

Student's 5th and 6th Grade regular education teacher, Nathan Roberts, Coordinator of the Life Enrichment Education (LEEP) program offered by the Clackamas County Educational Service District, Tammy Elliott, an occupational therapist with District, Donna Grossman, a physical therapist with the District, Jaine Gasparich, an occupational therapist with the District, and Patrick Tomblin, the District's Director of Special Services.

The record was left open to allow for the receipt of the hearing transcript and closing arguments. The hearing transcript was provided on October 30, 2009. Written closing arguments from both sides were received on the deadline of November 12, 2009. The deadline for issuance of the Final Order was extended to December 1, 2009 by mutual request of the parties, and this Final Order was issued by that date.

ISSUES¹

Whether the District failed to provide a Free Appropriate Public Education (FAPE), based on the following alleged violations of Individuals with Disabilities Education Improvement Act (IDEA):

- a. The District failed to place Student in the least restrictive environment for the 2009-2010 school year;
- b. The District failed to give the parents the opportunity of meaningful participation in the placement decision;
- c. The District failed to provide an updated evaluation prior to making the placement decision;
- d. The District failed to consider general education as a placement option;
- e. The District failed to consider potential harmful effects of the proposed placement.

EVIDENTIARY RULINGS

The District offered Exhibits D1 through D14 which were admitted into evidence without objection. The parents offered Exhibits S1 through S15. Exhibits S1 through S7 and Exhibits S9 through S15 were admitted into evidence without objection. The District objected to Exhibit S8 as irrelevant. That objection was sustained and Exhibit S8 was not admitted into the evidence.

FINDINGS OF FACT

- (1) Student has been a resident of the District since at least 2001 when s/he entered

¹ In their request for due process hearing, the parents also raised as an issue the alleged failure of the District to hold another IEP meeting at the parents' request. At the hearing, the parents withdrew that allegation but may pursue it through a separate complaint with the Oregon Department of Education.

kindergarten at the District's Oak Creek Elementary School. Student is mentally retarded, non-verbal, and has autistic-like tendencies. (Test. of Mother; tr. 575-577) Student has received special education services under annual Individualized Education Plans (IEPs) from kindergarten through the end of the 6th grade in June 2008. During that entire period, Student attended classes at the District's Oak Creek Elementary School. From kindergarten through 5th grade, Student was in a "structured learning center" class taught by Susan Fuller. (Test. of Truax, tr. 53-54; Ex. D10 at 8.)

(2) Oak Creek has classes from the kindergarten level through the sixth grade. At the seventh grade level, students transfer to a middle school. Children attending Oak Creek typically transfer to Lake Oswego Junior High (LOJH) at seventh grade. However, Student lives within the attendance area of the District's Waluga Middle School and not LOJH. (Test. of Truax, tr. 63.)

(3) Sometime prior to the 2008-2009 school year, the District decided to change its special education program at Oak Creek. Previously, Oak Creek had a self-contained classroom for grades kindergarten through 6th grade, providing services for students ranging from mild to severe disabilities. For the 2008-2009 school year, the District elected to provide services for students in two classrooms. The first would serve children from kindergarten through 3rd grade. The second would serve children from grades 3 through 6. In addition, the District decided to change the focus of the program, known as the Essential Life Skills (ELS) program, to serve students in the mild to moderate range of disabilities. For students with more severe disabilities, the District intended to offer services through the LEEP program administered by the Clackamas County Educational Service District (ESD.) However, students (like the Student in this case) who were already in the Oak Creek ELS program would be allowed to remain in the program with the understanding that a new placement decision would need to be made at the seventh grade level. (Test. of Tomblin, tr 596-602.)

(4) Despite the changes to the general structure of the ELS program, the District continues to make placement decisions based on the goals set forth in each student's IEP. There is one student who is more developmentally impaired than the Student in this case who the District placed in a regular classroom setting. The District did so because it determined that the student would not realize any appreciable educational benefit from being placed in a special class. However, the District believes that it is appropriate to develop programs that will, in general terms, be suitable for different types of disabilities. (Test. of Tomblin, tr 616-617.)

(5) Because the District has a fairly low population of severely disabled students at the middle school level, it would be financially burdensome to operate a self-contained classroom program to serve them. The ESD operates the LEEP program at no cost to the District. By utilizing LEEP rather than operating its own program, the District saves approximately \$200,000 per year. (Test. of Tomblin, tr 602-604.)

