BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF EDUCATION

IN THE MATTER OF:	)	**CONSOLIDATED RULING ON**
	)	**DISTRICT'S MOTION TO DISMISS**
	)	**AND PARENT'S MOTION FOR STAY-**
STUDENT AND SALEM-KEIZER	)	**PUT AND FINAL ORDER OF**
SCHOOL DISTRICT 24J	)	**DISMISSAL**
	)	
	)	OAH Case No. 2024-ABC-06500
	)	Agency Case No. DP 24-011

HISTORY OF THE CASE

On April 30, 2024, Parents filed a request for a due process hearing (Due Process Complaint) with the Oregon Department of Education (ODE or Department) on behalf of Student, alleging that Salem-Keizer School District 24J (District) violated federal and state statutes, federal regulations, and state administrative rules[1] during the period of March 21, 2024, through April 30, 2024. Specifically, Parents object to the termination of a regional deaf/hard of hearing (D/HH) program, operated by the Willamette Education Service District (WESD), and transition to the provision of services to D/HH students in their neighborhood schools. On April 30, 2024, the Oregon Department of Education referred this matter to the Office of Administrative Hearings (OAH) for a due process hearing. The OAH assigned Senior Administrative Law Judge (ALJ) Kate Triana to preside over the contested case hearing in this matter.

On May 30, 2024, the District filed a Motion to Dismiss (MTD) with supporting case law, seeking dismissal of Parents' Due Process Complaint, in its entirety, with prejudice asserting Parents' claims are not ripe for adjudication or otherwise justiciable.

ALJ Triana conducted a prehearing conference, by telephone, on May 31, 2024. Attorneys Anna Moritz and Whitney Hill represented Parents, who also appeared. Attorneys Elizabeth Polay and Colin Milton represented the District. Melissa Glover, the District's Special Education Director, and Iton Udosenata, the District's Deputy Superintendent, also appeared on behalf of the District.

At the prehearing conference, ALJ Triana scheduled this matter for hearing and established filing dates for prehearing motions as well as exhibits and witness lists. At the prehearing conference, the parties expressed a dispute over Student's current educational placement during the pendency of the contested case proceeding. ALJ Triana set this matter for

[1] 20 USC §§ 1400 *et seq*. – the Individuals with Disabilities Education Act – (IDEA); 34 CFR §§ 300 *et seq*.; ORS Chapter 343; and OAR Chapter 581, Division 15.

a second prehearing conference on June 20, 2024 to address this issue.

On June 13, 2024, the parties jointly requested to postpone the June 20, 2024 prehearing conference to allow time for the parties to complete Student's Individual Education Plan (IEP) for the coming school year.[2] Also on June 13, 2024, the OAH reassigned this matter to Senior ALJ Joe L. Allen. ALJ Allen granted the parties' request to postpone the prehearing conference and rescheduled the conference to June 27, 2024.

On June 14, 2024, Parents filed a Response to District's Motion to Dismiss (Response to MTD) along with the Declaration of Anna Brooks, Exhibits A and B, and supporting case law.

ALJ Allen convened a second prehearing conference via telephone on June 27, 2024. Ms. Polay and Ms. Moritz appeared at the conference. At the conference, the parties confirmed their dispute regarding the maintenance of Student's current educational placement pursuant to 20 USC §1415(j)/ORS 343.177(1) (stay-put) and requested the opportunity to brief the issue, which was granted. ALJ Allen set July 19, 2024 as the deadline for Parents' initial brief on the issue and August 2, 2024 as the deadline for the District's response brief.

On June 21, 2024, the District filed its Reply in Support of Motion to Dismiss (Reply) with supporting case law. The ALJ took the matter under review at that time.

On July 3, 2024, Attorney Joel Hungerford, counsel for the Willamette Education Service District (WESD), filed a Motion to Quash, with Exhibit 1 attached, seeking to quash a subpoena issued on July 1, 2024, by Parents' counsel for the purpose of deposing a WESD employee on July 11, 2024.[3] Ms. Moritz filed Parents' Response to Motion to Quash on July 5, 2024. The ALJ took the matter under review on that date. On July 8, 2024, ALJ Allen issued a Ruling on Motion to Quash Subpoena granting WESD's motion and quashing the subpoena of a non-party witness for failure to comply with the applicable administrative rules pertaining to depositions and subpoenas in contested case proceedings before the OAH.[4]

On July 16, 2024, Mr. Hungerford filed a letter on behalf of WESD objecting to Parents' request – contained in the Response to MTD – for leave to amend the Due Process Complaint to add WESD as a party to the contested case proceedings.

