

On October 12, 2009, the Parents filed a second due process hearing request with the State Superintendent of Public Instruction. The District subsequently moved to consolidate both hearing requests for hearing. ALJ Mann granted that request and consolidated Case Nos. DP 09-110 and DP 09-121 for hearing. ALJ Mann also granted the Parents' motion to postpone the hearing. The consolidated hearing was therefore rescheduled for January 25 through 29, 2010 in Tualatin, Oregon.

On October 19, 2009, the District filed a Motion to Dismiss in Case No. DP 09-110. On that same date, the Parents filed a Motion for Summary Determination in Case No. DP 09-110. On October 28, 2009, ALJ Mann held a status conference with the parties to allow oral argument with regard to the motions and to discuss scheduling of the consolidated hearings. On November 6, 2009, ALJ Mann issue a Ruling on Motions for Summary Determination denying the Parents' motion in its entirety and granting the District's motion with regard to an alleged violation of the Family Educational and Privacy Act (FERPA). ALJ Mann denied the District's motion with regard to all other issues.

On November 30, 2009, the Parents filed a request for an expedited due process hearing with the State Superintendent of Public Instruction (Case No. DP 09-127E). The Department of Education referred the hearing request to the Office of Administrative Hearings (OAH) for a hearing. Administrative Law Judge (ALJ) John Mann was assigned to preside over the hearing.

On December 16, 2009, a pre-hearing conference was held in Case No. DP 09-127E. ALJ David K. Gerstenfeld presided at the conference because ALJ Mann was not available. Student's Mother participated in the conference and was not represented by counsel. The Lake Oswego School District (the District) participated in the conference and was represented by Mr. Cohn-Lee. The parties agreed to hold a hearing from January 5 through 8, 2010 at the OAH office in Tualatin, Oregon. The parties also agreed that the evidentiary record in Case No. DP 09-127E would be part of the evidentiary record of Case Nos. DP 09-110 and DP 09-121.

A hearing was held in Case No. DP 09-127E on January 5 through 8, 2010 at the OAH office in Tualatin, Oregon. Mary T. Jacks of Naegeli Reporting performed real-time transcription of the hearing on those dates. The hearing was extended an additional day and concluded on January 11, 2010. Alexandra Kaan of Naegeli Reporting performed real-time transcription of the hearing on January 11, 2010.

The Parents participated in the hearing in Case No. DP 09-127E. Mother, a licensed attorney, served as co-counsel at the hearing along with Kevin Bague, Attorney at Law. Both Parents and Student testified. Parents also provided testimony from Timothy Kopet, Ph.D, Glen Zielinski, DC, DACNB, Hayley Wood, Patricia Thomas, Donna Atherton, EdD, and Carrie Lippencott, OTR/L. The District was represented by Mr. Cohn-Lee. The District presented testimony from Dan Sterling, Leslie McKenna, Scott Reese, James Sanders, PhD, and Patrick Tomblin. The evidentiary record closed on January 11, 2010 and an Expedited Final Order was issued on January 26, 2010.

The hearing on Case Nos. DP 09-110 and DP 09-121 was held from January 25, 2010 through February 2, 2010. Mary T. Jacks of Naegeli Reporting performed real-time transcription of the hearing on January 25, 26, 29, and February 2, 2010. Cecily Yates of Naegeli Reporting performed real time transcription of the hearing on January 27 and 28, 2010.

The Parents participated in the hearing in Case Nos. DP 09-110 and DP 09-121. Mother represented Parents at the hearing without co-counsel. Both Parents testified. Parents also provided testimony from Timothy Kopet, Ph.D., Nancy Bryant, Ph.D., Leslie Johnson, Jan Pearce, and Fernette Eide, M.D. The District was represented by Mr. Cohn-Lee and by co-counsel, Nancy Hungerford. The District presented testimony from Carol Whitten, Jennifer Graver, Tammy Elliot, Mark Snook, Dan Sterling, James Sanders, PhD, and Patrick Tomblin. The evidentiary record closed on February 2, 2010. At Mother's request, ALJ Mann agreed to a delayed briefing schedule to allow the Parents to attend the Olympic Games. ALJ Mann asked the parties to submit closing briefs by March 10, 2010. On March 9, 2010, ALJ Mann extended the briefing deadline to March 18, 2010 at the request of the District.

The hearing transcript was provided on February 22, 2010. Written closing arguments from both sides were received on the extended deadline of March 18, 2010. The deadline for issuance of the Final Order was April 12, 2010.

ISSUES

Case No. DP 09-110

Whether the District violated the The Individuals with Disabilities Education Act (IDEA), and failed to provide the student a Free and Appropriate Public Education by:

1. Failing to conduct a manifestation determination prior to changing the student's placement on October 9, 2007.
2. Failing to return the student to [] regular class on October 10, 2007.
3. Failing to provide prior written notice to the parents prior to changing the student's placement.
4. Failing to implement the December 6, 2006 Individualized Education Plan (IEP).¹
5. Failing to provide tutoring per a prior written notice dated January 7, 2008.

¹ At the July 17, 2009 prehearing conference, Mother noted that she had made a typographical error in preparing the due process hearing request and thus failed to separately number as an issue the failure to implement the December 6, 2006 IEP. Mother asked for permission to amend to clarify that this was a separate issue. The District did not object and the ALJ allowed the amendment. However, when the ALJ prepared the Notice of Hearing, he neglected to list that as an issue. The District contends that it was not given fair notice of the issue because it was not identified on the Notice of Hearing. Under OAR 581-015-2360(2) the scope of the hearing is determined by the due process hearing request. The District's attorney was present at the prehearing conference and was thus on notice that the Parents intended to raise this issue. Furthermore, the Parents raised the issue on the first day of the hearing in this case and questioned witnesses regarding implementation of the IEP. The District also had a full and fair opportunity to examine the relevant witnesses with regard to the steps taken by District staff on the specific dates identified by Mother. The issue was within the scope of the hearing and the District was not prejudiced by the failure to specifically identify the issue on the Notice of Hearing.

6. Failing to place the student in the least restrictive environment from December 21, 2007 through May 4, 2009.
7. Failing to provide occupational therapy as requested by the parents.²
8. Failing to provide the Parents a meaningful opportunity to participate in a placement discussion on April 28, 2008.
- 10 Refusing to pay for an evaluation requested by the Parents.

Case No. DP 09-121³

Whether the District violated the IDEA, and failed to provide the student a Free and Appropriate Public Education by:

1. Changing the student's placement without conducting a manifestation determination following a suspension on September 24, 2009.
2. Failing to provide a justification for a change in placement at an October 7, 2009 IEP meeting.
3. Failing to consider the harmful effects of the placement offered by the District on October 7, 2009.

In addition, at the hearing the Parents raised the following issue with regard to Case No. DP 09-121:

4. Whether the scope of the hearing includes the issue of whether the District violated the IDEA by failing to allow Student to return to school on October 13, 2009 after the Parents filed a request for a due process hearing.

EVIDENTIARY RULINGS

In Case No. DP 09-127E, The District offered Exhibits D1 through D20. Exhibits D3 through D20 were admitted into evidence without objection. The District withdrew Exhibits D1 and D2. The Parents offered Exhibits S1 through S43. Exhibits S1 through S9, Exhibits S11 through S36, and Exhibits S38 through S43 were admitted into the record without objection. The District objected to Exhibit S10 as hearsay and objected to Exhibit S37 as not being best evidence. Those objections were overruled and Exhibits S10 and S37 were admitted into evidence. Those Exhibits are part of the consolidated evidentiary record in this case.

² At the hearing, the Parents withdrew an allegation that the District failed to provide requested vision services.

³ At the hearing, the Parents withdrew an allegation that the District failed to provide an updated evaluation of Student prior to the October 7, 2009 change in placement.

