

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-32**

### **PROCEDURAL HISTORY**

On February 26, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Tacoma School District (District). The Parent alleged the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On February 27, 2020, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District Superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On March 20, 2020, the District requested an extension of time to respond to this complaint. On the same day, OSPI granted the requested extension.

On March 30, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent on March 31, 2020. OSPI invited the Parent to reply.

On April 8, 2020, the Parent requested an extension of time to reply to the District's response. On the same day, OSPI granted the requested extension.

On April 20, 2020, OSPI received the Parent's reply. OSPI forwarded that reply to the District the same day.

OSPI considered all information provided by the Parent and the District as part of its investigation.

### **SCOPE OF INVESTIGATION**

Throughout communications in the complaint and the Parent's reply to the District's response to this complaint, the Parent frequently referred to the preschool classroom as being "segregated." The IDEA requires districts to provide a continuum of placement options for students, which can include more restrictive placements, such as self-contained classrooms. Whether students are being segregated in a classroom based on being members of a protected class (race, ethnicity, disability, gender, etc.) is a civil rights discrimination issue. OSPI does not have authority through the special education citizen complaint process to address issues of discrimination. These allegations can be addressed by the federal Department of Education's Office for Civil Rights. As such, while OSPI quotes the Parent's language in this decision, the inclusion of the quoted language is not intended to identify additional issues or potential violations that are outside the scope of this complaint decision.

### **ISSUE**

1. Did the District follow procedures to consider a full continuum of placement options for the Student per WAC 392-172A-02055 since determining he was eligible to continue receiving services on January 16, 2020?

## LEGAL STANDARDS

Continuum of Alternative Placement Options: Each school district shall ensure that a continuum of alternative placements is available to meet the special education and related services needs of students. The continuum required in this section must: include the alternative placements listed in the definition of special education in WAC 392-172A-01175, such as instruction in general education classes, special education classes, special schools, home instruction, and instruction in hospitals and institutions; and make provision for supplementary services such as resource room or itinerant instruction to be provided in conjunction with general education classroom placement. 34 CFR §300.115; WAC 392-172A-02055.

Least Restrictive Environment: School districts shall ensure that the provision of services to each student eligible for special education, including preschool students, shall be provided: to the maximum extent appropriate in the general education environment with students who are nondisabled; and special classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114; WAC 392-172A-02050.

A student's IEP team has the responsibility to determine the student's LRE, and must consider the following factors when making the determination: the educational benefits to the student of a placement in a general education classroom; the nonacademic benefits of interaction with students who are not disabled; the effect of the student's presence on the teacher and other students in the classroom; and, the cost of mainstreaming the student in a general education classroom. *Sacramento City Unified School District, Board of Education v. Rachel Holland*, 14 F.3d 1398, 1400 (9<sup>th</sup> Cir. 1994).

Educational placement decisions must be determined annually, or sooner if appropriate, and be made by a group of persons, including the parents, and other persons knowledgeable about the student, the evaluation data, and the placement options that provide a reasonably high probability of assisting the student to attain his or her annual goals, and a consideration of any potential harmful effect on the student or on the quality of services the student needs, based on the student's individualized education program (IEP) and least restrictive environment (LRE) requirements. 34 CFR §300.116(e); WAC 392-172A-02060.

Consideration of Less Restrictive Placement Options: Less restrictive placements must be considered, but they do not always have to be tried. As a rule, when there is uncertainty about the appropriate placement for a student, a district should make a diligent effort to educate him in a less restrictive environment before proposing a more restrictive one. *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996).

IEP Team Unable to Reach Consensus: The IEP team should work toward consensus, but the district has ultimate responsibility to ensure that the IEP includes the services that the student needs in order to receive a free appropriate public education (FAPE). If the team cannot reach consensus, the district must provide the parents with prior written notice of the district's proposals or refusals,

or both, regarding the student's educational program and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12, 472, 12,473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 9). *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9<sup>th</sup> Cir. 2003). *See also, Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1182-83 (9<sup>th</sup> Cir. 1984) (Holding that a school district is responsible for providing a student with a disability an education it considers appropriate, even if the educational program is different from a program sought by the parents.)

Education Programs: A general education program is a program that includes 50 percent or more students without disabilities (i.e., students that do not have IEPs). A special education program is a program that includes less than 50 percent students without disabilities. A regular early childhood program is an early childhood that includes a majority (at least 50 percent) students without disabilities. This may include, but is not limited to, Head Start of Early Childhood Educational Assistance Program (ECEAP) classrooms, kindergarten, private kindergartens or preschools, group child development center or childcare, etc. Individuals with Disabilities Education Act (IDEA), Part B Data Dictionary (Data Accountability Center, OSEP 2013).