On July 19, 2024, Parents' filed their Motion for Stay-Put, the Declaration of Anna Brooks, Exhibits A through G, and supporting case law. On August 2, 2024, the District filed

[2] The parties' request, filed by Ms. Polay, was received by the OAH after normal business hours on June 12, 2024 at 9:20 p.m. Thus, it is considered filed the following business day, June 13, 2024.

[3] Due to the short period between issuance of the subpoena and the commanded appearance, the ALJ issued an order to Parents' counsel via email directing them to file a response to the motion to quash no later than July 5, 2024.

[4] Also on July 8, 2024, Mr. Hungerford filed a reply brief on behalf of WESD in support of the motion to quash. However, as that brief was not contemplated by the applicable administrative rules and was received after issuance of the ALJ's ruling, it was not considered.

District's Response to Parents' Motion for Stay-Put with the Declaration of Elizabeth L. Polay in Support of District's Response to Parents' Motion for Stay-Put and Exhibits 1 through 7 attached thereto.[5] The ALJ took the stay-put matter under review at that time and now issues this consolidated ruling on both motions.[6]

ISSUES

1. Whether Parents' Stay-Put Motion, seeking an order that the District maintain operation of the WESD Center Site Program during the pendency of this administrative adjudication, should be granted. 20 USC §1415(j); 34 CFR §518(a); ORS 343.177(1); OAR 581-015-2400(2).

2. Whether the District's Motion to Dismiss Parents' Due Process Complaint on ripeness grounds should be granted.

DOCUMENTS CONSIDERED

In ruling on the parties' motions, the ALJ considered the following documents: Parents' April 30, 2024 Due Process Complaint; the District's Motion to Dismiss; Parents' Response to District's Motion to Dismiss, Exhibits A and B attached thereto, and the Declaration of Anna Brooks; the District's Reply in Support of Motion to Dismiss; WESD's July 16, 2024 letter objecting to Parents' request to amend the due process complaint; Parents' Motion for Stay-Put, Exhibits A through G attached thereto, and the Declaration of Anna Brooks; and the District's Response to Parents' Motion for Stay-Put, the Declaration of Elizabith Polay along with attached Exhibit 1.

CONCLUSIONS OF LAW

1. Parents' Stay-Put Motion seeking an order that the District maintain operation of the WESD Center Site Program during the pendency of this administrative adjudication should be denied.

2. The District's Motion to Dismiss Parents' Due Process Complaint on ripeness grounds should be granted.

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[5] Exhibit 1 consists of the Special Education Placement Determination page from Student's operative IEP dated November 9, 2023. That document is relevant to the determination of placement during the period in issue. By contrast, Exhibits 2 through 7 are documents dated between June 10 and 24, 2024, each of which applies to amendments to Student's IEP occurring after the filing of the Due Process Complaint in issue. As this tribunal does not take continuing jurisdiction over educational decisions made after filing of a due process complaint, those documents are irrelevant to the current dispute and thus were not considered in reaching this ruling on Parents' Stay-Put Motion.

[6] Because the ALJ determined the District's MTD was dependent, at least in part, on a determination of what constitutes Student's current education placement for the purposes of stay-put, consolidation of the rulings was deemed appropriate.

OPINION

On March 21, 2024, WESD issued a letter to interested parties indicating it would be discontinuing a regional deaf/hard of hearing (D/HH) program – then centralized at Crossler Middle School and Sprague High School within the District (and commonly referred to as the Center Site Programs) – at the end of the 2023-2024 school year and instead providing services for D/HH students in their neighborhood schools.[7] Parents filed the Due Process Complaint at issue in response to WESD's letter. *See* Due Process Complaint at 5; *see also* Exhibit A to Response to MTD.[8]

WESD's letter explained that all services identified in a student's individualized education plan (IEP) would remain in place regardless of the school the student attended. Exhibit A to Response to MTD at 1. In response to inquiries from parents within the District, the District clarified that the decision to terminate the Center Site Programs at Crossler Middle School and Sprague High School was made in response to "declining * * * interest in a center-based program and an increased interest from families in keeping their children in their neighborhood school, especially at the secondary level." Exhibit G to Parents' Stay-Put Motion at 3. The District also reiterated that all services in identified in a student's IEP would continue in the neighborhood school and no cuts were planned as a result of the shift to a decentralized service delivery model. *Id*.