In Case Nos. DP 09-110 and DP 09-121, the Parents offered Exhibits S1 through S51 which were admitted into the record without objection. The District offered Exhibits D1 through D61. Exhibits D1, D3, D7, D11 through D19, D21 through D25, D27 through 35, D37 through D40, and D42 through D61 were admitted into the record without objection. Exhibits D2, D4 through D6, and D8 through D10 were admitted into the record over the Parents objections as to foundation and relevance. Exhibit D20 page 1 was admitted into the record without objection. The Parents' objection the remainder of Exhibit D20 was sustained and the additional pages were not admitted. Exhibit D26 page 6 was admitted without objection. The Parents' objection the remainder of Exhibit D26 was sustained and the additional pages were not admitted. Exhibit D36 was admitted over the Parents' objection as to relevance. The District withdrew pages 37 through 49 from Exhibit D41. The remainder of Exhibit D41 was admitted without objection.

The consolidated record thus consists of transcripts and exhibits from Case No. DP 09-127E and from Case Nos. DP 09-110 and DP 09-121. To avoid confusion, any citation in this order to exhibits or the transcript from DP 09-127E will be designated as follows: References to transcript: Tr.-127E; References to exhibits: Ex. (no.)-127E. Unless so designated, all other references to the transcript and exhibits will refer to the hearing on Case Nos. DP 09-110 and DP 09-121.

FINDINGS OF FACT

(1) Student has been identified as intellectually gifted and has been identified as eligible for TAG (Talented and Gifted) services. (Ex. D40 at 8.) In August of 2009, when Student was nine years old, Student was administered a standardized test which demonstrated a reading comprehension score at the 12th grade level and a math concepts and applications score at the 9th grade level. (Ex. S6-127E at 2.)

(2) Student attended the District's Palisades Elementary School in Kindergarten through the beginning of his/her second grade year in the fall of 2007. Student last attended regular education classes at Palisades on September 24, 2007. (Test. of Whitten.)

(3) Student completed Kindergarten year without apparent incident. Although Student's teacher later expressed some concern about Student's behavior, the teacher never imposed formal discipline against Student. (Test. of Whitten, tr. at 279-80; test. of Graver, tr. at 323.)

(4) In October 2006, Jennifer Graver, Student's first grade teacher, noticed that Student's voice was often hoarse and raspy. Ms. Graver believed that Student may have vocal cord nodules that interfered with [] speech. Ms. Graver believed that the problem could be remedied with speech therapy. (Test. of Graver, tr. at 328-29.)

(5) On October 26, 2006, a school psychologist developed a functional behavioral assessment (FBA) of Student with input from members of the District's intervention team (also known as the "I team.") The FBA included a behavior intervention plan (BIP). The FBA was revised on November 28, 2006 after input from team members and the parents. (Ex. D7; test. of Whitten at 179-86.)

(6) On December 6, 2006, the District and Student's Parents developed an Individual Education Plan (IEP) based upon an identified communication disorder. The team did not identify any other disability at that time. The IEP incorporated the November 28, 2006 BIP.

(Ex. D7a.)

(7) The BIP contained a section labeled “Consequences of Behavior” which included specific steps to follow if the Student became physically aggressive. (Ex. D7 at 2.) This included offering to take Student to “a small, quiet place free from distraction and adult or peer attention” followed by debriefing once Student calmed down. (*Id.*) The BIP also required Student to be returned to class as soon as s/he was calm and could express Student’s feelings appropriately. (*Id.*)

(8) On June 6, 2007, the District suspended student for one and a half days for a playground incident. On that day, an educational assistant overheard Student call another student “stupid” on the playground. The assistant told Student that it was not very nice and asked Student what s/he should say to the other student. Student continued to say that the other student was stupid. Student became upset and hit a tetherball which then struck the assistant in the face. Student then ran away to the corner of the school’s property. Eventually the assistant was able to convince Student to return to the school and directed him/her to the school office. (Test. of Whitten, tr. at 197-99.)

(9) On September 12, 2007, Ms. Graver asked Student to step out into the hallway to discuss Student’s refusal to do math. As student stood in the hall near the doorway, Ms. Graver turned briefly to address other students. As she did so, Student left the area. Ms. Graver did not see Student leave and did not know where Student was. She contacted the principal, Carol Whitten, who immediately organized a group of staff members to search for Student. Eventually, Student was found hiding under the desk of Gail McClain, the school counselor. (Test. of Whitten, tr. at 207-09; test. of Graver, tr. at 345-46.)

(10) On September 19, 2007, Dr. McClain and Vickie Johnson, the learning specialist teacher at Palisades, developed a draft revision to the BIP. (Exs. D14, D15; test. of Graver, tr. at 344-45.)

(11) Ms. Graver was away from school on September 20, 2007 and arranged for a substitute teacher for her class on that date. (Test. of Graver, tr. at 347.) On that morning, Student refused to do math work and told the teacher s/he was not going to do it. During music class later in the day, Student did not follow directions but did not interrupt the class. During the lunch period, Student walked on student chairs and told a teacher “no” when instructed to sit down.⁴ Student then played with a toy car and dolphin, running them over student desks and on another student’s arm. The teacher asked Student to choose a place to sit and then to stay there. Later, in health class, Student talked excessively and did not respond when the teacher attempted to redirect him/her. After class, as the students prepared for recess, the teacher told the students that they could go outside or they could get a pass for the library or the computer lab. Student took a pass and had a brief disagreement with another student who believed Student got the pass before s/he was supposed to do so. (Ex. D16 at 1.)

(12) During recess from 2:10 to 2:20 p.m. on September 20, 2007, Student took a pass for the computer lab, but later gave that pass to another student and took a pass for the library instead. Student went to the library and picked out a book. S/he then asked the library assistant if s/he could go into the computer lab. When the library assistant told Student that s/he could not

⁴ At Palisades, students eat lunch in their regular classrooms. There is not a separate lunch room or cafeteria.

because the lab was full, Student through a chair toward the assistant, sat on top of a table, and threatened to throw a marker at her. The assistant reviewed the rules with Student and told him/her it would not be safe. After the assistant turned, Student threw the marker and hit her. (*Id.* at 2.)

(13) When Student returned to his/her classroom at approximately 2:20 p.m., another student asked why Student was mad. Student did not answer, but took the other student's notebook and struck him in the abdomen. The other student fell to the floor and was crying. Student began to tear items off of a white board in the classroom and then picked up a tray of pencils and threw them across the room, striking some students. The school principal, Carol Whitten, approached Student and kneeled on the floor with him/her and attempted to calm him/her down. Ms. Whitten asked Student to take four deep breaths with her and Student complied. After a few minutes, Ms. Whitten asked Student to come to the office with her. Student at first refused, but later agreed to go. At the office, Student began kicking chairs. Student remained in the office for approximately one hour before being picked up by Mother. (*Id.* at 2-3.) As a result of Student's behavior that day, Ms. Whitten suspended Student through September 24, 2007. (Ex. D17.)

(14) On September 24, 2007, the District held a meeting of Student's IEP team to discuss Student's reintegration to school following the suspension. (Ex. D21.) The District did not consider this to be an extension of the disciplinary process, but wanted to gather additional information about Student to address ongoing behavioral difficulties and how they were interfering with Student's education. (Test. of Whitten, tr. at 244-46.)

(15) At the September 24, 2007 meeting, the District team members determined that Student should be placed in a "diagnostic placement" in the school's library working one-on-one with an educational assistant for three hours per day. The District's team members did not believe that it would be appropriate to return Student to his/her regular education classroom at that time. (Ex. D23.) At the meeting, Mother stated that she thought the District was trying to do the right thing, but did not want Student's school hours reduced and thought that the placement was too long. (Ex. D21 at 13.)

(16) On October 9, 2007, the IEP team met to review the diagnostic placement. All participants agreed that the placement had not gone well. While in the placement, Student failed to follow directions, left the room without permission, threw items at the educational assistant, struck the assistant and displayed a defiant attitude. Parents expressed concern that Student was angry as a result of the placement. Student's psychologist, Tim Kopet, Ph.D., also believed the placement was having a negative effect on Student. Parents expressed concern that the District was moving toward placement in its AIM program.⁵ Mr. Tomblin denied that the District was trying to move Student to Aim. (Ex. D26.)