Early Childhood Programs: Children are eligible for the ECEAP if the child is at least three years old by August 31 of the school year, is not age-eligible for kindergarten, and meets certain income thresholds or is qualified by a school district for special education services. Children may be served by a school district for special education and simultaneously enrolled in ECEAP. PAO-38 Eligibility for ECEAP Services, 2019-20 ECEAP Performance Standards (Department of Children, Youth, and Families). Further, children are eligible to enroll in ECEAP who turn three years old after August 31 of the school year and who have received services from or participated in early support for infants and toddlers (ESIT) or Early Head Start, if space is available in the program. PAO-39 Additional Children Allowed for Enrollment. To be eligible for Head Start, a child must be at least three years old or, turn three years old by the date used to determine eligibility for public school in the community in which the program is located; and, be no older than the age required to attend school. 45 CFR 1302.13(b)(2).

## **FINDINGS OF FACT**

1. During the 2019-2020 school year, the Student was two years old and was eligible for IDEA Part C early intervention services through a birth to three developmental center.
2. The District's 2019-2020 school year began on September 5, 2019.
3. On December 18, 2019, the Parent signed consent for the Student's initial evaluation for IDEA Part B special education eligibility, and the District's school psychologist emailed and invited the Parent to an evaluation review and eligibility meeting, scheduled for January 16, 2020.

The Parent responded, "to be clear I am requesting that [Student] be placed in a fully inclusive placement" because "natural proportions and best practices provide that a truly inclusive classroom includes no more than 12% students with disabilities."

4. On December 19, 2019, the psychologist responded to the Parent's email and thanked her for sharing her request. The psychologist also asked the Parent to fill out an autism spectrum rating scale as part of the evaluation for social/emotional information.
5. The District was on winter break from December 23, 2019 through January 3, 2020.
6. On January 16, 2020, the Parent (via phone), school psychologist, occupational therapist (OT), speech/language pathologist (SLP), school nurse, early learning specialist, the District's assistant director of student services (assistant director), and the Parent's advocate (via phone) met and reviewed the Student's evaluation. The group found the Student eligible for special education services under the category developmental delay, based on the Student's delays in adaptive, cognitive/pre-academic, communication, and social-emotional/behavior.

According to the evaluation report, the Student's social-emotional/behavioral functioning was in the "significant developmental delay" range and his cognitive and adaptive functioning were in the "mild developmental delay" range. The evaluation noted the Student's language and communication skills were "significantly delayed" and his fine motor skills were mildly delayed. The evaluation report recorded the group's recommendation that the Student receive specially designed instruction in communication, cognitive/preacademic, adaptive/self-help, and social-emotional/behavioral. The evaluation report also noted recommendations for speech and language as a related service, an occupational therapy consultation, and sensory supports and strategies as accommodations.

The evaluation group recommended the Student be placed in the District's extended day preschool setting "due to [Student's] need for significantly modified instruction and a high level of adult assistance to participate in age-appropriate activities."

According to the District's response, during the meeting, the Parent stated that she wanted the Student placed in a general education setting that had no more than 12% students with disabilities. According to the District's response, the District members of the evaluation group "expressed their belief that Student needed a higher level of support than is provided in a general education preschool setting due to his significant needs." The District stated it did, however, offer to arrange for Parent to observe the District's preschool programs.

7. According to the prior written notice, dated January 16, 2020, the Student met the "eligibility criteria for Developmentally Delayed based on delays greater than -1.5 standard deviations from the mean in the areas of adaptive, cognitive, communication, and social-emotional/behavior" and that "these delays will have an adverse impact on [Student's] ability to participate with same-age peers in age-appropriate activities in a general education preschool setting, and [Student] shows a need for specially designed instruction."

The notice summarized the group's consideration of a placement in the general education preschool setting, based on the Parent's request for "an inclusive preschool setting with what [Student's] mother describes as a population with natural proportions of individuals with disabilities." The notice summarized the reasons those options were rejected:

[Student] is not yet age eligible for consideration for a Head Start or ECEAP preschool placement. Federal and state guidelines stipulate children must be three years old by August 31 of the current school year. Additionally, [Student] currently needs a higher level of support than is provided in a general education preschool setting due to his significant needs in the areas of qualification.

The notice further documented the following:

- The Parent expressed interest in a Montessori setting or a private preschool with itinerant services at her neighborhood school.
  - The early learning specialist offered to schedule, with the Parent, an observation of the extended day program and one of the District's Montessori preschool programs.
  - Parent "indicated she is not seeking a one-on-one paraeducator for [Student]."
8. On January 17, 2020, the school psychologist emailed the Parent the final copy of the evaluation report. The psychologist also noted the special education teacher would reach out to schedule a meeting.

The Parent's advocate responded, asking for clarification "of your email text versus the text of the [prior written notice]." The advocate stated the email indicated placement had not been determined, whereas the prior written notice stated the team rejected the Parent's request for a general education preschool.