As relevant to this consolidated ruling an order, Student was found eligible for special education services under the categories of D/HH and other health impairment (OHI). At the time Parents filed the Due Process Complaint, Student was served by an IEP effective November 2, 2023 identifying specially designed instruction (SDI) and related services[9] for Student through

[7] The Center Site Programs were supported and shared by WESD and the District. Exhibit A to Response to MTD at 1.

[8] Parents also offered this document as Exhibit A to Parent's Stay-Put Motion.

[9] As relevant to this order, ORS 343.035 provides definitions for SDI and related services and reads, in part:

> (15)(a) "Related services" means transportation and such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education, including:
>
> (A) Speech-language and audiology services;
>
> (B) Interpreting services;
>
> * * * * *
>
> (D) Physical and occupational therapy;
>
> * * * * *
>
> (K) Medical services for diagnostic or evaluation purposes;

the 2023-2024 school year. *See* Exhibit C to Parents' Stay-Put Motion.

In the Due Process Complaint, Parents contend that a component required for Student to access a free and appropriate public education (FAPE) is the cohort of D/HH students made possible by centralizing D/HH services through the Center Site Programs. *See* Due Process Complaint at 2. Moreover, Parents assert that, by terminating the Center Site Programs, WESD and the District are denying Student a FAPE in violation of OAR 581-015-2200(1)(d) [10] and 34 CFR §300.101.[11] Parents further allege "[t]he decision to phase out the [Center Site] program

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* * * * *

(M) Assistive technology.

(b) "Related services" does not include a medical device that is surgically implanted or the replacement of a medical device that is surgically implanted.

* * * * *

(18) "Special education" means specially designed instruction that is provided at no cost to parents to meet the unique needs of a child with a disability. "Special education" includes instruction that:

(a) May be conducted in the classroom, the home, a hospital, an institution, a special school or another setting; and

(b) May involve physical education services, speech-language services, transition services or other related services designated by rule to be services to meet the unique needs of a child with a disability.

[10] OAR 581-015-2200(1)(d) identifies content for a student's IEP and requires:

A statement of the specific 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:

(A) To advance appropriately toward attaining the annual goals;

(B) To be involved and progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and

(C) To be educated and participate with other children with disabilities and children without disabilities[.]

[11] 34 CFR §300.101 identifies the requirements of a free, appropriate, public, education, and provides:

(a) ***General.*** A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d).

also constitutes a change in placement that denies [Student] access to the least restrictive educational environment (LRE) * * *." Due Process Complaint at 7. Parents also assert that the alleged unilateral change in placement occurred outside the IEP process – denying them a meaningful opportunity to participate in the placement decision – and that, in doing so, the District failed to offer a continuum of placement options as required by OAR 581-015-2245 and 34 CFR §300.115(a). *See* Due Process Complaint at 9.

In the Due Process Complaint, Parents invoke the stay-put provision of the IDEA and corresponding state statutes and rules to assert Student should remain in his/her then-current educational placement, which Parents assert is the Center Site Program. Due Process Complaint at 9.

The parties' motions raise the legal questions of what constitutes Student's educational placement as of the time of filing the Due Process Complaint and whether Parents' claims raised therein are ripe for adjudication at the time of filing. The parties' responses do not create factual disputes on either issue but instead argue for a legal determination in opposition to that proffered by the moving party. In ruling on Parents' Stay-Put Motion and the District's MTD, the ALJ considered the content of the parties' exhibits without engaging in weighing the strength of that evidence. As such, the ALJ makes no findings of fact in this consolidated ruling.

1. *Parents' request to maintain Student's placement (stay-put) in the Center Site Program.*

Under the IDEA, a parent may file a due process complaint and request an impartial due process hearing on any matters related to the identification, evaluation, *or educational placement*

(b) ***FAPE for children beginning at age 3.***

(1) Each State must ensure that—

(i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and

(ii) An IEP or an IFSP is in effect for the child by that date, in accordance with § 300.323(b).

(2) If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP or IFSP will begin.

(c) ***Children advancing from grade to grade.***

(1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

(2) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making eligibility determinations.

of a child with a disability, or the provision of a free, appropriate, public education (FAPE) to the child. 34 CFR §300.507(a). During the pendency of any administrative or judicial proceeding regarding a due process complaint – unless the State or local agency and the parents of the child agree otherwise – the child involved in the complaint must remain in his or her current educational placement. *See* 20 USC §1415(j), 34 CFR §300.518(a). This maintenance of placement provision is commonly referred to as "stay-put." The federal statutes and regulations are silent on the definition of what constitutes a child's current educational placement for the purposes of the IDEA's stay-put provision. Nonetheless, in Oregon, OAR 581-015-2400(2) provides some guidance by defining "current educational placement" – albeit for purposes of disciplinary removal proceedings for students with a disability – and provides:

> "Current educational placement" means the type of educational placement of the child as described in the child's "annual determination of placement" document at the time of the disciplinary removal. *It does not mean the specific location or school but the type of placement on the continuum of placement options* (*e.g.* regular classroom with support; regular classroom with resource room support; special class; special school; home instruction, etc.).