(17) During the October 9, 2007 IEP meeting, the District offered to keep Student placed in the library working one-on-one with an educational assistant, but reduced the number of hours offered to one hour per day. In addition, the District proposed that Student be given additional time for peer interaction, at lunch and recess, if Student's behavior improved. Mother was upset by the offer. She gave the District a due-process hearing request and left the meeting. Although Father remained at the meeting and discussed how the District's offer would be implemented, he

⁵ AIM is a self-contained classroom designed for students with behavioral difficulties.

disagreed with the placement. (*Id.*)

(18) On October 10, 2007, Mother brought Student to school and sought to return Student to his/her regular education classroom. Mother contended that Student had the right to be placed in the regular education classroom under the “stay put” provisions of the IDEA as a result of filing the due-process hearing request. Ms. Whitten, after consulting with Mr. Tomblin, told Mother that Student would not be allowed to attend regular education classes, and that the placement for purposes of stay put would be three hours per day in the school library. Mother and Student then left the school. (Test. of Whitten, tr. at 265.)

(19) Sometime following October 10, 2007, Mother enrolled Student in Willow Cottage, a private home school setting. (Ex. S1 at 5.)

(20) On October 25, 2007, Ms. Whitten wrote a letter to Parents acknowledging that Student had been enrolled in a private school. Ms. Whitten wrote that the District remained willing to provide special education services as determined by the IEP team should Student reenroll in a District School. (Ex. D29 at 1.) Later Ms. Whitten learned that Willow Cottage was not a private school, but was actually a home school which held a different legal status. (Test. of Whitten, tr. at 266-69.) On October 30, 2007, Ms. Whitten again wrote to the Parents, this time acknowledging that Student had been enrolled in a home school. Ms. Whitten wrote that Student may be eligible to receive special education services if the IEP team determined that it was possible to provide a Free Appropriate Public Education in conjunction with home schooling. Ms. Whitten invited Parents to contact the District for an IEP meeting if they wished to pursue that option. (*Id.* at 2.)

(21) On November 17, 2007, following mediation, Parents and the District entered into an agreement settling the issues raised by Parents due process hearing request. As part of that agreement, the parties agreed to hold two additional facilitated IEP meetings. (Ex. D30.) The agreement also provided as follows:

As a result of the Parent’s [sic] disagreement with the District’s determination of the Child’s placement, the Parents have unilaterally placed the Child in a private home-school setting. The District remains ready and willing to serve the Child’s educational needs. Until the District’s IEP team determines otherwise, should the parents re-enroll the Child into the District, the District will provide the Child with one hour per day of tutoring with a certified teacher in the school setting with the optional reward of additional general education time each day.

(*Id.* at 4.)

(22) On December 21, 2007, the IEP team met with a facilitator. Parents were present along with an advocate, Rhoda Golden. The team determined that Student did not qualify for services under the category of Emotional Disturbance and that the District would extend Student’s eligibility under the category of Other Health Impaired until further testing was completed. The District also agreed to pay up to \$1,000 toward the cost of a neuropsychological examination. The District also offered to provide up to five hours per week of tutoring at a community site until the assessments were completed or the IEP team developed a mutually agreed plan for additional services. (Exs. D32, D35.)

(23) On December 27, 2007, the District wrote to Nancy Bryant, Ph.D, requesting an
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evaluation of Student. The District stated that it would be liable for payment for the evaluation at a cost not to exceed \$1,000. (Ex. D38 at 2.)

(24) On January 7, 2008, the District mailed a Prior Notice of a Change to Special Education Program or Placement outlining the results of the December 21, 2007 IEP meeting. (Ex. D35.)

(25) The District provided tutoring for Student until February 14, 2008 when the tutor quit the assignment. (Test. of Tomblin, tr. at 1765-67; test. of Mother, tr. at 2008-09.)

(26) On February 15, 2008, Parents submitted an enrollment form seeking to reenroll Student at Palisades Elementary School. Parents had no expectation that the District would allow Student to resume attendance in a regular education classroom and made no attempt to bring Student to the school for classes. Mother submitted the form because she “wanted to see what [the District] would do.” (Test. of Mother, tr. at 2010-11.)

(27) On February 22, 2008, Dr. Bryant, prepared a psychological evaluation of Student. Dr. Bryant noted that Student had been diagnosed with sensory integration disorder and had other cognitive challenges that contributed to [] behavioral difficulties. Dr. Bryant concluded that Student had strong intellectual potential, but faced an unusual pattern of challenges that led to some of the difficulties at school. (Ex. D38 at 19.) Dr. Bryant mailed the report to the District on March 11, 2008. (*Id.* at 1.)

(28) Student’s diagnosis was later clarified to Sensory Processing Disorder (SPD). (Test. of Sterling, Tr.-127E at 185.) As a result of [] SPD, Student has difficulty with auditory and touch processing which is confusing and frustrating for him/her. S/he has a poor tolerance when there is significant environmental sensory input often resulting in emotional outbursts. (Ex. S5-127E at 2.) SPD is a diagnosis typically used in the field of occupational therapy, and not in the field of psychology. There is a split of authority as to whether SPD is a stand-alone diagnosis or is a constellation of symptoms associated with other diagnoses. (Test. of Sanders, Tr.-127E at 982-985.) While there is agreement that Student has SPD, no one has developed a complete understanding of how it affects Student. (Test. of Kopet, Tr.-127E at 644-45.)

(29) On March 11, 2009, the District wrote a letter to the Child Development and Rehabilitation Center (CDRC) to inquire about a potential evaluation of Student. The letter states that the evaluation was not intended to be an independent educational evaluation, but that it was being initiated by the District with the consent of the parents. The District asked for a cost estimate and a description of the scope of the assessment. In particular, the District noted that the Parents would not consent to the use of projective assessments. The District believed that projective assessments would be helpful and wanted to know what alternative assessment tools would be used by CDRC. (Ex. S25.)

(30) The District ultimately decided not to have Student evaluated by CDRC because CDRC would not agree to allow a District representative to be part of the team providing input on the evaluation process. (Test. of Sanders, tr. at 1375-76.) The Parents, believing the evaluation would be helpful, paid for the evaluation themselves. (Test. of Mother, tr. at 2021) They did not share the results of the evaluation with the District. (Test. of Sanders, tr. at 1377.)

(31) On March 31, 2008, the IEP team met with a facilitator. Parents participated in the meeting along with their advocate, Ms. Golden. (Ex. D40.) As a result of that meeting, the team

identified Student as eligible for services under the category of Other Health Impaired based on Student's diagnosis of sensory integration disorder. (Ex. D41 at 1.) The team agreed to meet again on April 21, 2008. (Ex. D40 at 7.)

(32) On March 31, 2008, the District prepared a Prior Notice of a Change to Special Education Program or Placement summarizing the results of the IEP team meeting. The Notice recited that the team would meet again to develop an IEP. The Notice also recites that the Parents did not want tutoring services at that time. (Ex. D42.)

(33) On April 21 and 28, 2008, the IEP team met to discuss placement. Parents attended both meetings along with Ms. Golden. As a result of the meetings, the District offered to place Student in the AIM classroom. The Parents did not want to place the Student in AIM, but asked for additional time to visit the program. Parents and the District were ultimately unable to agree on placement. (Exs. D43-D46.) Parents were unwilling to accept the District's offer to place Student in the AIM program and, consequently, Student did not return to a District school at any time in 2008. (Test. of Mother.)

(34) The April 28, 2008 IEP provided for the following specially designed instruction (SDI):

- 30 minutes per week of Occupational Therapy Services for four weeks;
- 300 minutes per week for social/behavioral services;
- 30 minutes per week for social/communication services.