(6) On June 2, 2008, the parents and other members of Student's IEP team agreed on an IEP for the 2008-2009 school year. The IEP included several goals including a goal to increase Student's use and proficiency with electronic augmentative communication devices. They also included a goal of learning 15 new words during the course of the school year, being able to discriminate between small, medium and large objects, and using a computer to learn to type

his/her name and address. There were also several personal care goals such as learning to put on and take off shoes independently. (Ex. D2.) The IEP team, including the parents, agreed that the appropriate placement would be a “special class with mainstreaming for non-academic subjects.” (*Id.* at 29.) The team rejected as a placement option a “regular classroom in neighborhood school with adult assistance and pullouts for specially designed instruction and related services” because it would not provide enough support for Student. (*Id.*)

(7) In 2008-2009, the Oak Creek ELS for 3rd through 6th grade was taught by Tara White, a first year teacher. The program operated as a self-contained classroom with opportunities for mainstreaming as appropriate. Student attended the ELS class for all academic subjects and attended regular education activities solely for non-academic purposes. In the morning s/he attended a regular education 6th grade classroom taught by Jane Lierman. Student was present in Ms. Lierman’s class for attendance and the pledge of allegiance and then left for the ELS classroom. Student returned each day to Ms. Lierman’s classroom where s/he ate lunch with other students in the class. S/he also participated with the regular education students in physical education (PE), music and recess. (Test. of White, tr 156, 159-161; Test. of Lierman, tr 242.)

(8) In the 2008-2009 school year, the LEEP middle school program was not housed at a District school. Middle school students from the District placed in LEEP attended classes at a middle school in Oregon City. In the summer of 2009, ESD made the decision to open a LEEP classroom at the District’s Waluga Middle School and began operating the program at the beginning of the 2009-2010 school year. (Test. of Roberts, tr 461-62.) As of October 2009, there were only three students attending classes at the Waluga LEEP program; if Student were to attend, s/he would be the fourth student. (*Id.*, tr 455.) For financial reasons, the ESD prefers to have at least eight students enrolled in a LEEP program to make it viable. Because there is a relatively small number of students in the class, ESD may elect to move the class to another school, possibly outside the District, as early as the 2010-2011 school year. (*Id.*, tr 462-63.)

(9) The LEEP middle school program is a self-contained classroom with opportunities for mainstreaming as appropriate. This includes the opportunity to attend non-academic courses and activities outside of the classroom. The program also provides community outings and activities designed to teach leisure and community skills such as bowling, swimming, shopping, and utilizing public transportation. (Test. of Roberts, tr 443-444.) The LEEP curriculum focuses on functional academics and functional life skills. (Test. of Ginn, tr 111.) If Student were to attend LEEP, s/he would be able to attend regular education activities to the same extent s/he attended while at Oak Creek ELS. (Test. of Ginn, tr 124; Test. of White, tr 191-192.)

(10) The District operates a program at LOJH also known as Essential Life Skills which is taught in two classrooms by two teachers, Jane Chapman and Ms. Hewitt. (Test. of Chapman, tr 228.) However, unlike the Oak Creek ELS, the LOJH ELS is not a self contained classroom. Instead, it follows a “learning center” model. (Test. of Truax, tr 63-64.) Students attend the ELS classroom as little as one, but no more than four, of seven class periods per day. (Test. of Chapman, tr 227.) During the first and sixth periods of the day, the class operates as a learning support center. Each morning, the class works as a group on the “word of the day” and a daily “quick write” exercise. Students will work on individual goals including personal management, reading and math. Periods two and five are used for teacher preparation and case management;

students do not attend the ELS class during those periods. Periods three and four are for language arts (reading and writing) and social studies using a 5th grade text book. Although there is a wide variety of skill levels in the class, all students are able to pay attention to lectures, follow instructions, and work independently. (Test. of Chapman, tr 213-18.) The seventh period of the day is a math class. There is wide range of ability in the class. At least two students are working at the second grade level. One student is able to perform some math skills at the sixth grade level. Students work together in three groups, organized by ability. Students work together and with classroom assistants. The classroom teacher also works with students individually as needed. (*Id.*, tr 220-21.) There are currently no students in the program working on functional or self-care goals. (*Id.* at 225.) The schedule closely tracks the schedule for the regular education curriculum. (*Id.*, tr 216,228.)

(11) Ms. Chapman believes that Student's IEP goals could be worked on in the LOJH ELS setting, but does not believe that the program could offer Student the level of services s/he needs under the IEP. (Test. of Chapman, tr 225-226.) Because of the marked difference in Student's academic goals and needs, Ms. Chapman does not believe it would be fair to place Student in the LOJH ELS environment because it would restrict his/her interactions with a peer group in both social and academic areas. (*Id.*, tr 238-40.)

(12) Student is very outgoing and social. S/he liked to greet other students each morning as they arrived at school. (Test. of White, tr 160.) In the classroom, Student was easily distracted and had a very short attention span. It was difficult to maintain Student's attention for longer than 20 to 30 minutes at a time. (Test. of White, 170.) Student liked to approach other students and tap them and/or wave to them to get their attention. (Test. of Lierman, tr 246.)