Emphasis added.

> 20 USC §1415(j) is titled "maintenance of current educational placement" and reads:
>
> 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.
>
> Similarly, 34 CFR §300.518(a) requires:
>
> Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

In Oregon, ORS 343.177(1) provides similar requirements for educational placement of a disabled student during administrative or judicial proceedings and reads:

> 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.

Emphasis added.

OAR 581-015-2245 identifies the requirement for alternative placements as well as supplementary aids and services and provides, in pertinent part:

> School districts must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum must:
>
> (1) Include as alternative placements, instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions;
>
> (2) Make provision for supplementary aids and services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement[.]

OAR 581-015-2250 addresses placement of students with disabilities and provides, in relevant part:

> School districts must ensure that:
>
> (1) The educational placement of a child with a disability:
>
> (a) Is determined by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options;
>
> (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;
>
> * * * * *
>
> (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[,]

Emphasis added.

As is evident from the text of the above statutes and rules, school districts must provide an appropriate educational placement and follow certain procedures allowing for meaningful participation by a student's parents any time a school district proposes to initiate or change the educational placement of a student with a disability. The pivotal question in this case is what constitutes Student's educational placement at the time Parents filed the Due Process Complaint. Only after determining Student's educational placement can this tribunal determine whether the decision to provide SDI and/or related services through a decentralized model in the neighborhood schools resulted in a change in educational placement.

Parents argue that "Student's current placement is the WESD * * * Center Site Program" while simultaneously acknowledging that the Center Site is not specifically identified in Student's November 2023 IEP. Stay-Put Motion at 2. Parents allege that, "[b]y unilaterally closing the [Center Site] Program, and unilaterally determining the Student's placement would be at her neighborhood school, [the District] changed the Student's educational placement without involving the Parents in the placement decision in contravention of the IDEA." *Id*. Parents acknowledge that Student will be matriculating to Sprague High School – Student's designated neighborhood school as well as the location of the former Center Site Program for high school aged students – beginning with the 2024-2025 school year. Stay-Put Motion at 4.

Nothing in the Due Process Complaint or the Stay-Put Motion indicates Student's IEP team, including Parents, contemplated Student's continued attendance at Crossler Middle School beyond eighth grade or matriculation to a high school other than Sprague. Thus, Parents' "change-in-placement" argument can be understood only to apply to the change in service delivery *format* from the centralized Center Site Program to a decentralized neighborhood school model identified in the WESD closure letter.

In response to Parents' Stay-Put Motion, the District argues that Student's educational placement at the time of filing the Due Process Complaint should not be viewed as the Center Site Program but the services, supports, and placement embodied in his/her IEP in effect on that date, *to wit* the November 2023 IEP. *See* District's Response to Parents' Stay-Put Motion at 3.[12] For the reasons set forth below, I agree that Student's educational placement at the time of filing of the Due Process Complaint is properly defined as the SDI and related services set forth in in his/her operative IEP. Unless the IEP specifies otherwise, the concept of educational placement should not be understood so narrowly as to require that those services and supports be delivered to the student through a specific model or format.

While the IDEA and its implementing regulations do not define the term "educational placement," several courts have addressed this issue and determined that not every change to a disabled child's learning environment constitutes a change in educational placement. For

[12] The District also asserts, in the alternative, that exceptions to the stay-put requirement apply because the Center Site Program operated by WESD is no longer available at Student's grade level and that perceived change to his/her placement offers comparable DSI and related services. *See* District's Response to Parents' Stay-Put Motion at 6-17. Because this tribunal determines the Center Site Program was not Student's operative educational placement, and thus determines no change in placement occurred during the period in issue, it is unnecessary to address those alternative arguments in this ruling.

example, the Ninth Circuit Court of Appeals addressed this issue in *N.E. by and through C.E. and P.E. v. Seattle School District*, 842 F.3d 1093 (2016) and defined "educational placement" as "the general educational *program* of the student." *Id*. at 1096, emphasis added. Citing *N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). The court in *N.E.* stated, "[m]ore specifically, we have, in a series of cases, interpreted current educational placement to mean the placement set forth in the child's last implemented IEP." *Ibid*, internal citations omitted. Citing *K.D. ex rel. C.L. v. Dep't of Educ.*, 665 F.3d 1110, 1117–18 (9th Cir. 2011); *N.D.*, 600 F.3d at 1114; *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 911 (9th Cir. 2009); *Johnson ex rel. Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) (*per curiam*). Further, the *N.E.* court determined that, "[a]lthough the statute refers to 'educational placement,' not to 'IEP,' the purpose of an IEP is to embody the services and educational placement or placements that are planned for the child." 842 F.3d at 1096-97; Citing *Timothy O. v. Paso Robles Unified Sch. Dist.* 822 F.3d 1105, 1111–12 (9th Cir. 2016).