(Ex. D47 at 2.) In addition, the IEP provided for visual and verbal cueing, a designated calming space, preferential seating, adult support for transitions, modeling and practice calming, a behavior plan, a sensory diet, visually simplified assignments, graphic organizers, checking for understanding, extra time for tasks, adult proximity during recess, and an occupational therapy protocol. (*Id.* at 2-3.) District members of the IEP team believed that the IEP could not be successfully implemented in a regular education setting due to the excessive amount of time that Student would need to devote to SDI. The District team members were also concerned about the amount of time that Student had previously been out of class as a result of behavioral difficulties. (Ex. D46-4-7.)

(35) The April 28, 2008 IEP states that Student would "participate in regular school activities and classes as deemed appropriate by the IEP team." (Ex. D58 at 2.) On the placement page, the IEP explains that the team, over the objection of the parents, selected placement in a "[s]pecial class with support for social/emotional," which team members understood meant the DELTA program. As an explanation as to why the option was selected the placement page states "Selected by team as least restrictive environment to address revised IEP (10/7/2009)." (*Id.* at 14.) With regard to the regular education placement, the IEP states that the option was rejected because it was not the least restrictive environment in which the IEP could be implemented. The IEP notes, as potential harmful effects, that the regular education setting was less structured, less predictable, and would require multiple transitions. (*Id.*)

(36) On April 8, 2009, Student's IEP team met at the District's Bryant Elementary School to discuss the possibility of Student reentering the public school system. Parents attended the meeting, as did Dan Sterling (Bryant's Principal), Mark Snook (a general education teacher),
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Mr. Tomblin, Tim Kopet (Student's psychologist), James Sanders (LOSD's clinical psychologist), and other District personnel. As a result of the meeting, the team developed an IEP and a Behavioral Support Plan (BSP.) (Ex. S14-127E.)

(37) Student began attending Bryant on May 14, 2009. (Ex. D20-127E at 1.)

(38) On June 2, 2009, Student had a miniature plastic toy rifle at school. Another student told Student s/he was not allowed to bring the rifle to school. Student kicked the other student in the crotch. (Ex. D5-127E at 1.)

(39) Also on June 2, 2009, Student pulled a large weed out of the school garden area and threw it on the sidewalk. A teacher asked Student to pick it up. Student first hid, and then refused. When another teacher asked him/her to sit on a bench with other children, Student answered "Why don't you see that I don't want to do that crappy thing?" (Ex. D5-127E at 2; test. of Sterling, tr.-127E at 168.)

(40) On June 4, 2009, Student was in class with a paper bag on his/her head. Another student tapped the side of the bag to get Student's attention. Because the bag amplified the sound of the noise, Student thought the other student was slapping him/her. Student punched the boy in the head, said "what the hell?" and then kicked the student in the back. When Student's teacher, Mr. Snook, called Student over to discuss it, Student said "What the fuckin' hell?" (Ex. D5-127E at 1.)

(41) On June 8, 2009, Student got angry near the end of a PE (physical education) class because s/he believed that another student was not following the rules. Student pulled the child by the hair and punched him in the chest. (*Id.*)

(42) Right after PE, Student was waiting to use a drinking fountain when another student tried to cut in front of Student. Student pushed other student on [] face, causing him to fall. (*Id.*)

(43) Student was sent to the school's office to speak with the Principal, Mr. Sterling. While waiting, a school secretary asked Student to sit in a chair. Student stated that s/he did not want to sit in the "fuck-ass chair." (*Id.*) S/he then threw pens and rulers backwards across the room, nearly striking a secretary. (*Id.*)

(44) On June 10, 2009, Student punched another student in the face when playing a game. The other student had placed [] hand on Student's shoulder just before Student hit him. Student ran away and hid behind some bushes. Later in the day, Student punched a student in the cheek and then kicked him in the area of his/her upper thigh or crotch. Student then ran toward a neighboring middle school. When another student asked what was wrong, Student slapped her across the face. (*Id.*)

(45) Mr. Sterling met with Student after every behavioral incident in June 2009 and also spoke with Student's Mother. Mr. Sterling did not think it was in Student's best interests to suspend him/her for the incidents in part because Student was new to the school. Mr. Sterling also believed that Student was making progress in trying to improve his/her behavior and to recognize signs that his/her SPD was causing him/her to be over-stressed. Mr. Sterling also believed that Student? Or Mr. Sterling? was getting significant support from Mother in dealing with Student's behavior. (Test. of Sterling, tr.-127E at 71-75.)

(46) On September 18, 2009, Mother called Mr. Sterling and told him that Student did not want to come to school. Mr. Sterling then spoke on the phone with Student. Student told Mr. Sterling that s/he was afraid that something bad was going to happen because of a couple of events the previous evening. Student told Mr. Sterling that s/he believed that in the past poor behavioral incidents occurred in clusters of four. Mr. Sterling persuaded Student to come to school. (Test. of Sterling, tr.-127E at 82-84; Ex. D5-127E at 2.)

(47) On September 23, 2009, Student ripped up a worksheet in class. Student left the class and spoke with another teacher. A brief time later, Student returned to the classroom and was reminded to complete his/her work. Student called the teacher a “shit head.” The teacher sent Student to the school office. As student left the classroom, s/he threw a large box of pencils on the ground. (Ex. D5-127E at 2.)

(48) On September 24, 2009, Student became upset with an educational assistant who was helping Student to organize his/her desk. Student became increasingly upset, and directed loud and abusive profanity at the assistant. Student then kicked the assistant in the abdomen. (*Id.*) The assistant had a hysterectomy over the summer and had to go to the hospital as a result of the kick. (Test. of Sterling, tr.-127E at 86.) After kicking the assistant, Student picked up a large container of pencils and threw it at the assistant and the teacher. Student then kicked a wagon, scattered his/her lunch on the floor, and ripped posters off of the wall. (Ex. D5-127E at 2; test. of Sterling, tr-127E at 86-88.)

(49) As a result of the September 24, 2009 incident, the District suspended Student through October 7, 2009. (Ex. D5-127E at 3.) The school scheduled an IEP meeting for October 7, 2009 to review Student’s IEP and placement. (Ex. D6-127E at 1.)

(50) Dr. Kopet spoke with Dr. Sanders in a phone call prior to the October 7, 2009 IEP meeting. Dr. Kopet told Dr. Sanders that he was concerned about Student’s potential placement in the DELTA program Dr. Kopet believed, at that time, that Dr. Sanders was open to placement options other than DELTA. (Test. of Kopet, tr. at 676-77.) On October 5, 2009, Dr. Kopet provided a letter to the Parents explaining how Student’s negative attitude toward DELTA could pose a barrier to success in that placement. (Ex. S42.)

(51) Dr. Kopet had no direct knowledge of the DELTA program itself. However, Dr. Kopet believed that Student’s extremely negative perception of the program would make it likely that Student would fail. Dr. Kopet believes that such a failure, in light of Student’s history, could create lasting psychological damage. (Test. of Kopet, tr. at 690-92.)

(52) At the October 7, 2009 IEP meeting, Mother noted Student’s negative attitude toward DELTA and admitted that she may have played a role in Student developing that impression. (Ex. D57 at 8.) This concern was specifically documented in the IEP. (Ex. D58 at 14.)

(53) Parents attended the October 7, 2009 IEP meeting. At the meeting, Mr. Tomblin stated that the disciplinary matter had been resolved, but that the incident caused the District to want to review the IEP. (*Id.* at 15.) The members of the team discussed a number of placement options. Ultimately, the District offered to place Student in its DELTA program.⁶ (Ex. D6-

⁶ DELTA stands for Daily Educational Learning Tools for Achievement and is self-contained class designed for students with behavioral problems. (Test. of Sanders at 965-969.)

127E.) Although Parents did not agree to that placement, they agreed to visit the program for an intake meeting. (Test. of Tomblin, tr.-127E at 1600-1603.)

(54) The District told Parents that it would schedule a meeting at DELTA on Monday, October 12, 2009. Parents did not understand that a meeting at DELTA was scheduled for that day, but believed that the IEP team would be holding another placement meeting. (Ex. D7-127E.)