9. Also, on January 17, 2020, the special education teacher at the Student's neighborhood school emailed the Parent and invited her to an individualized education program (IEP) meeting, scheduled for January 29, 2020. The Parent responded and asked to participate via phone.
10. On January 21, 2020, the early learning specialist emailed the Parent to schedule visits to District preschool programs.

The Parent responded, "thank you for offering us a tour of the segregated preschool setting at [neighborhood school]" and stated she was interested in touring "a school which has at least a 50/50 proportion...of students who do and who do not need additional supports."

The early learning specialists replied to address the Parent's comment regarding the preschool setting being "segregated" and stated:

All our preschool programs, which have students with IEPs, have typically developing peers enrolled as well who are actively learning side by side. The number of students on IEPs varies in each one of [the] classrooms. All our preschool classrooms utilize a common general education curriculum and every student has access to the curriculum. When students are on IEPs, the IEP team make accommodations, modifications and differentiates the instruction to meet that student's individual needs...

The Parent responded and asked the early learning specialist to "confirm that you received our request...to tour a preschool with at least a 50/50 ratio of students receiving IEP supports along with students who are not" and reiterated that she wanted the "option to tour the...preschool that's considered the least restrictive environment. If that's a 50/50 option because of his age/birthdate, then I'd like to tour those preschools."

11. On January 22, 2020, the special education teacher emailed the Parent with call in information for the IEP meeting. The special education teacher also provided the Parent with information about signing consent for the initial provision of special education. The teacher stated she would email the IEP invitation and consent form (to sign after the meeting) and would prepare an enrollment packet and "Welcome to Preschool" packet for the Parent to pick up.
12. Also, on January 22, 2020, the assistant director responded to the advocate's January 17, 2020 email about the prior written notice. The assistant director stated the prior written notice documented the Parent's requests and recommendations the evaluation team made, but they could clarify the language to "expand on the parental requests and the recommendations of the evaluation team." The director stated the early learning specialist could set up visits to the "Peer Inclusion classroom in addition to the visit to the blended program at [neighborhood school]." The director wrote, "As has been said before, both the blended program and the Peer Inclusion program serve a mix of general...and special education students."

The Parent responded and asked the assistant director to explain the difference between its peer inclusion and blended program. The assistant director replied:

- **Peer Inclusion:** "Half-day program with two session daily, (9-11:30 & 1-3:30)...Curriculum: Zoo Phonics, Creative Curriculum, and Conscious Discipline ([specially designed instruction] embedded per students' IEP)...up to 15 [students] per session-Ratio of individuals that receive special educations services varies. Adults: 2"
- **Extended Day/Blended Program:** "Extended Program hours, 1 session daily (9-11:30 all students, 11:30-1:30 Students who received [specially designed instruction] services)...Curriculum: Zoo Phonics, Creative Curriculum, and Conscious Discipline ([specially designed instruction] embedded per students' IEP, in addition to the afternoon session)...up to 12 [students]-Ratio of individuals that receive special education services varies. Adults: 3 \*Higher adult to student ratio to support students' needs within program."

The Parent responded that she would like to tour both programs and the District agreed to arrange visits.

13. In its response to this complaint, the District provided a document, outlining the District's "Preschool Program Continuum of Services." This described the following:

| Placement Options                                                             | Program                                                                                                                                                                                                                                                                                             |
|-------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| General education program with SDI <sup>1</sup> provided in general education | <b><u>Head Start</u></b><br>Children are eligible for Head Start based on their age (at least 3 years old by August 1 <sup>st</sup> of the school year) and family income. There is an exception to the income requirement for students with disabilities.                                          |
|                                                                               | <b><u>Early Childhood Education and Assistance Program (ECEAP)</u></b><br>Children are eligible for ECEAP based on their age (at least 3 years old by August 1 <sup>st</sup> of the school year) and family income. There is an exception to the income requirement for students with disabilities. |

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<sup>1</sup> SDI = specially designed instruction.

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|                                                                      | <p><b><u>Title I</u></b><br/>Children are eligible for the Title 1 program based on their age (at least 3 years old by August 1<sup>st</sup> of the school year) and where they live (in attendance area for a Title I school) or family income. There is an exception to location/income requirement for students with disabilities.</p> <p><b><u>Title I – English Language Learners</u></b><br/>...</p> <p><b><u>Montessori</u></b><br/>A tuition-based program that is multi-aged. The preschool classrooms have students age 3-5 years old.</p>                            |
| General education program with SDI provided elsewhere                | Students participate in a general education program and receive services in a special education program.                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| General education program or separate class, depending on enrollment | <p><b><u>Peer Inclusion Model</u></b><br/>Classes may include up to 8 students with IEPs and 7 typically developing peers. The percentage of students with disabilities and general education students varies based on enrollment.</p> <p><b><u>Blended Program</u></b><br/>Classes may include up to 8 students with IEPs and 4 typically developing peers. The percentage of special education students and general education students varies based on enrollment. Some of the students with IEPs also attend the extended day portion, depending on the student's needs.</p> |
|                                                                      | <p><b><u>DHH/LSL – Deaf or Hard of Hearing/Listen &amp; Spoken Language</u></b><br/>...</p> <p><b><u>Extended Day Program</u></b><br/>Self-contained special education model in which typical peers are included for the first half of the day. Certain students with IEPs attend the extended day portion without any typical peers.</p>                                                                                                                                                                                                                                       |
| Separate Class                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