This definition of educational placement aligns with that found in Oregon statutes and administrative rules cited above. Moreover, multiple district and appellate courts outside the Ninth Circuit have analyzed the question of educational placement in the context of the IDEA's stay-put provision and come to conclusions similar to that of the Ninth Circuit. *See L.S. v. Lansing Sch. Dist. # 158*, 169 F.Supp.3d 761, 764 (N.D. Ill. 2015) (Not every change to a student's learning environment effects a change to his or her "educational placement." * * * "[T]he meaning of 'educational placement' falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP," and courts use a fact-driven approach to determine whether a change to the student's placement has occurred.") Citing *Board of Educ. of Community High School Dist. No. 218, Cook County, Ill. v. Illinois State Bd. of Educ.,* 103 F.3d 545, 548–49 (7th Cir.1996); *Lunceford v. District of Columbia Bd. of Educ*., 745 F.2d 1577, 1582 (D.C. Cir.1984) (noting that one "must identify, at a minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change [in schools] to qualify as a change in educational placement"); *Tilton v. Jefferson County Bd. of Educ*., 705 F.2d 800, 804 (6th Cir.1983), *cert. denied*, 465 U.S. 1006, 104 S.Ct. 998, (1984) (transfer from one school to another school with comparable program is not a change in educational placement). These cases appear to align with the language of OAR 581-015-2400(2), which identifies a student's educational placement as the program of SDI and related services required by an IEP, rather than a specific location or particular program structure.[13]

As set forth in the Due Process Complaint and Parents' Stay-Put Motion, Student's IEP requires SDI in the areas of organization and self-advocacy to be provided at least 30 minutes each week. The IEP identifies the anticipated location of service provision as "school wide." Moreover, Student's IEP specifies that certain SDI will be provided by a D/HH specialist. Due Process Complaint at 2. In addition, Student's IEP identifies the need for related services in

[13] Notably, none of the cases cited by the parties, or otherwise reviewed by the ALJ, addresses an administrative change in the structure or format of how IEP services are delivered as a change in educational placement under the IDEA. Therefore, I decline the invitation to expand upon the definition of educational placement to include the structure or format of service delivery determined appropriate by school districts. Such administrative matters are best left to the implementing school districts or educational service districts with the necessary expertise in how best to allocate scarce education resources.

assistive technology and audiological evaluation each delivered for a total of 180 minutes per year; audiology services for 120 minutes per year; and visual transcription for 360 minutes per day. *Id*. Furthermore, according to Parents' Due Process Complaint, the IEP identifies numerous accommodations for Student to be delivered in the general education setting, primarily by his/her general education teacher. Those accommodations include an FM system that works in conjunction with Student's hearing aids, closed captioning on Student's computer, visual access to auditory information, written instructions, preferential seating, etc. *Id*. at 3. Parents assert that, other than a residential school for the deaf located in Salem, the Center Site Program is the only public-school specialty program for D/HH students. In addition, Parents claim the Center Site Program was serving approximately 375 D/HH students at the time of filing the Due Process Complaint. *Id*.

According to Student's IEP, the educational placement code selected for Student during the period in issue was 30c – Regular Education 80% or more of [the] day in regular classroom. Exhibit 1 to Decl. of Polay in Support of District's Response to Stay-Put Motion at 2. Specifically, that placement requires that Student "have access to special education in, or outside of[,] the general education setting for up to 20% of the school day." *Id*. The benefits identified by the IEP team, including Parents, for this placement option are listed as "continue to work on academic skills, opportunity to take mainstream classes, opportunity for regular diploma[;] [e]xposure to regular education curriculum[;] [s]ocial interaction with typically developing peers[;] and [m]aximum integration with classroom peers." *Id*. That document also reflects options rejected by the IEP team that would have limited Student's time in the general education setting and placed him/her in a specialized classroom, away from typically developing peers, for significant portions of the school day. *Id*. at 2-3.