(55) Student had been suspended a total of eight school? days as of October 7, 2009. Because the District was not ready to admit Student to the DELTA program as of Friday, October 8, 2009, Student was not scheduled to attend classes. Mr. Sterling viewed this as an extension of the suspension. However, because Mr. Sterling understood that there would be an intake meeting at DELTA on Monday, October 12, 2009, he did not believe that day was part of the suspension. (Test. of Sterling, tr.-127E at 225-227.) The District thus concluded that Student had been suspended for a total of nine school? days. (Ex. D20-127E at 1.)

(56) On October 12, 2009, Parents did not visit the DELTA program, but filed a request for a due process hearing. As part of that request, the Parents invoked the “stay put” provisions of the IDEA and intended to have Student return to his/her regular education classroom. (Ex. S1-127E; Test. of Mother, tr.-127E at 1746.) On October 13, 2009, an attorney for the District e-mailed Mother and told her that the District would not allow student to return to the regular education classroom and would be seeking a temporary restraining order (TRO) to prevent such a return. (Ex. S28-127E at 6.)

(57) On October 15, 2009, the District filed a complaint with the Clackamas County Circuit Court seeking a TRO. The Parents filed a response. Later, on that same date, the Court denied the District’s request. (Ex. S11-127E.)

(58) Also on October 15, 2009, the District filed an expedited due process hearing request pursuant to OAR 581-012-2430 seeking an order from the an ALJ to change Student’s placement to an interim alternative educational setting for not more than 45 days based upon the District’s assertion that returning Student to the regular educational setting was substantially likely to result in injurious behavior. (Ex. D10-127E.) The District withdrew this hearing request after the parties reached an agreement in principal that would have placed Student at Heron Creek, a program operated by the Clackamas Educational Service District. (Exs. D14-127E, D15-127E.)

CONCLUSIONS OF LAW

Case No. DP 09-110

The District did not violate the IDEA, or fail to provide the student a Free and Appropriate Public Education.

1. The District was not required to conduct a manifestation determination prior to changing the student’s placement on October 9, 2007.
2. The District was not required to return the student to [] regular class on October 10, 2007.

3. The District provided appropriate prior written notice to the parents prior to changing the student's placement.
4. The District did not fail to implement the December 6, 2006 IEP.
5. The District did not fail to provide tutoring per a prior written notice dated January 7, 2008. The District was not required to continue tutoring after February 14, 2008.
6. The District did not fail to place the student in the least restrictive environment from December 21, 2007 through May 4, 2009.
7. The District did not fail to provide occupational therapy as requested by the parents.
8. The District did not fail to provide the parents a meaningful opportunity to participate in a placement discussion on April 28, 2008.
10. The District was not required to pay for an evaluation requested by the parents.

Case No. DP 09-121

The District did not violate the IDEA, or fail to provide the student a Free and Appropriate Public Education.

1. The District was not required to conduct a manifestation determination prior to changing the student's placement following a suspension on September 24, 2009.
2. The District provided a justification for a change in placement at an October 7, 2009 IEP meeting.
3. The District considered the harmful effects of the placement offered by the District on October 7, 2009.
4. The scope of the hearing did not include the issue of whether the District violated the IDEA by failing to allow Student to return to school on October 13, 2009 after the Parents filed a request for a due process hearing.

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).

Student qualifies for and has been provided special education services by District under the IDEA. Student attended the District's Palisades Elementary School in Kindergarten through the beginning of [] second grade year. From October 2007 through May 2009, Student was placed in a private home school setting. In May 2009, Student re-entered the public school system and began attending the District's Bryant Elementary School.

The issues raised by the Parents in their two due process hearing requests are addressed separately below.

I. Case No. DP 09-110

1. Did the District violate the IDEA by failing to conduct a manifestation determination prior to changing the student's placement on October 9, 2007?

When a school district changes the placement of a student receiving special education services based on behavior that violates a student code of conduct, the District is required to conduct a review to ascertain whether the behavior was a manifestation of the student's disability. That review must be conducted within ten days of the decision to change the student's placement. If the IEP team, including the parents and necessary school personnel, determines that the behavior was a manifestation of the disability, then the school district must follow specific statutory criteria to address the incident; the district may not apply its normal disciplinary process. On the other hand, if the IEP team determines that the behavior is not a manifestation of the student's disability, then the school may apply the same disciplinary standards applicable to regular education students. 20 U.S.C. § 1415(k)(C); 34 C.F.R. § 300.530(c); OAR 581-015-2415(5).

On September 20, 2007, Student was suspended following a serious behavior incident at school. Throughout the course of the day, Student engaged in a series of actions that included refusing to do school work, and throwing a chair, and later a marker, toward a staff member. The series of incidents culminated in Student striking another student in the abdomen with a binder, throwing a tray of pencils, and tearing work off of a white board in the classroom. As a

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result of this incident, Student was suspended and did not return to school until September 25, 2007.

On September 24, 2007, Student's IEP team met. District team members, over the objection of the Parents, changed Student's placement from regular education to three hours per day in the school's learning resource center. On October 9, 2007, the team met again to discuss Student's progress. All team members agreed that the placement had not been successful. District team members, again over the objection of the Parents, changed Student's placement by reducing [] time in the learning center to one hour per day.

In the present case, Parents have *not* alleged that the District was required to conduct a manifestation determination with regard to the September 24, 2007 decision to remove Student from regular education. Rather, it is the October 9, 2007 decision to reduce Student's school hours that is at issue.

The problem with the allegation is that there is no evidence that the District made the decision to reduce Student's school hours based on a violation of a student code of conduct. Although the District had concerns about Student's behavior in the diagnostic placement, the evidence demonstrated that the District was chiefly concerned about Student's ability to be successful in the placement; not whether he/she had violated a specific code of conduct. At the hearing Mother described the placement as a "disaster." While the Parents may have believed that the District's response to the situation was inappropriate, the evidence did not suggest that the reduction in hours was anything other than a response to an unsuccessful placement. In short, the evidence did not establish that the reduction in hours on October 9, 2007 was intended as a method of discipline.

The District would have been required to conduct a manifestation determination with regard to the October 9, 2007 change in placement only if the change was "because of a violation of a code of student conduct." The evidence did not establish that this change was due to such a violation. Therefore, the District was not required to conduct a manifestation determination at that time.

Even if the October 9, 2007 change in placement was viewed as a disciplinary response to the September 20, 2007 incidents, however, the Parents did not demonstrate that a failure to conduct a manifestation determination resulted in a denial of FAPE. At the time of the incident in question, neither the District nor the Parents knew that Student had a sensory processing disorder. At that time, the only identified disability was a communication disorder. There is no evidence to suggest that Student's behavioral difficulties were related in any way to [] communication disorder. Rather, the evidence strongly suggests that Student's behavioral problems were, at least in part, the result of [] sensory processing difficulties. Thus, if the District had conducted a manifestation determination, the likely result would have been a finding that Student's behavior was not related to [] identified disability.

2. Failing to return the student to [] regular class on October 10, 2007.

On October 9, 2007, Parents filed a due process hearing request. On October 10, 2007, Parents sought to return Student to the regular educational classroom pursuant to the "stay put" provisions of the IDEA. The District would not allow the student to return to that setting, but

instead offered to allow Student to return to the diagnostic placement that had been in place since September 24, 2007.

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.

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). On September 24, 2007, following an IEP meeting, the District changed Student's placement from [] regular education classroom to three hours per day in the school's library working one-on-one with an educational assistant.

Although the parents did not agree with that placement, they did not file a due process hearing request until October 9, 2007, after the District offered to reduce Student's school time to one-hour per day. The stay put provisions of the IDEA operate as an automatic injunction, designed to maintain the status quo pending the outcome of a hearing. As of October 9, 2007, the status quo was the three hour per day placement in the school library. Nothing in the IDEA required the District to return Student to the regular education classroom pending resolution of the hearing.