14. On January 27, 2020, the District emailed the Parent a draft copy of the IEP in advance of the meeting. The draft IEP noted the proposed placement in the "peer-inclusion/extended day" preschool class. The draft IEP also stated the Student would spend 37.04% of his time in the general education setting and receive related services and specially designed instruction in the special education setting, for a total of 850 minutes in the special education setting per week.

15. On January 29, 2020, prior to the meeting, the Parent's advocate emailed a document with the Parent's input into the IEP, in which the Parent requested the Student attend the preschool program "3 days a week, and take data on progress and reconvene." The Parent also stated:

Our son has a right to a free and appropriate education in the least restrictive environment alongside his typical age-peers. This right extends to preschool. We expect that he'll be included throughout his educational career...There was no typical children and no para when we toured [preschool], so we didn't really know the dynamic of the classroom.

Question: Why is the school proposing [Student] do the extended day? He's not diagnosis [sic] with Autism and the teacher described the extended day as a program for children with Autism.

The Parent also proposed goals related to taking turns, using words/phrases to express wants/needs and share information, and answering questions. The Parent requested several accommodations and that the Student work with a speech language pathologist for at least an hour a week.

16. On January 29, 2020, the District held an initial IEP meeting for the Student. The Parent and her advocate attended via phone. The team developed the Student's IEP, including present levels and annual goals. The IEP included annual goals in cognitive/pre-academics (two goals), adaptive/self-help (two goals), social-emotional/behavioral (three goals), and communication (one goal). In the "team considerations" section of the IEP, the Parent noted:

[Student] is a bright boy who knows much more than he can communicate...We remain very concerned about the segregated setting (or as OSPI calls it, 'separated') placement being offered to [Student]. Special education is a service, not a place. The extended day program at [school] is a place, and is problematic for a few reasons. First, we were told that the extended day program is for students who have autism. [Student] does not have an autism diagnosis, and it is unclear if he ever will. It does not make sense to spend 10 hours a week in a segregated setting with kids who have autism or speech delays when all the research shows that kids with speech delays need to be with their neurotypical peers. This program does not offer that. Second, the program has a high adult to student ratio, so theoretically he would be making great strides. But [Student] is with a nanny 1:1 every day, so if he were going to be making strides in speech due to a high adult/student ratio, he would have done so.

The IEP provided accommodations, including a visual schedule/communication book, access to sensory supports and strategies, visual modeling of behavior, and an occupational therapy consult. The IEP provided the Student with the following specially designed instruction in a *special education setting*:

- Communication (concurrent): 60 minutes per day (provided by a special education teacher)
- Social-emotional/behavioral: 60 minutes per day (provided by a special education teacher)
- Adaptive/self-help: 40 minutes per day (provided by a special education teacher)
- Cognitive/pre-academic: 30 minutes per day (provided by a special education teacher)

The IEP also included 20 minutes a week of speech and language therapy in a special education setting as a related service.

The IEP indicated the Student would spend 550 minutes a week in the special education setting and would spend 59.26% of his time in the general education setting. On the "Placement Options for LRE" (least restrictive environment) portion of the IEP, the box was checked for "separate class." The IEP noted: Student "will be a student in a Peer-Inclusion/Extended day preschool class, where typically developing peers are a part of the program. The extended day portion includes a high level of adult assistance and significantly modified instruction for



students identified as in need of these supports to participate in age-appropriate activities and curriculum.”

17. According to the District’s response and the prior written notice, dated January 30, 2020, at the meeting, the District members of the IEP team “proposed placement in the blended/extended day program because Student required significantly modified instruction and a high level of adult assistance to participate in age-appropriate activities.” According to the prior written notice and District’s response, the Parent also requested the following placement options, which the IEP team considered and rejected:

- **General education program with itinerant services:** “District maintains they are able to provide [Student’s] services as outlined within the proposed IEP within the pre-school programs they have recommended.”
- **Tuition-based Montessori preschool:** “District maintains that an IEP team can be convened to discuss the request for Montessori placement prior to the student becoming age eligible for that school. The districts [sic] maintains that the suggested programs will most appropriately meeting [Student’s] educational needs in the least restrictive environment.”
- **Student attend on an alternate schedule (3 days a week for 2.5 hours a day, 7.5 hours per week):** The District “recommended five days a week, for 4.5 hours per day, for a total of 22.5 hours per week...Parent told the team she would get back to them in regards to which days she would like him to attend.”