Based on the current record, I find that the alteration of service delivery format does not constitute a change in educational placement. According to the evidence submitted by Parents and the District, the District will continue to provide all services identified in Student's IEP – albeit in a decentralized format in each neighborhood school rather than a centralized setting limited to two schools within the District – in the high school Student was anticipated to attend under the former service delivery structure. With no change to SDI or related services identified in the IEP, and in fact no change to the physical location of Student's attendance, this tribunal finds no change in educational placement has occurred. *See Weil v. Board of Elementary & Secondary Educ*., 931 F. 2d 1069, 1072 (5th Cir. 1991) (Where the programs at both schools were under the same agency supervision, both provided substantially similar classes, and both implemented the same IEP for the student, the court concluded "the change of schools under the circumstances presented in this case was not a change in 'educational placement' under section 1415.")

In the Stay-Put Motion, Parents cite to the Office of Special Education and Rehabilitation Services' (OSERS) *Letter to Bosso*, 56 IDELR 236, 111 LRP 13109 (2010), for the proposition that placement in a specialized D/HH program may be appropriate to address the unique communication needs of a student. In *Letter to Bosso*, OSERS appears to have limited its discussion of placement options between one in a general education setting and placement of students in a special school for the deaf. It does not address the structuring of service delivery alternatives for the provision of SDI and related services for D/HH students in the general

education setting. Parents acknowledges that a residential school for the deaf in Salem is a placement option for Student but do not advocate for such placement. Instead, through the operative IEP, Parents agree that placement in the general education setting is appropriate but argue that such placement should continue to include their preferred mode of service delivery, *to wit* the Center Site Program. Accordingly, Parents' reliance on OSERS guidance in *Letter to Bosso* is misplaced.

Likewise, Parents cite to guidance from the Office of Special Education Programs (OSEP) in its *Letter to Fisher*, 21 IDELR 992, 21 LRP 2769 (1994) in arguing that the District was required to provide them with prior written notice, in compliance with 34 CFR §300.505, prior to closing the Center Site Programs. Nonetheless, the plain language of *Letter to Fisher* identifies that such prior written notice is only required where the change involves a substantial or material alteration in the child's educational program. Because the District/WESD's decision to decentralize the provision of SDI and/or related services does not amount to a substantial or material alteration to Student's IEP, Parent's reliance on OSEP's guidance in *Letter to Fisher* is similarly misplaced.

None of the case law cited by Parents to support their arguments address the issue of "placement" in a program – operated either by a school district or educational service district – that no longer exists. Significantly, Parents have offered no support for their position that this administrative tribunal has the authority to mandate that an educational service district maintain a particular service delivery structure or that a school district must continue to fund such a structure. While it is clear under the IDEA, and corresponding state statutes and administrative rules, that an ALJ is empowered to order a school district to provide all services identified in a student's IEP or otherwise necessary to ensure a FAPE to that student, nothing in the text of those statutes or rules provides an ALJ the authority to govern *how* a school district or educational service district administratively structures the provision of those services.

While couched in terms of a placement dispute, at base, the gravamen of Parents' Due Process Complaint is that the District is not optimizing Student's education by maintaining the Center Site Program, which Parents perceive as the ideal program structure for Student. However, courts have long maintained that such educational optimization is not the goal of the IDEA. *See Board of Education of Hendrick Hudson School Dist. v. Rowley*, 458 U.S. 176 (1982) (We think * * * that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children.").[14] Parents' placement arguments in the Due Process Complaint argue for optimization of program structure rather than the provision of FAPE or appropriate placement in the least restrictive environment as required by the IDEA. The IDEA and Oregon law require school districts to educate students with disabilities in a manner that provides a FAPE in the least restrictive environment, and not those environments preferred either by school personnel or parents.

[14] While the U.S. Supreme Court recently expanded on the *Rowley* standard – to require that school district's offer an IEP that is "appropriately ambitious" in light of Student's unique needs and circumstances – it stopped far short of requiring optimization of a student's educational program. *See Endrew F. ex rel Joseph F. v. Douglas County School Dist. RE-1*, 580 U.S. 386, 137 S. Ct. 988 (2017).

Based on the above, I find no basis for defining Student's placement so narrowly as to require that the District, and by extension WESD, maintain the service delivery structure of the Center Site Program. To do so would, it seems, require the District to sequester all eligible D/HH students on two campuses – Crossler Middle School or Sprague High School – regardless of the school those students would normally attend if not disabled. Despite Parents' arguments to the contrary, such a requirement to be in contravention to the least restrictive environment placement requirements found in the IDEA and corresponding state administrative rules. *See* 20 U.S.C. §1412(5)(A), 34 C.F.R. §300.114; OAR 581-015-2240, OAR 581-015-2250.