3. Failing to provide prior written notice to the parents prior to changing the student's placement.

Parents have alleged that the District failed to give an adequate Prior Written Notice (PWN) with regard to changes in placement on October 9, 2007, March 31, 2008, and May 1, 2008. OAR 581-015-2310 provides, in relevant part:

(1) Prior written notice must be given to the parent of a child, and to the adult student after rights have transferred, within a reasonable period of time before a school district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(2) Prior written notice must be given after a decision is made and a reasonable time before that decision is implemented.

On October 11, 2007, the District mailed a PWN to the Parents concerning the October 9, 2007 decision to change Student's placement. The District provided PWN with regard to the March 31, 2008 IEP meeting. On May 5, 2008, the District mailed a PWN concerning the placement change decided at the April 21 and 28, IEP meetings.

Parents assert that the District's October 11, 2007 PWN was deficient because it was mailed after Parents filed a due process hearing request on October 9, 2007. That assertion is without merit. The District had not made the decision that was the subject of the October 11, 2007 PWN until the October 9, 2007 meeting. Before that meeting was concluded, Mother served a due process hearing request and left. Under those circumstances, it would have been impossible for the District to provide PWN before being served with the due process hearing request. Furthermore, the District never implemented the change addressed in the PWN because Student did not return to a District school until the following school year.

With regard to the March 31, 2008 PWN, the Parents have not clearly identified any deficiencies. The only change discussed in the PWN is that Student had been identified as meeting the criteria for services under the Other Health Impaired category. The PWN states, accurately, that Student was then being home schooled and that the District had offered to provide five hours of tutoring per day. The Parents offered no evidence to establish that the PWN was untimely or inaccurate. To the contrary, the PWN reflected the District's determination that Student qualified for additional services as a result of [] sensory processing issues. Parents agreed with that determination.

With regard to the May 5, 2008 PWN, the Parents failed to identify with any specificity how the PWN was deficient. In their closing brief, Parents cite to arguments they made in a previous complaint to the Oregon Department of Education. As noted by the Department, the PWN addressed decisions made at the April 28, 2008 IEP meeting. The Parents participated in that meeting and strongly disagreed with the placement decision offered by the District. The Parents did not return Student to school following that meeting and the proposed change was never implemented. Thus, the PWN was provided to the parents within a week after the April 28, 2008 IEP meeting and discussed a change that was never implemented. That was sufficient to meet the District's legal obligations.

4. Failing to implement the December 6, 2006 IEP

At the hearing, the Parents asserted that the District failed to implement the December 6, 2006 IEP by failing to follow the BIP on three specific dates: June 6, September 12, and September 20, 2007. The evidence did not support those allegations.

On June 6, 2007, an educational assistant overheard Student call another child "stupid" and was admonished by an educational assistant. Nothing in the Student's IEP prohibited that admonishment or required a different response. The IEP required school personnel to take specific action if Student became physically aggressive. Later during the incident, Student became physically aggressive when s/he struck the assistant with a tether ball. S/he then immediately ran away. The assistant approached Student and eventually convinced him/her to return to the school. The BIP did not require the assistant to force Student to go to a "calming place" under these circumstances.

On September 12, 2007, Student ran from the teacher and hid under a desk. There is no evidence that Student ever became physically aggressive. The IEP did not require the teacher to follow any specific protocol under these circumstances.

Student did become physically aggressive on September 20, 2007. In a ten minute period, s/he threw a chair and a marker at a library assistant and struck a student with a binder. S/he then tore down items from the wall and threw a tray of pencils. The school principal, Ms. Whitten immediately took steps to calm Student. This included kneeling and taking deep breaths with him/her. Ms. Whitten took reasonable steps under volatile circumstances aimed at calming Student and defusing the situation. The IEP did not demand more.

5. Failing to provide tutoring per a prior written notice dated January 7, 2008.

In a PWN dated January 7, 2008, the District offered to provide Student up to five hours per week of tutoring, at a community site, until a number of assessments were complete to determine if Student was eligible for services under the category of Other Health Impaired. At the time of this offer, Student was being home schooled. OAR 581-021-0029(5) provides, in relevant part:

District responsibilities for home schooled children with disabilities:

(a) When the district receives notice that a parent intends to home school a child with a disability or that a child with a disability is being home schooled, the district shall offer, and document to the parent;

(A) An opportunity for the child to receive special education and related services if the child were enrolled in the district; and

(B) An opportunity for IEP meeting to consider providing special education and related services to the child with a disability in conjunction with home schooling.

(i) An IEP shall only be developed for a child with a disability if the IEP team determines that a free appropriate public education can be provided in conjunction with home schooling.

Thus, unless and until an IEP meeting is held, a school district is under no obligation to provide services to a home schooled child with a disability. At the time of the January 7, 2008 PWN, no IEP meeting had been held for that purpose. In fact, the PWN reflected the results of a December 21, 2007 IEP meeting in which all parties agreed to further evaluations which culminated in additional meetings on March 31, April 21, and April 28, 2008. The District, looking at a potential return of Student to a District school, offered tutoring as part of an overall plan to reintegrate Student into the public school system. When the tutor quit on February 14, 2008, the District offered to hold an IEP meeting to discuss providing services in conjunction with home schooling. This was consistent with the District's legal obligations under OAR 581-021-0029(5). The Parents never requested such a meeting. Under these circumstances, the District was under no legal obligation to continue to provide services to a home schooled child.

6. Failing to place the student in the least restrictive environment from December 21, 2007 through May 4, 2009.

From December 21, 2007 through the April 28, 2008 IEP meeting, Student was being home schooled; therefore the District did not place student in *any* environment. During that time, the parties were arranging for various evaluations which culminated in an IEP that included an offer to place Student in the AIM program.

The Parents attempted to enroll Student at Palisades on February 15, 2008. Pursuant to the terms of a mediated settlement agreement, the Parents were on notice that such reenrollment would mean that Student would be provided one hour per day of tutoring in the public school setting “[u]ntil the District’s IEP team determines otherwise.” Thus, when they attempted to reenroll Student, they did so with the knowledge that the placement would be one hour of tutoring until the evaluations were complete and the IEP team met. Despite the attempted reenrollment, the Parents never returned Student to Palisades under the placement set forth in the mediated agreement.

In the mediated settlement agreement, the Parents, in essence, agreed to a process that included an evaluation period. The Parents also agreed to accept tutoring, in the public school setting, during that evaluation period should they attempt to re-enroll Student. Pending the outcome of the evaluation, the District was under no obligation to offer services beyond those agreed upon in the mediated settlement agreement.

As a result of the April 28, 2008 IEP meeting, the District offered to place Student in its AIM program. Parents contend that this was not the least restrictive environment in which the IEP could be implemented. OAR 581-015-2240 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.

On April 28, 2008, the IEP team met and determined that the level of services required by the IEP could not be satisfactorily implemented in the regular education setting due to the excessive amount of time that Student would be removed from the classroom. District personnel were already concerned about the amount of class time that Student had experienced in the past. Student’s absence from the classroom would likely have increased as a result of the IEP. Parents have not shown that the District team member’s decision was unreasonable or that placement in the AIM program was not the least restrictive environment in which the April 28, 2008 IEP could be implemented.

classroom. This includes: 1) Whether the student is receiving an educational benefit from being in the regular classroom; 2) Whether the student is receiving any non-academic benefits from being in the regular classroom; 3) The effect of the Student's placement on the teacher and other students; and 4) The relative costs of the placements.

In this case, the cost of the placements was not at issue. However, the evidence did establish that Student's behavior, and [] frequent absence from the classroom, was interfering with any ability to benefit from the regular education environment. Furthermore, the extensive amount of specially designed instruction contemplated by the April 28, 2008 IEP would have made it difficult for Student to be successful in the regular education environment. The evidence demonstrated that the District had precisely these kinds of concerns in mind when it determined to place Student in the AIM program.

7. Failing to provide occupational therapy as requested by the parents.

At the hearing, the Parents withdrew the issue of whether the District violated the IDEA by failing to provide vision therapy. They did not withdraw the related issue of whether the District violated IDEA by failing to provide occupational therapy (OT). However, the Parents did not present evidence on that issue, nor did they address it in their closing brief.