(13) Student attended Ms. Lierman's regular education classroom for nonacademic purposes for both the 5th and 6th grades. (Test. of Lierman, tr 242.) Ms. Lierman requested to have Student in her classroom and encouraged other students to assist with integrating Student into the class. Ms. Lierman rotated lunch seating assignments on a monthly basis and encouraged other students to try to engage Student in conversations. Student was generally not responsive to the students and did not make an effort to engage in longer interactions. (*Id.*, tr 244-45.)

(14) Ms. Lierman attempted to teach Student aspects of the Pledge of Allegiance including the practice of placing a hand over the heart. Ms. Lierman instructed other students to stand with their right hands raised with the hope that Student would observe and copy this behavior. Student appeared to notice other students raising their hands, but did not do so him/herself. Eventually, Student was able to learn to place his/her hand over his/her heart, but did so very infrequently. (Test. of Lierman, tr 247.)

(15) Parents have had a positive relationship with members of Student's IEP team over the years. In general, Mother believes that the IEP team has been responsive to Parents' concerns and comments in past meetings. (Test. of mother, tr 587-88.)

(16) On April 21, 2009, the District convened an IEP meeting to discuss Student's IEP for the following year. Parents attended the meeting with an advocate. Several District employees were present for the meeting including Ms. Lierman and Ms. White. Pat Ginn, a

District Supported Education Specialist responsible for students in the LEEP program and Tami Truax, a Supported Education Specialist responsible for students in ELS programs in the District were also present. Nathan Roberts, Coordinator of the ESD LEEP program also attended as did Patrick Tomblin, the District's Director of Special Services. (Ex. D11.)

(17) The parents were aware that placement would be a major topic of discussion at the IEP meeting and asked District personnel not to prepare a draft IEP prior to the meeting. The District honored that request. Prior to the April 21, 2009 meeting, the District arranged for the parents to visit the LEEP classroom at Ogden Middle School in Oregon City and the ELS program at LOJH. (Test. of Tomblin, tr 607; test. of Chapman, tr 230.) The parents expressed their concern about having Student attend classes in Oregon City which was further from home and outside of the Lake Oswego community. However, the parents told Mr. Tomblin that they believed the LEEP program was "great," but that it was simply too far away. (Test. of Tomblin, tr 607.) Student's mother was familiar with the teacher at the Ogden LEEP program due to his association with an early intervention program that Student attended in the past. Mother believed that the teacher had created a "really nice program" at Odgen where he had been teaching for 13 years. (Test. of mother, tr 594-595.)

(18) Prior to the April 2009 IEP meeting, Ms. White prepared an extensive and detailed Present Level of Academic Achievement and Functional Performance (also referred to as a PLEP) in advance of the meeting. (Ex. D10, 2-7.) The parents provided comments on the PLEP and also provided their own written PLEP reflecting their observations of Student at home. (Ex. D8.) On April 10, 2009, the parents e-mailed Ms. White a message for the team expressing their opposition to placing Student in the LEEP program in Oregon City. The parents asserted that the LEEP program was more restrictive and expressed their strong desire that Student continue attending school in the Lake Oswego community where s/he had established a network of friends, most of whom would be moving on to LOJH. (Ex. D10 at 9-10.)

(19) At the meeting, the parents and other team members engaged in a productive and positive dialogue regarding Student's goals and objectives for the upcoming school year. (Test. of Lierman, tr 257; test of mother, tr 590.) Changes were made to the IEP in response to parents concerns and comments including changes to Ms. White's PLEP. (Test. of Lierman, tr. 259, test. of White, tr 177.) The goals were similar to those contained in the June 2008 IEP with some changes to reflect Student's achievement of the prior goals. The goals in the April 2009 IEP included learning 15 new functional words during the course of the year, learning to sort objects based on common characteristics, distinguishing between small, medium, and large objects, and identifying the names of coins and dollar bills (Ex. D11 at 12-23.)

(20) At the April 2009 IEP meeting, parents did not request or otherwise suggest that Student be evaluated prior to making a placement decision. (Test. of mother, tr 593.) The parents did not suggest or otherwise request that a general education placement be considered as an alternative to LEEP or LOJH ELS. (Test. of Elliott, tr 501.)

(21) Parents have participated in annual IEP meetings with District personnel throughout Student's academic career. In general, mother believes that members of the team have been responsive to parents' concerns. She believes that his/her experience with the team was generally very positive. (Test. of mother 587-588.)