The prior written notice also recorded that the Parent was “given the opportunity to visit two preschool programs in [District]. They observed two different preschools at two different sites.” The prior written notice summarized that the IEP team discussed specially designed instruction, how progress was evaluated, and that the “preschools are language based” and use a general education curriculum that “meets Early Learning state and federal expectations.” The notice stated an SLP would deliver specially designed instruction along with the special education preschool teacher.

The notice further documented that the Parent requested clarification regarding access to general education opportunities and the District responded:

All special education preschool classrooms have general education preschool students in attendance. These general education students attend alongside students who require specially designed instruction. All special education preschool classrooms utilize general education preschool curriculum, including...These curriculums are utilized in our other district preschool programs including Head Start, Title I and ECEAP preschool classrooms. All [District] preschools have general education preschool students enrolled.

The Parent also asked if the program was for students with autism, to which the District responded there could be students diagnosed with autism in the program, but that it was not intended or designed to serve only students with autism.

The notice documented the recommendation to reconvene the IEP team in June 2020 after the Student “has been able to receive specially designed instruction in a program he is age eligible for. The team could then determine the services that would meet [Student’s] individual needs as documented by the formal evaluation.”

18. In her complaint, the Parent alleged the District "only considered and unilaterally" placed the Student in a "separate class." The Parent also raised concerns about the characterization of the general education setting. The Parent stated, "[Student] cannot at once experience a separate classroom which the IEP accurately depicts, AND a 60% general education setting simply because he has access to the general education curriculum. If he is in a separate classroom, then by definition, the general education minutes matrix must read 0%." The Parent argued the District was conflating curriculum and placement. The Parent stated she wanted the Student to first have "the opportunity to start in a regular preschool classroom with supports."
19. In her reply to the District's response, the Parent stated the Student had "never been offered a least restrictive environment" and that all "requests for supports to assist in a least restrictive environment were denied." The Parent further stated the District only offered the program outlined in the IEP, and while the District "offered a tour of a 'blended' program", it "declined offering this program" to the Student. The Parent also argued the District failed to consider supplementary services and supports, such as a "general education [setting]...AND...supplementary services such as itinerant instruction."
20. On February 1, 2020, the Student turned three years old.
21. On February 9, 2020, the Parent emailed the District further questions regarding the IEP and percentage of time the Student would be in a general education setting.
22. On February 24, 2020, the special education teacher emailed the Parent and asked whether she was still considering having the Student attend preschool. The teacher noted they would need to "schedule a time to meet one of those days [conference, no preschool] to finish the IEP (sign the initial placement form) and you could fill out the enrollment packet."
23. On February 25, 2020, the Parent responded to the special education teacher and stated she had sent "two emails to the IEP team trying to clarify" the Student's placement, but received no response, and was still confused about the placement. The Parent stated, specifically that she wanted the Student's IEP "changed to state that [Student] will be placed in a Regular Preschool Program." The Parent stated, "although we would like more than 59% in a general education setting, we are overall in agreement with the IEP goals and accommodations as long as the placement is clarified." The Parent requested the placement be at the top of the agenda for an IEP meeting. The Parent also asked the teacher to confirm that program has "8 slots for students on IEPs, and 4 slots for 'per models' (students without IEPs)."
24. On February 25, 2020, the special education teacher responded to the Parent's email from that same day, stating the preschool program was "designed to have 4 peers and 8 students on IEP's." She stated that at the time the Student's IEP was developed, the program had "4 peers and 3 IEP's and [Student] would have been the 4<sup>th</sup> IEP, so yes, at that time, it would have been a 50/50 ratio...We continually add students as they qualify for special education services and we now have 6 students on IEP's." The teacher also responded with dates for a meeting.

25. On March 2, 2020, the special education teacher emailed the Parent—following an email from the Parent with proposed dates to meet—stating they could meet on March 17, 2020. The teacher stated she wanted to make sure they were on the same page for the meeting and stated she was happy to answer questions about the programs and discuss options within the program. The teacher stated:

The Childfind team is recommending (and the IEP team is in agreement) the extended day program for [Student] as per the assessment results. If that is not what you want, then I need to change the school per week minutes on the IEP. The notes on the prior written notice indicate that you wanted him to attend 3 days/week. That will need to be reflected as well. And again, the consent for initial placement will need to be signed before he can receive service.

The teacher stated that because they were not planning on changing the goals or service minutes for occupational therapy and speech, she was not planning on inviting the entire team, but would invite the early learning specialist and assistant director, and the Parent's advocate.