In their complaint to the Oregon Department of Education (ODE) the Parents contended that the District erred, in the April 28, 2008 IEP, by limiting OT services to the first four weeks of the IEP. Parents argued to the ODE that Student should have been provided such services for the duration of the IEP. Because Student did not enroll in a District school under the April 28, 2008 IEP, however, Student never began the four weeks of OT and thus the District never had an opportunity to consider whether more was necessary. Given the nature of Student's SPD, it is certainly possible that Student would have benefited from additional OT services. However, the District did not fail to provide such services, it merely limited the initial offer to the first four weeks. If after the initial four weeks of services it became apparent that additional OT services were necessary, then, hypothetically, the District may have been required to provide them under the IDEA. However, the IDEA did not require the District to make such an open-ended offer of OT services in the April 28, 2008 IEP itself.

8. Failing to provide the parents a meaningful opportunity to participate in a placement discussion on April 28, 2008.

At the hearing, Parents contended that the District prevented them from meaningfully participating in the April 28, 2008 placement discussion because Parents were not allowed to visit the AIM program prior to making a placement decision. Parents contend that such a visit would have allowed them to make a more informed decision regarding placement and, consequently, would have allowed them to provide more cogent input in the placement discussion.

As a general matter, Parents are correct that a discussion of any significant action is likely to be more productive when all parties have sufficient information. However, nothing in the IDEA requires a school district to provide parents an opportunity to develop expertise regarding a program before the parents can meaningfully participate in a placement discussion. Indeed, such a requirement would likely be unworkable. In any IEP meeting, a district's team members are likely to have more information regarding educational options than the parents, who, as a

general matter, will not be educational experts. Nothing in the IDEA requires the District to level the playing field by allowing a full pre-meeting investigation of any potential placement options. It was sufficient that the team members present were able to provide the Parents enough information to allow the Parents to provide meaningful input regarding their concerns about Student's placement.

The April 28, 2008 IEP resulted from a months-long process that included evaluations, and at least four meetings of the IEP team (December 21, 2007 and March 31, April 21, and April 28, 2008.) Parents were present at each meeting and were given the opportunity to provide input personally and through an advocate. Although the Parents were clearly, and vocally, opposed to the AIM placement, they were given a full opportunity to discuss that placement option at the April 28, 2008 IEP meeting.

9. Refusing to pay for an evaluation requested by the parents

Parents contend that the District was obligated to pay for an evaluation completed by CDRC. On March 11, 2009, the District wrote to CDRC to discuss a potential evaluation of Student. The letter states that the evaluation was not intended to be an independent educational evaluation, but that it was being initiated by the District with the consent of the parents. The District did not commit to the evaluation, but asked for a cost estimate and a description of the scope of the assessment. In particular, the District noted that the Parents would not consent to the use of projective assessments. The District believed that projective assessments would be helpful and wanted to know what alternative assessment tools would be used by CDRC. Nothing in the letter suggests an unqualified agreement that CDRC perform the assessment.

Subsequently, the District decided against the CDRC evaluation when it learned that CDRC would not allow a District representative to participate in the process. The Parents, however, believing that the evaluation would be helpful, had the evaluation performed at the Parents' own expense.

The Parents note the obligation of a District to conduct a reevaluation of a Student upon Parents' request. 20 USC §1414(a)(2)(A) requires the District to conduct a reevaluation of a student under two specific circumstances:

- (i) if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
- (ii) if the child's parents or teacher requests a reevaluation.

The District explored the possibility of having CDRC conduct a reevaluation of Student, but wanted some assurance that the evaluation would provide the kind of information that could be garnered through the use of projective assessments. Having determined that the evaluation would not provide such information, the District determined that the CDRC evaluation would not provide the needed information and thus opted not to go forward.

The Parents appear to argue that once the District expressed a willingness to have CDRC conduct the evaluation, the District was obligated to move forward. Nothing in the IDEA compels such a result. The evidence demonstrated that this potential reevaluation was initiated

by the District and was not the result of a request by the Parents. The District was not obligated to agree to an evaluation if the District concluded that it would not provide information in developing an IEP absent an explicit reevaluation request from Parents or a teacher. No such requests were made in this case.

Case No. DP 09-121

1. Changing the student's placement without conducting a manifestation determination following a suspension on September 24, 2009.

Student was suspended on September 24, 2009 following a serious behavioral incident at school. The District concedes that the suspension was a disciplinary removal. OAR 581-015-2415 provides, in relevant part:

(1) A disciplinary removal is considered a change in educational placement and the school district must follow special education due process procedures if:

(a) The removal will be for more than 10 consecutive school days (e.g. expulsion); or

(b) The child will be removed for more than 10 cumulative school days from their current educational placement in a school year, and those removals constitute a pattern under OAR 581-015-2410(2).

(2) School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a disciplinary removal under subsection (1) for a child with a disability who violates a code of conduct.

(3) Manifestation determination. Within 10 school days of any decision to change the placement of a child with a disability *because of* a violation of a code of student conduct, the school district must determine whether the child's behavior is a manifestation of the student's disability in accordance with OAR 581-015-2420.

(Emphasis added.)

However, for disciplinary removals of 10 days or less, a district is not required to conduct a manifestation determination. OAR 581-015-2405 provides, in relevant part:

(1) School districts may remove a child with a disability who violates a code of student conduct from the child's current educational placement to an appropriate interim alternative educational setting, another setting, or suspension, for up to ten school days in a school year to the same extent, and with the same notice, as for children without disabilities. These removals are not considered a change in placement.

(2) During disciplinary removals described in section (1) of this rule:

* * * * *

(b) School districts are not required to determine whether the child's behavior resulting in disciplinary removal is a manifestation of the child's disability.

Thus, in order for the Parents to prevail on this issue, they had to establish that Student had been subject to a disciplinary removal of more than 10 school days. The Parents did not meet that burden.

On October 7, 2009, the eighth day of Student's suspension, the District convened an IEP meeting to discuss a possible change in placement. The District was concerned that Student's IEP could not be successfully implemented in the regular education setting given the repeated numbers of behavioral incidents that had occurred since Student enrolled at Bryant. That echoed an earlier concern that the District had in 2008 when the District determined that Student's IEP could not be successfully implemented in regular education at Bryant. As part of the IEP process on October 7, 2009, the District made the decision to offer placement in its DELTA program. The District intended to have Student attend an orientation meeting at DELTA on October 12, 2009.

The District did not allow Student to return to school on October 8, 2009 which was therefore the ninth day of the suspension. On October 12, 2009, the tenth day on which Student did not attend classes, the District anticipated that Student would participate in a DELTA orientation with classes at DELTA to begin on October 13, 2009. Thus, as of October 7, 2009, the District anticipated that Student would be out of school for a maximum of ten school days. Even if each of those days is counted as part of the disciplinary suspension, the District had not, as of that date, exceeded the 10 day threshold to require a manifestation determination unless the change in placement to DELTA is considered as a form of discipline. The evidence did not establish that the District changed Student's placement to DELTA as part of its disciplinary process.

Nothing in the IDEA, or in the applicable administrative rules, prohibits an IEP team from changing a student's placement as part of the normal IEP process so long as that change in placement is not imposed as a form of discipline. Where, as here, however, a behavioral issue constitutes both a basis for discipline and a rationale for revisiting a placement decision, finding a neat dividing line between a disciplinary removal and a non-disciplinary change in placement can be problematic. Clearly the District did not want Student returned to the regular educational environment. Given the number of serious behavioral incidents, culminating in an assault on a staff member, the District's concern was warranted. Nevertheless, the IDEA does not require a district to maintain a placement, even where the placement is unsuccessful, simply because behavioral issues might also provide a basis for discipline. Rather, the IDEA prevents a school district from applying its standard disciplinary policies to a student whose offending behavior directly results from a disability. The requirement to conduct a manifestation determination is squarely aimed at situations in which a District wishes to impose extended disciplinary action against a student with a disability. It is not aimed at a situation where a District determines that a change in placement is necessary because a student's behavior interferes with the Student's ability to meet IEP goals in the regular academic setting.