(22) The parents were unable to reach an agreement with the District with regard to the appropriate placement for the coming year. The parents wanted Student to be placed in the ELS program at LOJH because they wanted Student to attend a District school with familiar peers in both the regular and special education programs. The parents were concerned that the LEEP program was in a non-District school, administered by non-District personnel, and would require a longer commute. The parents were also concerned about removing Student from the community of friends and support that s/he had established since kindergarten. (Ex. D9 at 6-7; Ex. D10 at 8-9.) The parents have another child in the LEEP program and have had concerns about the level of services provided. (Test. of mother, tr 580-582.) However, at the IEP meeting the parents did not mention any concerns about the level of services provided by LEEP. (Test. of Tomblin, tr 607-608.) All other team members believed that LEEP program would be the most appropriate placement for Student in light of his/her IEP. Although Student could work on his/her IEP goals at LOJH ELS, s/he would have to do so individually with a one-on-one assistant. Because Student could not understand the academic focus of the LOJH ELS program, s/he would not be able to follow the same curriculum as other students in the program. When the team members reached an impasse, Mr. Tomblin made the decision, on behalf of the team, to place Student at LEEP. (Ex. D9 at 7.)

(23) Ms. Chapman could work with Student on the IEP goals in the LOJH ELS but does not believe she could do so effectively because of the marked differences in the curriculum followed by other students in the ELS program. (Test. of Chapman, tr 225-227, 238.) None of the educators believe that Student would be able to follow or understand the academic subjects taught as part of the LOJH ELS curriculum. (Test. of White, test. of Ginn, test. of Truax, test. of Lierman.)

CONCLUSIONS OF LAW

The District offered a Free Appropriate Public Education (FAPE) to Student for the 2009-10 school year. The District did not violate the provisions of IDEA as alleged by Parent, specifically:

- a. The District offered to place Student in the least restrictive environment in which Student's IEP could be effectively implemented for the 2009-2010 school year;
- b. The District gave the parents the opportunity of meaningful participation in the placement decision;
- c. The District was not required to provide an updated evaluation of Student prior to making the placement decision;
- d. The District was not required to consider general education as a placement option;
- e. The District considered potential harmful effects of the proposed placement.

OPINION

The burden of proof in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005). The standard of proof applicable to an administrative hearing is preponderance of the evidence. *Cook v. Employment Div.* 47 Or App 437 (1980) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Public Education Requirements under the IDEA

The IDEA provides for a free appropriate public education (FAPE) for children with disabilities. The purpose of the IDEA is to ensure that all children with disabilities are provided a FAPE, emphasizing special education and related services designed to meet the unique needs of the child and to ensure the rights of children with disabilities and parents of those children are protected. 20 USC §1400(d)(1). The United States Supreme Court, in *Board of Educ. Of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982) (*Rowley*) and set out a two-part test for evaluating complaints about the content of an IEP and the provision of a FAPE:

[A] court's inquiry in suits brought under [§ 1415(i)(2)] is twofold. First, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. [Footnotes omitted.]

Rowley, 458 U.S. at 206-207.

Student qualifies for and has been provided special education services by District under the IDEA at Oak Creek Elementary School from kindergarten through the 6th grade. As Student enters the 7th grade, s/he will be leaving Oak Creek and entering a middle school program. One purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. 20 USC § 1400(d); 20 USC § 1412(a)(1); ORS 343.155(1). At issue in this case is whether the District has complied with its IDEA obligations in proposing to place Student in an educational program operated by the ESD.

The parents raise a number of issues which they contend constitute a denial of FAPE in this case. However, all of the issues focus on a common theme: the parents' disagreement with the District's decision to place the Student in the LEEP program operated by the Clackamas County ESD. In addition, the parents contend that the District failed to comply with its obligation to maintain Student's current educational setting pending the outcome of the hearing. Each issue is addressed separately below.

1. Stay Put

On August 3, 2009, the District filed the District's Motion on Stay Put, seeking a determination that the District was not required to place the child in the LOJH ELS program as requested by the parents under the "stay put" provisions of IDEA. On September 8, 2009, the Motion was denied because there were disputed issues of material fact which precluded a favorable ruling as a matter of law.

The parents contend that the Student's current placement was the District's ELS program. Because the District had a program designated as ELS at LOJH, the parents asserted that the District was required to place the Student in that program pending the outcome of the hearing.

The stay-put provisions of the IDEA are set forth in 20 USC §1415(j) which provides:

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

Those requirements are mirrored in ORS 343.177(1) which provides:

During the pendency of any administrative or judicial proceedings concerning the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child, the child shall remain in the then current educational program placement.