26. On March 3, 2020, the Parent responded to the special education teacher's March 2, 2020 email, asking if this was an IEP meeting. The Parent also asked what the current "configuration of students in your extended day program (students on IEPs versus students not on IEPs) and what is the maximum or possible configuration of students in extended day?" (Emphasis in original).

The teacher replied that it would not be an IEP meeting, but instead a "meeting of some of the IEP members." The teacher further stated the preschool program was a "brand new classroom that is a 'blend' of the district's Peer Inclusion Program and the Extended Day Program." The teacher stated the program was designed to have 12 students in the class size: "4 community peers and 8 children that qualify for special education. There are 4 slots available for IEP students that qualified for more intensive and structured instruction. The main portion runs from 9-11:30 am and the extended part runs until 1:30 pm."

The Parent responded, asking whether all the students in the extended day program had IEPs. The teacher replied that the extended day program was designed for students with IEPs.

27. On March 4, 2020, the Parent emailed the special education teacher and copied the early learning specialist, Parent advocate, and assistant director and stated that because "the only thing left to finish up is the placement portion of the IEP," she did not feel comfortable having an unofficial meeting and wanted to have an IEP meeting. (Emphasis in original).

28. On March 5, 2020, the early learning specialist responded to the Parent's March 4, 2020 email and stated she wanted to "clarify that our extended day preschool program is not 100% students on IEPs. [Assistant director] sent a detailed email on 1/23/20 explaining our preschool programs," which the early learning specialist resent.

29. On March 10, 2020, the District issued a prior written notice, stating the IEP team would meet further to discuss services and placement, as requested by the Parent. The notice stated, "the

initial IEP meeting was held on 01/29/20. Student has not been receiving services as the initial consent for services has not been signed by the Parent.”

30. On March 16, 2020, the special education teacher emailed the Parent, stating the IEP meeting would need to be rescheduled due to the school facility closures ordered by the Governor due to the novel coronavirus (COVID-19) outbreak. The teacher stated they would reach out “in the coming days” to reschedule. To date, there is no documentation of a meeting being scheduled.

## **CONCLUSIONS**

**Issue: Continuum of Placement Options** – The Parent alleged the District failed to consider a continuum of placement options in order to place the Student in his least restrictive environment once he was eligible for special education services.

District’s Continuum of Placement Options: A district is required to have a continuum of alternative placement options available to meet the special education and related services needs of students. The continuum must include instruction in general education class, special education classes, special schools, home instruction, instruction in hospitals or institutions, and the provision of supplementary services, such as a resource room or itinerant instruction provided in conjunction with a general education classroom placement.

The District had a continuum that included several general education programs where specially designed instruction would be provided in the general education setting (e.g., Head Start, Early Childhood Education and Assistance Program (ECEAP), Title I, and tuition-based Montessori); general education with specially designed instruction provided in a special education program; programs that were considered general education or a special education setting/separate class depending on the enrollment (e.g., peer inclusion model and blended program); and special education/separate class programs (e.g., deaf or hard of hearing/listen and spoken language program and extended day program). In general, the District has a comprehensive continuum of placement options for preschool students who turned 3 by August 31 of a current school year. However, the District misunderstood the age requirements for programs such as ECEAP. In general, a student must be at least three years old by August 31 of the school year to be eligible; however, students are eligible to enroll in ECEAP who turn three years old *after* August 31 of the school year if they have received early intervention services, and if there is space available in the program. This, discussed below, had an impact on the continuum of placement options discussed for this Student.

Student’s Placement: The Parent, in her complaint, alleged the District “only considered and unilaterally” placed the Student in a “separate class.” Placement decisions must be made annually by a group of persons, including the parents, knowledgeable about the student, the evaluation data, and the placement options. A district should consider a continuum of alternative placement options to provide a student instruction and services in the least restrictive environment (LRE)—to the maximum extent appropriate students should be provided instruction in the general education environment; and be placed in special classes or removal from the general education

environment only if nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. A student's IEP team should also consider what are known as the *Rachel H.* factors when determining LRE, which include: the educational benefits to the student of a placement in a general education classroom; the nonacademic benefits of interaction with students who are not disabled; the effect of the student's presence on the teacher and other students in the classroom; and, the cost of mainstreaming the student in a general education classroom. Less restrictive placement options must be considered, but they do not always have to be tried before placing a student in a more restrictive placement.

Here, the Student had been previously eligible for early intervention services and was found eligible for IDEA Part B special education services on January 16, 2020. From the start, the Parent made it clear she was requesting an "inclusive placement," specifically a placement that included "not more than 12% students with disabilities." On January 16, 2020, the Student's evaluation group met and found the Student eligible for special education and related services under the category developmental delay based on the Student's developmental delays in social-emotional/behavioral, language and communication, cognitive, adaptive functioning, and fine motor. The evaluation report recorded the recommendation that the Student receive specially designed instruction in communication, cognitive/preacademic, adaptive/self-help, and social-emotional/behavioral. The evaluation report noted the recommendation that the Student be placed in the District's extended day preschool setting.