In this case, the evidence established that Student's placement changed as a part of the regular IEP process, not as a form of discipline. Thus, the District was not required to conduct a manifestation determination.

On October 12, 2009, the tenth school day following the suspension, Parents filed the due process hearing request that led to the hearing in this matter. The following day, the Parents attempted to return Student to [] regular education classroom under the stay put provisions of the IDEA. The District, through its attorney, advised Parents that Student would not be allowed to return to school and that it would be seeking a court order to prohibit such a return. The District also filed a request for an expedited hearing under the provisions of OAR 581-015-2360(5)(a)(D) seeking authorization to place Student in an interim alternative placement for up to 45 days. The Circuit Court ultimately denied the requested injunction and the parties eventually agreed to settle the issues raised in the District's expedited hearing request, which was then withdrawn. Student then returned to his/her regular education classroom on October 21, 2009, the 17th school day following [] suspension.

Although Student's extended absence was unfortunate, the evidence did not establish that it was disciplinary. Rather, the District appears to have been motivated primarily by a concern that Student posed a danger to staff and students in the regular education setting. The failure to return Student to regular education on October 13, 2009 was, arguably, inconsistent with its stay put obligations under the IDEA. However, the evidence did not establish that the District acted with an intent to discipline Student. A non-disciplinary change in placement may raise other concerns under the IDEA; but it does not require a district to conduct a manifestation determination. Thus, the change in placement contemplated as a result of a change to Student's IEP on October 7, 2009 was non-disciplinary. The District was not required to conduct a manifestation determination prior to making that change.

2. Failing to provide a justification for a change in placement at an October 7, 2009 IEP meeting.

The Parents assert that the District failed to provide an adequate justification for removing Student from [] regular education class to the DELTA program. Parents assert that this violated the IDEA by failing to offer a justification for removing Student from the regular education environment. In their closing brief, Parents argue that the alleged failure to provide such a justification violated 20 USC §1414(d)(1)(A)(i) which requires an IEP to contain, among other things:

(IV) a statement of the special education and related services and supplementary aids and services, based on peer reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

* * * * *

(c) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc)[.]

This statutory requirement is mirrored, with essentially identical language, in 34 CFR §300.320(a)(5) and in OAR 581-015-2200(1).

Thus, to comply with the statutory requirement, the October 7, 2009 IEP had to include an explanation of the extent to which Student would not be participating with nondisabled peers in the regular class. The IEP contains that explanation. The IEP states that Student would “participate in regular school activities and classes as deemed appropriate by the IEP team.” D58 at 2. On the placement page, the IEP explains that the team, over the objection of the parents, selected placement in a “[s]pecial class with support for social/emotional,” which team members understood meant the DELTA program. As an explanation as to why the option was selected the placement page states “Selected by team as least restrictive environment to address revised IEP (10/7/2009).” Ex. D58 at 14.

The Parents have not explained why the explanation set forth in the IEP falls short of the statutory standard. The IEP explains that Student would need to be removed from participation with nondisabled peers and that he/she would be placed in DELTA. That was sufficient to comply with 20 USC §1414(d)(1)(A)(i)(V).

Although the parents have not cited to any specific statute or administrative rule on point, the due process hearing request asserted that the District failed to provide justification for the removal *at the IEP meeting*. This was not supported by the evidence. The change in placement from regular education to DELTA was discussed extensively at the IEP meeting. The Parents were keenly aware that this would entail Student’s removal from participation in Student’s regular class; indeed, that was one of the chief reasons that Parents opposed the placement. While the parents disagreed with the decision, the District provided ample explanation as to why they believe that DELTA was the appropriate placement.

3. Failing to consider the harmful effect of the placement offered by the District on October 7, 2009.

Parents contend that the District failed to consider the harmful effect of placing Student in the DELTA program. Specifically, Parents note that Student’s treating psychologist believed that placing Student in DELTA could “set [Student] up for failure” due to Student’s very negative attitude about the program. Dr. Kopet had little actual information about the DELTA program, and did not assert that the placement itself could be harmful to Student. However, Dr. Kopet believed that Student’s extremely negative perception of the program would make it likely that Student would fail. Dr. Kopet believes that such a failure, in light of Student’s history, could create lasting psychological damage.

However, Dr. Kopet expressed his concern to the District’s psychologist, Dr. Sanders in a phone call shortly before the October 7, 2009 IEP meeting. Dr. Kopet believed, at that time, that Dr. Sanders was open to placement options other than DELTA. Also prior to the meeting Dr. Kopet provided a letter to the Parents explaining how Student’s negative attitude toward DELTA could pose a barrier to success in that placement. At the IEP meeting, Mother noted Student’s negative attitude toward DELTA and admitted that she may have played a role in Student developing that impression. Furthermore, this concern is specifically documented in the IEP.

The evidence established that Student has a negative perception of DELTA. District personnel admitted that this would pose a challenge in making that placement successful;

however the District believed that the challenge was not insurmountable. While the Parents had a greater level of concern about the potential harm of the DELTA placement than did the District, the evidence did not establish that the District failed to consider those concerns.

4. Stay Put – Jurisdiction

At the hearing, and in their closing brief, Parents asserted as an issue the District's failure to comply with its stay put obligations by failing to return Student to his/her regular education placement on October 13, 2009, the day after the Parents filed the hearing request in DP-09-121. At the time that the Parents filed the due process hearing request, the actions that the Parents assert constitute a violation of stay put had not occurred. Consequently, the hearing request alleges no facts regarding the alleged violation. The Parents did not later amend the request to include such facts.

OAR 581-015-2360(2) provides:

Subject matter of hearing: The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the hearing request unless the other party agrees otherwise.

OAR 581-015-2345(1)(a)(B)(iii) requires a hearing request to include "facts relating to the problem" that is the subject of the hearing request. This rule mirrors federal law which also requires a due process hearing request to include "facts relating to such problem." 20 USC §1415(b)(7)(A)(ii)(III).

Thus, both Oregon and Federal law requires a recitation of facts related to the alleged violation of the IDEA. The due process hearing request in this case contains *no* such facts because all of the facts that the Parents allege as violations of stay put did not occur until after they filed their due process hearing request. Therefore, that issue was not properly within the scope of the hearing.

I realize that this interpretation of the pleading requirements can place parents in a difficult situation. The stay put provisions of the IDEA are intended to operate automatically. That automatic enforcement provision can be frustrated where, as alleged in this case, a school district does not comply. Nevertheless, nothing in the IDEA or its implementing regulations suggests that a parent can enforce the provision by filing a hearing request that anticipates the violation. Where a violation of the IDEA post-dates the hearing request, there is simply no basis for expanding the jurisdiction of the hearing absent agreement by the parties or the filing of an amended or subsequent hearing request.

CONCLUSION

All parties in this case agreed that Student is a remarkable child. S/he has enormous academic potential coupled with a unique set of challenges that result from a sensory disorder. At least in part due to this disorder, Student's behavior at school has often been disruptive to his/her educational progress. The Parents and the District have had a contentious relationship over the last several years based on a number of fundamental disagreements. Both in 2007 and 2009, the District determined that Student would be more successful in meeting the IEP goals in a self-contained classroom. Parents have been opposed to such a placement.

The Parents are clearly motivated by a sincere desire to do what they believe is best for their child. The District, as well, appears willing to try to create an educational environment in which Student can be successful as was demonstrated by the District's willingness to return Student to the regular educational environment in May 2009 despite their earlier concerns. Unfortunately, the parties have not been able to reach a consensus on how best to achieve that goal.

In this case, the Parents have alleged that the District violated the IDEA in several specifically identified ways. For the reasons explained in this decision, I find that the Parents failed to prove those violations. Therefore, the Parents' requested relief must be denied.

ORDER

Parents' request for relief, pursuant to the requests for due process hearing dated June 4, 2009 and October 12, 2009, are **DENIED**.

John Mann
Senior 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 12th day of April, 2010 with copies mailed to:

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