the allegation that the ESD failed to provide a continuum of placement options that included full inclusion of the child in the general education setting.

Prior Written Notice

The ESD did not dispute the allegation that a PWN issued on May 9, 2009 does not reflect the changes in placement and services included in the March 30, 2009 IFSP. The issue is whether corrective action is appropriate in this case.

OAR 581-015-2745(1) provides that PWN must be provided to the parent a reasonable amount of time before the contractor or subcontractor initiates or changes, or refused to initiate or change, the identification, evaluation, or placement. Subsection (3) of that rule states that:

“The content of the prior written notice must include:

- (a) A description of the action proposed or refused by the contractor or subcontractor;
- (b) An explanation of why the contractor or subcontractor proposed to take the action;
- (c) A description of any options that the IFSP team [considered] and reasons why those options were rejected;
- (d) A description of each evaluation procedure, assessment, test, record, or report which is directly relevant to the proposal or refusal;
- (e) A description or any other factors relevant to the contractor’s or subcontractor’s proposal or refusal;
- (f) A statement that the parents of a child with a disability have procedural safeguards and, if it is not an initial referral for evaluation, the means by which a copy of the Notice of Procedural Safeguards may be obtained;
- (g) Sources for parents to contact to obtain assistance in understanding their procedural safeguards * * *.”

Review of the PWN at issue in this case shows that the ESD provided notice of the action of reviewing the child’s current goals and developing a new IFSP. With regard to the content of the PWN, the document is accurate but incomplete. The ESD agrees that the notice does not contain the changes made in the child’s IFSP on March 30, 2009. However, there is no allegation that the parent or complainants did not receive the March 30, 2009 IFSP, and although the PWN is vague in that it does not list the changes in the child’s IFSP made on March 30, 2009, it does note correctly that the action taken was to develop a new IFSP for the child. During the investigation, the Department learned that the appropriate ESD staff members are aware that a more precise statement of the action taken and what options were considered is required on a PWN. The Department thus finds that staff training would be superfluous and would not assist the ESD because the ESD is aware of the requirement of more specificity in the changes made in an IFSP. Therefore, the Department does not order corrective action under the circumstances present in this case.

Implementation of IFSP

The complaint alleges generally that the ESD failed to implement the child’s March 30, 2009 IFSP in a timely manner. The Department finds that the services identified as beginning on March 30, 2009 were implemented from March 30, 2009 to June 4, 2009, the end of the 2008-

09 school year. The complainants' *Reply* indicates that there was no contact following the observation of a CDS preschool by the parent and complainants on May 15, 2009 until the August 27, 2009 when the ESD learned that the child would be enrolled in the private placement. However, this does not show that the ESD failed to implement the March 30, 2009 IFSP in a timely fashion. The ESD appropriately implemented the components of the March 30, 2009 IFSP that could be implemented during the 2008-09 school year in the PDHH classroom. Therefore, the Department does not substantiate the allegation that the ESD failed to timely implement the March 30, 2009 IFSP.

The complaint also alleges that the ESD failed to provide ESY services as indicated on the March 30, 2009 IFSP. However, the fact that the box was checked showing the child required ESY services was inadvertent. Although the child received ESY services the previous summer (the summer of 2008), ESD staff determined at the March 30, 2009 IFSP meeting that the child did not require ESY services and the parent and complainants disagree with that determination. The March 30, 2009 IFSP does not contain any mention of ESY services other than a box checked on the IFSP form. This is consistent with the Department's finding that the team discussed ESY services and determined that the child did not need ESY services during the summer of 2009; the complainants have not offered any contrary evidence. The Department does not substantiate the allegation that the ESD failed to implement the March 30, 2009 IFSP when it failed to provide ESY services to the child during the summer of 2009.

The complaint alleges that the ESD failed to provide support for personnel at the child's private school. This allegation refers to personnel support at the child's private placement, which did not begin until the child's enrollment on September 1, 2009. The *Reply* of the complainants in this case states that the integration consultant does not provide a written report or detailed recommendations to the teacher and that the PDHH consults are too limited. However, the consultation services provided at the private placement of the child are consistent with the child's IFSPs, beginning with the October 6, 2009 IFSP and continuing in the December 14, 2009 interim IFSP. The Department does not substantiate the allegation that the ESD failed to implement the child's IFSP by failing to provide support for personnel at the child's private placement.

Assistive Technology

The complaint alleges that the ESD failed to ensure that assistive technology devices and technology services provided in the child's March 30, 2009 IFSP were available to the child while enrolled in private school. However, the investigation revealed that the March 30, 2009 IFSP referred only to the child's hearing aids when it stated that the child required assistive technology devices and services; the hearing aids were to be provided by the child's parent. Additionally, the request for an FM system was made only one day before the filing of the complaint in this case, denying the ESD a reasonable opportunity to respond to this request. The Department does not substantiate this allegation.

Corrective Action

The complaint requests reimbursement in this case of costs of the private placement, including tuition. Pending a decision in this case, the ESD continued to provide consultation services to

staff at the private placement, provided home visits to address audition and language needs, and provided speech therapy at the ESD site. The Department has found, above, that the ESD did not fail to offer the child a FAPE in any of its placement decisions, beginning with the March 30, 2009 IFSP placement in the CDS preschool and ending with the placement, rejected by the parent, in an approved community preschool.

In order to establish a claim for reimbursement of the costs of a parentally selected private school, the claimant must first establish that the educational agency responsible for offering a FAPE to the child failed to fulfill their obligation. In this case, the Department has concluded that the District did not deny the child a FAPE. Therefore, the Department concludes that the parent is not entitled to reimbursement of the costs of placing the child in a private placement. Based on this conclusion, the Department does not reach the issue of whether the private placement selected by the parent constitutes a "private school" under the applicable statutes and administrative rules.

V. CORRECTIVE ACTION³

In the Matter of Douglas ESD EI/ECSE
Case No. 09-054-046

No Corrective Action is ordered in this case.

Dated: 29th day of January 2010

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

Mailing Date: January 29, 2010

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).