On January 29, 2020, the Student's IEP team met and developed the Student's IEP. The IEP noted the Parent's concerns about placement and her request for placement in an inclusive setting. The IEP team recommended the Student be placed in the "Peer-Inclusion/Extended day" preschool class, where he would spend 59.26% of his time in the general education setting (peer-inclusion portion). The IEP noted the Student needed a higher level of adult assistance and significantly modified instruction (extended day portion). The prior written notice indicated the IEP team considered and rejected the Parent's requests for a general education setting with itinerant services, a tuition-based Montessori preschool, and the Student attending on an alternate schedule (fewer days/hours). The notice summarized that the District members of the IEP team thought the peer-inclusion/extended day program was most appropriate for the Student, given his developmental delays and needs. The notice did indicate the team would be willing to meet again to discuss the Montessori preschool when the Student became age-eligible and that the team planned to meet again in June 2020.

While the District did consider several placement options and the Parent toured several classrooms, the District did not sufficiently consider a general education placement option for this Student. The District stated the Student was not age eligible for any of the general education options on the continuum (e.g., prior written notice following the evaluation meeting summarizing that the Student was not yet age eligible for consideration for Head Start or ECEAP; prior written notice following the IEP meeting that the Student was not age eligible for the Montessori program). As discussed above, in general, a student must be at least three years old by August 31 of the school year to be eligible for ECEAP; however, students are eligible to enroll who turn three

years old *after* August 31 of the school year if they have received early intervention services (like this Student), and if there is space available in the program. Thus, the Student could have participated in an ECEAP program if space was available and if it was appropriate based on his needs. The District should have given this option consideration.

The District's prior written notice following the IEP meeting did state it considered a general education setting with itinerant services, but OSPI finds this consideration to be insufficient given the multiple documents which state the team had determined the Student was not age eligible. The IEP team could not fully consider this as an option if it believed the Student was not age eligible for any of the general education placements. Further, the prior written notice stated the "District maintains they are able to provide [Student's] services as outlined within the proposed IEP within the pre-school programs they have recommended." So not only did the District only consider special education placements, but the notice does not provide any indication the District considered the *Rachel H.* factors, including the educational benefits of a placement in a general education classroom; the nonacademic benefits of interaction with students who are not disabled; the effect of the Student's presence on the teacher and other students in the classroom; and, the cost of mainstreaming the Student in a general education classroom. Finally, the peer-inclusion and blended programs could be general education settings at times, depending on the enrollment; but, at full enrollment, these programs would be special education settings. Given the uncertainty based on the fact the setting could fluctuate, consideration of these does not equate to consideration of a general education program.

While the IEP team did consider several placement options, the documentation in this complaint indicates the team only gave full consideration to special education placement options for this Student. As the general education options were dismissed based on the Student's age, the District did not adequately consider a general education option for the Student's preschool placement; and thus, the District failed to consider full continuum of placement options for the Student. Thus, OSPI finds the District in violation and the District will be required to hold an IEP meeting and update the District's continuum of early learning placement options.

Recording Placement in the IEP: Additionally, throughout the investigation, the Parent raised concerns about how the Student's placement was recorded in the IEP. The Student's January 29, 2020 IEP noted the Student would receive 550 minutes a week of specially designed instruction and related services in a special education setting and would spend 59.26% of his time in the general education setting. On the placement options for LRE portion of the IEP, it noted the Student would be in a "separate class" and stated the Student "will be a student in a Peer-Inclusion/Extended day preschool class, where typically developing peers are a part of the program." The Parent raised concerns that the Student could not be in a "separate class" and spend 59% of his time in a general education setting.

OSPI acknowledges this is confusing given the nature of the preschool program and the potential that the morning "peer-inclusion/blended" portion of the program could be characterized as either a general or special education setting, depending on enrollment. At the time the IEP was developed, the preschool class had four general education students, and with the Student, four students with IEPs making the peer-inclusion part of the day a general education setting (a general

education program is a program that includes 50 percent or more students without disabilities). OSPI notes that the fact that the program was a general education setting at the time the IEP was created indicates the Student likely could have been placed in a general education preschool program with appropriate supports. The extended day portion of the program was designed for students with IEPs, meaning that portion of the day was a special education setting. It is possible that a student could spend *part* of the day in a general education setting and *part* of the day in a separate class or special education setting. This was the case on January 29, 2020, when the Student's IEP was created.