As such, and as concerns Student during the period in issue, placement is more appropriately defined as the SDI and related services identified in the operative IEP necessary to permit him/her to access the general education curriculum and receive a FAPE. Consequently, I decline Parents' request to require that the District and WESD reinstate the centralized Center Site Program structure.

2. *District's motion to dismiss complaint on ripeness grounds.*

Next, this ruling turns to the District's MTD seeking dismissal of Parents' Due Process Complaint, with prejudice.

The District asserts Parents' claims are not ripe for adjudication because the Due Process Complaint fails to allege a denial of FAPE based on the Student's current identification, evaluation, IEP, or placement as of the date of filing of the complaint. *See* MTD at 2. In support of the MTD, the District notes that Parents' Due Process Complaint does not challenge Student's operative IEP or the implementation of that educational program. Rather, the District points out that Parents' allegations relate to anticipated future harm in the 2024-2025 school year resulting from WESD's shift from the centralized Center Site model of service delivery to a decentralized model that will deliver SDI and/or related services in each child's neighborhood school. *See* MTD at 5-6; *see also* Exhibit A to Parent's Response to MTD.

In addition, the District argues Parents' claims that it unilaterally changed Student's placement and predetermined that placement to be at his/her neighborhood school are not ripe or otherwise appropriate for adjudication. The District puts forth two reasons in support of its position. First, as noted above, the District argues that the Center Site Program was still in operation in March 2024 at the time of filing the Due Process Complaint and would continue to operate through the 2023-2024 school year. Second, the District notes that Student was scheduled to matriculate to Sprague High School, which was both his/her neighborhood school and the location of the Center Site Program for high school students and thus no change in physical location occurred during the relevant period. *See* MTD at 6-7.

In response, Parents argue the District is erroneously defining Student's placement as the matrix of services contained within his/her IEP. Parents allege the proper identification of Student's placement is the WESD Center Site Program itself. Parents' Response to MTD at 2. Parents' arguments regarding Student's educational placement are disposed of above. Thus, the remainder of this ruling addresses only the District's assertions that Parents' allegations are

speculative and/or hypothetical and thus unripe for adjudication.

For a claim to be ripe, "the controversy must involve present facts as opposed to a dispute which is based on future events of a hypothetical issue." *McIntire v. Forbes*, 322 Or 426, 434 (1996) *quoting Brown v. Oregon State Bar*, 293 Or 446, 449 (1982). In the context of claims brought under the IDEA, the United States District Court for the Central District of California addressed this question in *Bookout v. Bellflower Unified School Dist.,* 2014 WL 1152948 (C.D. Cal. 2014), stating:

> [R]ipeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. * * * Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution.

Id. at 15 (internal quotations and citations omitted).

Similarly, the United States Court of Appeals for the 10th Circuit addressed the issue of ripeness in the context of parents claims under the IDEA in *Chavez v. New Mexico Pub. Educ. Dep't*, 621F.3d 1275 (10th Cir. 2010). In that case, the court determined:

> To evaluate whether an issue is ripe, a court examines: "(1) the fitness of the issue for judicial resolution and (2) the hardship to the parties of withholding judicial consideration*." United States v. Wilson*, 244 F.3d 1208, 1213 (10th Cir.2001). A case meets the first prong if it does not involve uncertain or contingent events that may not occur at all (or may not occur as anticipated). *See New Mexicans for Bill Richardson v. Gonzales,* 64 F.3d 1495, 1499 (10th Cir.1995) (internal citations omitted). The second prong addresses whether the challenged action is a "direct and immediate dilemma for the parties." *Id.* at 1499 (internal quotations omitted). The ripeness question is primarily one of timing. *See Kan. Judicial Rev. v. Stout,* 519 F.3d 1107, 1116 (10th Cir.2008); *New Mexicans for Bill Richardson,* 64 F.3d at 1499.

Id. at 1281.

In the Due Process Complaint, Parents assert the District is incapable of providing the SDI and related services required in Student's IEP – through decentralized service in neighborhood schools within the District – because it does not employ sufficient specialized teaching and technical staff necessary to implement those services to Student and each of his/her D/HH peers without reducing services required by each students' IEP. Due Process Complaint at 4. These claims are speculative at best and assume uncertain or contingent events that may not occur. At base, those claims assume the District will not properly implement Student's IEP for the 2024-2025 school year. Moreover, Parents speculate that the District will evenly distribute hypothetical shortages in staffing to impact all D/HH students equally. Until the District and/or WESD have had an opportunity to implement the proposed decentralized model of service provision, any such arguments are hypothetical. In truth, some students within the District *may*

suffer a reduction of service or other failure in the implementation of their IEPs, but assuming Student will be among them is purely speculative and does not present a live controversy involving present facts ripe for adjudication.