During the 2008-2009 school year, the Student attended sixth grade at the District's ELS program at the District's Oak Creek Elementary School. Because the Student would be entering the seventh grade in the 2009-2010 school year, s/he would no longer be attending Oak Creek. Students who attend Oak Creek typically move to LOJH. The parents wanted Student to attend the ELS program at LOJH which they believed would be the least restrictive environment and because it would allow Student to continue to learn along side friends and people who were familiar with him/her. The District, however, believed that placement at LOJH would not be consistent with the goals set forth in Student's IEP. Because the parents and the District could not agree on a placement decision, Mr. Tomblin, on behalf of the team, made the decision to place the Student in the LEEP program. At the time the decision was made, the LEEP program was operated by the ESD at a school in Oregon City, outside of the Lake Oswego School District.

Where, as here, a parent requests a due process hearing, the IDEA requires the District to maintain the child's placement in the most recently implemented IEP. *L.M. v. Capistrano Unified School District*, 556 F3d 900 (9th Cir. 2009). However, courts have recognized that when a child moves from the elementary school level to middle school "the status quo no longer exists." *John v. Board of Education*, 502 F3d 708, 714 (7th Cir. 2007). In such situations, the

obligation of a school district is to “approximate the student’s old IEP as close[ly] as possible.” *Id.* at 714-715. *See also, Van Scoy v. San Luis Coastal Unified School Dist.*, 353 F Supp 2nd 1083 (CD Cal 2005) (stay put provision does not require student to remain in the current grade level pending the outcome of a dispute.).

Because Student was moving to the middle school level, the District could not keep Student in the same placement as in the prior school year. The District’s obligation was therefore to approximate the last implemented IEP as closely as possible. The most recent implemented IEP, dated June 2, 2008, described the placement as a “[s]pecial class with mainstreaming for non-academic subjects.” It is undisputed that this reference was intended, at that time, to describe the Oak Creek ELS program.

The parents argue that the closest approximation to the Student’s most recent placement is the ELS program at LOJH. However, it appears that the ELS program as constituted at LOJH shares little in common with the Student’s most recent placement other than the name. The Oak Creek ELS program was a self-contained classroom. Student was in the ELS classroom for all academic programs. S/he was mainstreamed in the general educational curriculum only for non-academic subjects including PE, art, music, lunch, and recess. S/he also attended a general education classroom for attendance each morning. In sharp contrast, the LOJH ELS program is a “learning center” model in which students spend the majority of their time in general education classrooms. Students in the LOJH ELS program spend a maximum of four, and as little as one, out of seven class periods per day in the ELS learning center. The curriculum in the LOJH ELS program focuses primarily on academics including math, language arts, and social studies. There is no focus on functional life skills, although there is some focus on personal management skills. The Oak Creek ELS program, in contrast, focused more on functional skills and less on academics.

The LEEP program is a self-contained classroom with a similar focus on functional life skills. Students in the program also have opportunities to attend regular education classes for non-academic subjects. The amount of mainstreaming depends, to a large extent, on a student’s IEP. In terms of content and structure, the LEEP program is very similar to the ELS program that the Student attended at Oak Creek during the 2008-2009 school year.

The parents note that the LEEP program is administered by the ESD and is not a District program. The parents assert that the change in service providers is relevant in considering whether LEEP is the appropriate stay put placement. However, the term “educational placement” refers to a program and a level of services, and not to the location of those services. *White v. Ascension Parish School Board*, 343 F3d 373 (5th Cir. 2033). Furthermore, a change to a different program does not constitute a change in placement where a school district attempts to “preserve intact * * * the basic educational programs that the transferred children had formerly enjoyed.” *Concerned Parent & Citizens for Continuing Education at Malcolm X v. New York City Board of Education*, 629 F2d 751 (2nd Cir. 1980). Nothing in the IDEA requires a school district to provide such services in a specific location or to utilize only district employees and resources in providing such services. Nor does the IDEA provide that a District can only comply with its stay-put obligations utilizing District employees.

Ultimately, it is the District that remains responsible for providing Student FAPE, even if it chooses to do so utilizing the services of the ESD. As a practical matter, although operated by the ESD, District personnel will need to work directly with LEEP staff located at the District's Waluga Middle School. Because the LEEP program offers opportunities for mainstreaming at that school, it is likely that Student, should s/he attend LEEP, would be interacting with District teachers and staff on a daily basis.

The evidence established that the ELS program at LOJH was materially different from the Oak Creek ELS program. Thus, placement in the LJOH ELS would not have been consistent with the District's stay put obligation. The LEEP program provided services substantially similar to those offered by the Oak Creek ELS program in the 2008-2009 school year. The District complied with its stay put obligations by offering to place the Student in the LEEP program pending the outcome of the hearing.