OSPI notes that the template format of the District's IEP may be an imperfect way to record placement, given that only one box can be checked in the LRE table. But, taken together, the IEP's service matrix, minutes, LRE table, and LRE explanation accurately documented that the Student would spend time in a general education setting (peer-inclusion portion of the program) and time in a special education/separate class setting (extended day portion of the program) when the IEP was created. The IEP summarized: The Student "will be a student in a Peer-Inclusion/Extended day preschool class, where typically developing peers are a part of the program. The extended day portion includes a high level of adult assistance and significantly modified instruction for students identified as in need of these supports to participate in age-appropriate activities and curriculum." Thus, OSPI finds no violation in how the placement was recorded in the IEP.

Subsequent to the development of the Student's IEP, additional students enrolled so that there were four peers and six students with IEPs—making this a special education setting (a special education program is a program that includes less than 50 percent students without disabilities). The program was designed to have—at full enrollment—four general education peers and eight students with IEPs, a special education setting. Thus, currently, the Student's IEP does not accurately reflect the preschool program. The District and Parent attempted to schedule an IEP meeting in March 2020 to discuss and clarify placement; however, that meeting was ultimately rescheduled due to the school facility closures as a result of the COVID-19 outbreak. The District will update and clarify the Student's placement during the required IEP meeting.

### **CORRECTIVE ACTIONS**

By or before **May 22, 2020, June 5, 2020, and July 15, 2020**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

By **May 15, 2020**, the District will hold an IEP meeting to discuss the Student's placement and will discuss the following topics:

- Continuum of early learning placement options;
- General education placement options available to the Student;
- Supplementary aids and services that could support the Student in a less restrictive setting; and,
- Whether and why the Student would need a more restrictive setting.

The District should use the *Rachel H.* factors to frame its discussion of different placement options. OSPI also strongly recommends the Student's IEP team discuss and clarify the two topics outlined

below in the recommendations section at the IEP meeting. The meeting should be held using distance technology, such as video conferencing or telephone conference call.

By **May 22, 2020**, the District will provide OSPI with a copy of the meeting invitation; the Student's IEP, if amended or revised; prior written notice reflecting the decisions made at the meeting; and any other related documentation.

#### **DISTRICT SPECIFIC:**

By **May 29, 2020**, the District's special education leadership and relevant early learning specialists will review the District's continuum of early learning placement options and the Department of Children, Youth, and Families (DCYF) 2019-20 ECEAP Performance Standards to ensure there are general education placement options along the continuum for students eligible for special education who turn 3 years of age *after* August 31 of a school year. OSPI and DCYF can be consulted for technical assistance, if needed.

The District will determine what District documentation, guidance, policies or procedures need to be updated. By **June 5, 2020**, the District will provide OSPI with a list of District documentation that needs to be updated. By **July 15, 2020**, the District will provide OSPI the updated versions of the identified documentation for review.

The District will submit a completed copy of the Corrective Action Plan (CAP) Matrix documenting the specific actions it has taken to address the violations and will attach any other supporting documents or required information.

### **RECOMMENDATIONS**

At the IEP meeting, OSPI recommends the District and Parent discuss two items about which there seem to be a misunderstanding.

First, the Parent believes that by providing services concurrently, it allows the District to "count that 'Concurrent' service as being delivered in a general education *setting*." This is inaccurate and it is unclear whether this confusion is a result of a miscommunication or misunderstanding. According to the Student's service matrix, he will receive concurrent service in a special education setting. However, concurrent services would *reduce* the overall minutes spent in a special education setting (e.g., one hour of communication and social/emotional combined, instead of two hours—one hour of communication plus one hour of social/emotional); thus, this would *increase* the amount of time spent in a general education setting. OSPI recommends the team discuss and clarify.

Second, the Parent stated throughout that the District was conflating access to general education curriculum with access to a general education setting. The documentation does indicate the District shared with the Parent the various curricula used in preschool programs, including general education curriculum. There is no documentation that supports the District stating that the curriculum is what defined the setting. Again, it is unclear whether this confusion is a result of a miscommunication or misunderstanding. Regardless, the Parent is correct when she points out



that it is a percentage of students, not a curriculum, that defines general or special education setting. OSPI recommends the Student's IEP team discuss this to ensure everyone is on the same page.

Dated this \_\_\_\_ day of April, 2020

Glenna Gallo, M.S., M.B.A.  
Assistant Superintendent  
Special Education  
PO BOX 47200  
Olympia, WA 98504-7200

**THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT**

IDEA provides mechanisms for resolution of disputes affecting the rights of special education students. This decision may not be appealed. However, parents (or adult students) and school districts may raise any matter addressed in this decision that pertains to the identification, evaluation, placement, or provision of FAPE to a student in a due process hearing. Decisions issued in due process hearings may be appealed. Statutes of limitations apply to due process hearings. Parties should consult legal counsel for more information about filing a due process hearing. Parents (or adult students) and districts may also use the mediation process to resolve disputes. The state regulations addressing mediation and due process hearings are found at WAC 392-172A-05060 through 05075 (mediation) and WAC 392-172A-05080 through 05125 (due process hearings.)