In addition, Parents argue that Student will be removed from his/her cohort of D/HH peers – through the proposed decentralized service model – which Parents assert is necessary for his/her social/emotional goals in the operative IEP. Ignoring for the sake of this argument that Student's IEP does not identify a specific social/emotional goal,[15] Parents' own representations in the Due Process Complaint undercut their argument. As stated above, the Due Process Complaint states there are approximately 375 D/HH students enrolled within the District. Moreover, evidence from the District indicated there are additional families with D/HH students who were not participating in the centralized service model of the Center Site Program because they wished to stay within their neighborhood schools. *See* Exhibit G to Parents' Stay-Put Motion at 3. With so many D/HH students now being provided services within their neighborhood schools, it is difficult to fathom that Student will be isolated as the only D/HH student at Sprague High School for the 2024-2025 school year.

As plead, Parents' claims in the Due Process Complaint are merely conjecture and fail to assert present facts demonstrating or claiming current harm ripe for adjudication.

3. Parents' request to amend the due process complaint to add WESD as a party.

In their Response to the MTD, Parents seek leave to amend the Due Process Complaint to include WESD as a party to this contested case proceeding. While acknowledging the District is responsible for the provision of FAPE to Student, Parents assert WESD is, in part, responsible for Student's education and change in placement because the decision to terminate the Center Site Program was made jointly by the District and WESD.

Having determined that the provision of SDI and related services required by Student's IEP through a decentralized service delivery model does not constitute a change in educational placement for Student, it is unnecessary to address Parents' assertion that WESD bears some responsibility for a change in educational placement.

With regard to whether WESD is a proper party in any dispute related to the District's failure to provide Student a FAPE, it is inappropriate to make such a determination as this ruling finds those claims are not ripe for adjudication. It is irrelevant whether WESD is a proper party to hypothetical or speculative claims.

As such, Parents' request to amend the Due Process Complaint is denied.

4. Conclusion.

The decision of WESD and/or the District to terminate the Center Site Program for D/HH

[15] Student's IEP for the period in issue identifies two Measurable Annual Goals, Self-Advocacy and Organization. Neither of those annual goals mentions involvement of a cohort of D/HH students as a necessary element of SDI or related services. *See* Exhibit C to Stay-Put Motion at 7.

students in favor of a decentralized model that provides all required IEP services in Student's neighborhood school does not constitute a change in educational placement. As such, Parents' Stay-Put Motion is denied.

In addition, because the Parents' failed to plead any deficiencies in identification, evaluation, IEP, or placement as of the date of filing of the complaint – and instead assert only allegations related to anticipated future harm in the 2024-2025 school year – all allegations in the Due Process Complaint are dismissed as unripe.

RULINGS

1. Parents' Stay-Put Motion seeking an order that the District maintain operation of the WESD Center Site Program during the pendency of this administrative adjudication is DENIED.

2. The District's Motion to Dismiss Parents' Due Process Complaint on ripeness grounds is GRANTED.[16]

ORDER

Parents' Due Process Complaint filed April 30, 2024, is DISMISSED with prejudice. No amended filing will be accepted in this matter.

/s/ Joe L. Allen
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.**

SERVICEMEMBERS' CIVIL RELIEF ACT

Unless otherwise stated in this order, the Office of Administrative Hearings (OAH) has no reason to believe that a party to this proceeding is subject to the Servicemembers' Civil Relief Act (SCRA). If a party to this proceeding is a servicemember who did not appear for the hearing, within

[16] This ruling is limited to Parents' claims in the present Due Process Complaint at the time of filing. The finding that such claims are not yet ripe for adjudication does not preclude Parents from raising those concerns in a new filing if the presumed harms come to fruition during the 2024-2025 school year.

the servicemember's period of service, or 90 days after their termination of service, that party should immediately contact the agency to address any rights they may have under the SCRA.

CERTIFICATE OF MAILING

On August 9, 2024, I mailed the foregoing CONSOLIDATED RULING ON DISTRICT'S MOTION TO DISMISS AND PARENT'S MOTION FOR STAY-PUT AND FINAL ORDER OF DISMISSAL in OAH Case No. 2024-ABC-06500 to the following parties.

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