2. Provision of a FAPE

The issues raised by the parent's due process hearing request is whether District's proposed placement of Student in the LEEP program will provide FAPE as required by the IDEA or more specifically, whether the placement is reasonably calculated to enable Student to receive educational benefit, the standard in *Rowley*.

A central feature of these laws, and the primary mechanism by which they work to ensure a FAPE, is the IEP. *Rowley*, 458 U.S. at 206. Schools are required to develop IEPs for students with disabilities, using IEP teams including parents, special education and general curriculum teachers, administrators and, where appropriate, the child. 20 USC § 1414(d); ORS 353.151; and OAR 581-015-2210. There are procedural requirements regarding the composition of the IEP team, the types of information that must be included in the IEP, and the notice provided to parents about the IEP meeting and plan. 20 USC § 1414(d); OAR 581-015-2200. The substantive requirement for a FAPE is set out above as explained in *Rowley*. District does not have to provide an optimal education for Student nor guarantee Student's educational progress, but must provide a "basic floor of opportunity." *Rowley*, 458 U.S. at 201.

Over the years, the parents and the educators serving Student at Oak Creek developed a very positive and respectful relationship as they worked cooperatively in establishing educational goals for Student. That respectful tone continued during the April 21, 2009 IEP meeting with regard to all aspects other than placement. However, the parents strongly disagreed with the District's decision to place Student in the LEEP program. The parents assert that the District failed to provide FAPE due to the following concerns:

- a) The LEEP program is not the least restrictive environment in which the IEP can be implemented;
- b) The parents were not given an opportunity to meaningfully participate in the placement decision;
- c) The District failed to provide an updated evaluation of Student prior to making the placement decision;
- d) The District failed to consider general education as a placement option; and

e) The District failed to consider harmful effects of the proposed placement.

Each of these allegations are addressed separately below.

a. Least Restrictive Environment

The parents contend that the District failed to place the Student in the least restrictive environment. OAR 581-015-2250 provides, in relevant part:

School districts must ensure that:

(1) The educational placement of a child with a disability:

* * * * *

(b) Is made in conformity with the Least Restrictive Environment (LRE) provisions of OAR 581-015-2240 to 581-015-2255.

(c) Is based on the child's current IEP; [and]

* * * * *

(e) Is as close as possible to the child's home;

(2) The alternative placements under OAR 581-015-2245 are available to the extent necessary to implement the IEP for each child with a disability;

(3) Unless the child's IEP requires some other arrangement, *the child is educated in the school that he or she would attend if not disabled;*

(4) *In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs; and*

(5) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

(Emphasis added.)

OAR 581-015-2240 sets forth the requirements with which school districts must comply in selecting the least restrictive environment. The rule 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 educational 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.*

(Emphasis added.)

The parents assert that the least restrictive environment would be placement in the LOJH ELS program. Every educator who testified disagreed with that contention. Because the Student is not capable of following the academic curriculum offered at the LOJH ELS, s/he would be required to work one-on-one with an assistant on a separate curriculum throughout the day. Although s/he would be physically present in the classroom, s/he could not be effectively integrated into the academic program which is geared toward an academic curriculum in marked contrast to the functional skills curriculum called for in the Student's IEP.

It is true that OAR 581-015-2250(5) provides that a child may not be removed from a regular classroom solely because of needed modification to the curriculum. But the parents have not asked the District to place Student in a regular education classroom. The parents believe that the appropriate setting would be at LOJH ELS, not at a regular education classroom. The parents acknowledge that Student has special needs which need to be addresses through the IEP. Thus the issue in this case is not whether Student should be removed from the regular education classroom, but rather, what is the appropriate and least restrictive placement in a classroom geared toward providing special education services: LOJH ELS or LEEP?

The parents note that several educators testified that the Student could work on his/her IEP goals in the LOJH ELS setting. While that may be the case, none of the educators believed that it could be done effectively. Notably, Ms. Chapman asserted that as an educator she did not believe that it would not be fair to Student to be placed in that setting given the very limited opportunities for social and academic interaction with peers.

If the student attended the LOJH ELS classroom, although s/he would be physically present in the classroom, s/he would be, for all practical purposes, isolated from peers who would be working on an entirely different curriculum. Because other students in the class would need to focus on a more traditional group academic program, the Student's ability to move freely in the classroom would necessarily be restricted. Similarly, because the Student has a short attention span and is easily distracted, his/her ability to focus on his/her own curriculum could be impaired if he/she were placed in a classroom with students who were focused on other activities.

At the time the IEP was drafted, the LEEP program was housed at school in Oregon City, outside of the District. Despite that fact, all team members other than the parents believed that the benefits of the program outweighed the longer commute and the absence of known age-peers. That was a reasonable determination and consistent with the District's obligations under the IDEA. However, after the April 2009 IEP was drafted, ESD opened a LEEP classroom at Waluga Middle School, the school the Student would attend if s/he were not disabled. OAR 581-015-2250(3) expresses a preference for students to attend the same school that s/he would attend if not disabled. By sheer happenstance, that will be the result if Student is placed in LEEP for the current school year.

In contrast with LOJH ELS, the evidence established that the Student's IEP could be satisfactorily implemented in the LEEP program, which closely resembles the learning environment the Student last attended. As with Oak Creek ELS, the LEEP program will allow Student to work on his/her functional academic skills in a setting with peers working on similar goals and will allow Student a similar opportunity for mainstreaming in nonacademic areas.

The evidence thus established that the LEEP program offers the least restrictive environment in which Student can effectively work on the goals set forth in the April 2009 IEP. The parents therefore failed to establish that the District's decision to place Student in the LEEP program constituted a denial of FAPE.

b. Opportunity for Meaningful Participation in the Placement Decision

OAR 581-015-2210(1)(a) generally requires an IEP team to include one or both parents. As members of the team, the parents have the right to meaningfully participate in the process of drafting the IEP. This includes the right to participate in decisions regarding placement. The parents asserted that they were not given an opportunity to meaningfully participate in the placement decision. Every member of the placement team, with the exception of the parents, agreed that the most appropriate placement for the student was the LEEP program. The parents contend that the decision was made prior to the meeting, was based primarily on budgetary issues, and that team members were pressured, through the presence of Mr. Tomblin, into agreeing with the placement decision.

However, none of the team members who testified at the hearing asserted that they were pressured into making a placement decision. To the contrary, all of them appeared to sincerely believe that LEEP was the appropriate placement. It is true that Mr. Tomblin was in a position of authority over other team members who could have felt pressure, subtle or otherwise, to agree with his choice of placement. Any team member who felt that pressure, may have had a similar reluctance to express a contrary view at the hearing given that Mr. Tomblin was present as the District representative. However, each of the witnesses appeared to be giving thoughtful, candid testimony concerning their evaluation of the relative placement options. Whether the team members felt pressure to agree with Mr. Tomblin or not, I am persuaded that each of them sincerely believed that LEEP was the appropriate placement. Indeed, Ms. Lierman appeared quite passionate about the issue because of his/her concern that Student master the use of augmentative communication devices to aid Student in life once s/he leaves the educational setting.

Nor did the parents establish that the placement decision was made prior to the IEP meeting. It is true that the District had made a decision, in general, to provide services for more severely disabled children through the LEEP program, and not through a District operated ELS self-contained classroom. However, the District provided persuasive testimony that it makes placement decisions based on the individual needs of the students, and not on a pre-ordained "pigeon-holing" of students based on broad generalities. While the IDEA requires school districts to make placement decisions based on the individual needs of the student, nothing in the IDEA suggests that a District may not make longer-term plans for providing services for students requiring services in a self-contained classroom model. In the past the District has done so with

its own ELS program. More recently the District has elected to take advantage of services provided by the ESD to serve children who need education in such a setting. Although the District unquestionably considered the financial impact of this decision, the parents did not establish that the placement decision in *this* case was made out of any budgetary concern or based solely upon Student's diagnoses or levels of academic performance. Rather, it appears that the District chose LEEP as the program best able to meet Student's IEP goals based on an individualized assessment of Student. Given the broad parameters of the LEEP program as compared to the LOJH ELS, the placement choice is not surprising. However, the evidence did not establish that the decision was pre-determined or based on improper considerations.

Furthermore, the evidence established that the District gave the parents an opportunity to visit the LEEP classroom in Oregon City and the ELS program at LOJH. At the parents' request, no draft IEP was prepared in advance of the meeting. All participants at the meeting, including the parents, described a healthy dialogue concerning all non-placement issues which resulted in several changes based on parental input. Furthermore, team members listened to and considered the parents' concerns regarding the LEEP placement before a decision was made. The IDEA requires an opportunity for meaningful parental participation; it does not, however, mandate that the District make only those decisions with which that parents agree. Meaningful participation does not equate to a parental veto. Although the parents strongly disagree with the District's placement decision, the District did not err by failing to place Student in the program preferred by the parents.

c. Failure to Provide Updated Evaluation

The parents contend that the District failed to provide an updated evaluation of Student before making a placement decision. It is unclear how the parents believe that the failure to provide an updated evaluation ran afoul of the law; they provided no legal authority to suggest that the District was required to conduct an additional evaluation given the information known to the IEP team. Ms. White, Student's then-teacher, provided an extensive PLEP which was supplemented by information provided by the parents. In addition, the team had input from Ms. Lierman, Student's regular education teacher for both the fifth and sixth grade. They also had input from Tami Truax who worked with Student and his/her family for Student's entire academic career. All team members, with the possible exception of the parents, believed they had enough information about the Student and his/her needs to make an informed decision regarding placement. If the parents thought that Student needed further evaluation, they did not make that request at the IEP meeting. The evidence did not establish that the failure to conduct a new evaluation constituted a denial of FAPE.

d. Failure to Consider General Education as a Placement Option

The parents contend that the District failed to consider general education as an option. It is true that the evidence established that such an option was not considered. However, given the goals set forth in the IEP and the student's academic history and performance, it would have been surprising if the District *had* considered such an option. None of the participants in the IEP meeting, including the parents, suggested that general education was a realistic placement option. As discussed above, it would be difficult to effectively implement Student's IEP goals in the

LOJH ELS program; a program specifically established to serve student's with special needs. There is no reason to believe that Student's IEP could be implemented any more successfully in the general education setting. Parents have not established that the District failed to provide FAPE because it failed to consider placing Student in a general education setting.

The parents appear to suggest that the District, as a procedural matter, was required to consider general education as an option in each of Student's annual IEPs. However, in order for a District to be found in violation of the IDEA for procedural violations, the violation must it must result in a substantive denial of FAPE to the student. The Ninth Circuit has held that only that a denial of FAPE occurs only when "procedural inadequacies * * * result in the loss of educational opportunity * * * or seriously infringe on the parent[s]' opportunity to participate in the IEP formulation process." *W.G. v. Bd. Of Trustees of Target Range School D.* 960 F2d 1479, 1484 (9th Cir 1992). There was no such substantive harm in this case; all team members, including the parents, were in agreement that Student would need to be provided services in a structured setting. The parents thought that the setting should be at the LOJH ELS; the District thought it should be in the LEEP program. No one suggested, as part of the IEP process, that Student's IEP could be successfully implemented in a general education classroom.

e. Failure to Consider Potential Harmful Effects of Proposed Placement

The parents asserted that the District failed to consider the potential harmful effects of placing the Student in the LEEP program. However, the only harmful effects identified by the parents concerned the location of the program and the longer commute it would have entailed had the program remained in Oregon City. Of primary concern, the parents believed that removing Student from those who were most familiar with his/her would damage, perhaps irreparably, Student's future standing and reputation in the Lake Oswego Community. While those concerns are understandable, and cannot be taken lightly, the parents were given a fair opportunity to raise them at the IEP meeting as reflected in the meeting notes. There is no evidence that the District ignored or failed to consider those concerns. However, those concerns did not override the opinion of the educators on the team that LEEP remained the most appropriate and least restrictive place to implement Student's IEP.

At the hearing, Student's mother testified that she had serious concerns about the quality of services provided by LEEP based upon his/her experience with another child. She was also concerned that the LEEP program did not have the institutional history and ties to the District to allow the program to work effectively. However, she also testified that she was very impressed with the LEEP program at Ogden and spoke very highly of its teacher and conveyed that opinion to Mr. Tomblin prior to the IEP meeting. To the extent that parents believe that the LEEP placement would have harmful effects due to poor quality, it does not appear that they raised those concerns within the context of the IEP meeting. There is no reason to expect the District to have considered these unexpressed concerns particularly given mother's praise for the Ogden program and its teacher.

The parents have not demonstrated that the District failed to consider harmful effects of placing Student in the LEEP program. The evidence thus does not demonstrate a denial of FAPE.

Conclusion

In summary, the parents failed to demonstrate that the District's placement decision, and the process used to reach that decision, constituted a denial of FAPE. The District's actions were consistent with its obligations under IDEA. Furthermore, the District complied with its stay-put obligations by offering to allow Student to attend class at the Waluga LEEP program pending the outcome of the hearing.

The parents' concerns in this case were not trivial. The transition from elementary to middle school can be traumatic for any student, particularly when the student moves into a new school filled with unfamiliar faces. The parents were understandably concerned with the impact such a move would have on Student and his/her relationships with those who have come to know him/her over the first seven years of his/her school career. However, those concerns do not override the District's obligation to provide Student with FAPE in the least restrictive environment in which the IEP could be successfully implemented. The evidence established that the District met those legal obligations by offering a placement in the LEEP program.

ORDER

Having failed to show by preponderance of the evidence that the District did not provide Student with a FAPE as required under IDEA, parents' request for relief, pursuant to the request for due process hearing dated June 10, 2009, is **DENIED**.

John Mann, Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 90 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(i)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER**.

ENTERED at Salem, Oregon this 1st day of December, 2009 with copies mailed to:

Jan Burgoyne, Oregon Department of Education, Public Services Building, 255 Capitol Street NE, Salem, OR 97310-0203.