

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-88**

### **PROCEDURAL HISTORY**

On June 12, 2023, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint from the parent (Parent) of a student (Student A) attending the Edmonds School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education and the education of another student (Student B).

On June 12, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on June 14, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On June 30, 2023, the District requested an extension of time to respond to the complaint. OSPI granted the extension to July 7, 2023.

On June 10, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on July 11, 2023. OSPI invited the Parent to reply.

On July 28, 2023, OSPI received the Parent's reply. OSPI forwarded that reply to the District on August 1, 2023.

On August 1, 2023, OSPI requested that the District provide clarifying information. The District did not provide the information prior to the complaint decision deadline.

On August 2, 2023, the investigator consulted with OSPI's Early Childhood Special Education/619 Coordinator.

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

### **ISSUE**

1. Whether the District implemented the Students' individualized education programs (IEPs) in the least restrictive environment (LRE), setting, and placement (regular early childhood program) during the 2022–23 school year?

### **LEGAL STANDARDS**

Least Restrictive Environment: School districts shall ensure that the provision of services to each student eligible for special education, including preschool students and students in public or private institutions or other care facilities, shall be provided: 1) To the maximum extent appropriate in the general education environment with students who are nondisabled; and 2) 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.

Early Childhood Placements: The continuum of alternative placements a public agency providing special education and related services to a preschool child with a disability may include, but is not limited to, the following: Providing opportunities for the participation of preschool children with disabilities in preschool programs operated by public agencies other than school districts (such as head start or community-based child care); Enrolling preschool children with disabilities in private preschool programs for nondisabled preschool children; Locating classes for preschool children with disabilities in regular public elementary schools; and Providing services and instruction in the home.

Regular Early Childhood Program: Regular early childhood program means a program that includes fifty percent or more children who do not have an IEP. Programs may include, but are not limited to, the following: Head start; early childhood education and assistance program (ECEAP); transitional kindergarten; kindergarten; preschool classes offered to an eligible prekindergarten population by the public school system; private kindergartens or preschools; group child development centers; or child care. WAC 392-172A-01152.

Special education and related services delivered in the child's classroom in the course of daily activities and routines in which all children in the classroom participate (e.g., "circle time", "learning centers"), would be considered as being received in the Regular Early Childhood Program. However, services delivered in other locations that remove the child from the opportunity to interact with nondisabled children would not be considered as being received in the Regular Early Childhood Program. These include, but are not limited to, services delivered in a 1:1 therapeutic setting, or in a small group comprised solely of children with disabilities in another location within the building where the regular early childhood program is located. *Dear Colleague on Preschool Least Restrictive Environments* (OSERS, 2017).

IEP Implementation: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction served through enrollment who is eligible to receive special education services and ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a [student with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Prior Written Notice: Written notice must be provided to the parents of a student eligible for special education, or referred for special education a reasonable time before the school district: (a) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student; or (b) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. 34 CFR 300.503; WAC 392-172A-05010.

## **FINDINGS OF FACT**

### **Complaint Allegations & Parent Concerns**

1. The Parent alleged that the District's preschool was not a "Regular Early Childhood Program of  $\geq$  10 hours and [specially designed instruction] in Early Childhood program," despite this being the placement listed on the IEPs.

The Parent noted in the complaint that IEPs indicated Students, including her child (Student A) and another student (Student B), would participate in an "inclusive preschool classroom."

The Parent stated that she did not believe the Students' classroom met the "50% threshold to be considered...a regular early childhood classroom." The Parent stated she was told by the District that as of May 2023 "62% of the students at [the preschool] have [an] IEP..."

2. Further, in the Parent's reply to the District's response, the Parent stated they never "received prior written notice when the developmental preschool transitioned to an inclusive model at the beginning of the 22-23 school year."
3. The complaint included emails obtained from the District by the Parent through a public record request. One such email from April 2023 referenced the student ratios in the preschool, stating they needed to "have ratios that are actually inclusive. We need LESS preschoolers receiving special education services in each classroom...We simply do not have inclusive ratios here, as in many classrooms more students are receiving services than not."
4. In the reply to the District's response, the Parent stated that in May or June 2023, she and another preschool parent met with the District's assistant superintendent and were told by the assistant superintendent that "when the school transitioned from developmental only to fully integrated for the 22-23 school year, all IEPs should have been reviewed and updated to reflect the shift." And that this need for review "was due to the fact that during the 21-22 school year, all IEPs indicated a special education setting because there were no general education settings at the school." The Parent stated it was her "understanding that this was not done for any of the returning students."

### **District Preschool Information**

5. The District's 2022–23 school year began on September 7, 2022 and ended on June 15, 2023.
6. In emails to preschool parents on September 8 and 9, 2022, the District shared it was "moving to a fully inclusive program, blending classes with children with and without special needs."
7. The District stated in its response that to the extent OSPI determines that corrective action is warranted, the District suggests "written guidance regarding implementation of IEPs."

8. The District provided a spreadsheet of all the students in the District's preschool program. Overall, the spreadsheet, when organized by teacher, indicated that each class, except for one, had more students with IEPs in the class than students without IEPs. The majority of the students with IEPs had least restrictive environments of 80–100% in a general education setting, although the spreadsheet did not provide the specific individual services on the students' IEPs or the specific setting for individual services.

### **Student A**

9. At the start of the 2022–23 school year, the Student was in preschool and was eligible for special education services under the category of developmental delay. His March 2022 IEP was in effect.
10. The March 2022 IEP included specially designed instruction in language skills provided by a speech language pathologist (SLP) and paraeducator in the special education setting. The Student's IEP stated he would be in a general education setting for 0% of his time in school. The IEP stated the Student would "participate in a self contained special education preschool classroom with specially designed instruction in language skills. His preschool setting is self-contained and typically developing peers are not regularly part of this preschool program."
11. On September 9, 2022, the Student's special education teacher informed the Parents that the District was "moving to a fully inclusive program, blending classes with children with and without special needs."
12. In its response to this complaint, the District stated that Student A's preschool class was intended to be an "inclusive general education setting" but that:
  - Due to enrollment, Student A's class contained eight students with IEPs and seven students without IEPs. However, given that Student A's IEP stated that he would be in a special education setting for the full school day, the student composition did not result in a failure to implement the placement in Student A's IEP from the beginning of the 2022-2023 school year to March 2023.
13. According to progress reporting, as of January 30, 2023, Student A was making sufficient progress on his language skills goals.
14. On March 13, 2023, the Student's IEP team developed a new annual IEP for the Student. The Student's IEP provided the Student with the following specially designed instruction in language skills: 30 minutes a week provided by an SLP in the general education setting.

The IEP also included 10 minutes per month of SLP consultation as a supplementary aid and service, also to be provided in a general education. The IEP indicated the Student would participate in an inclusive preschool classroom, spend 100% of his time in a general education setting, and that his placement was a regular early childhood program of 10 hours or more.

15. The District acknowledged that although Student A's classroom was intended to be an inclusive general education setting, due to enrollment, "the class included one more student with an IEP than without an IEP" and the District, "therefore, acknowledges that Student A's class did not consist of at least 50 percent general education peers for the duration of the school year."
16. The Parent, in her reply to the District's response, argued that prior to March 2023, the intent was to place the Student in a general education and therefore, the class '**was intended to be an inclusive general education setting,**' then [Student] was not placed in the least restrictive environment identified in his IEP...If they argue that they were somehow *IN* compliance with the IEP because, by...luck, the general education classroom [Student] was placed in didn't meet the requirements to be a general education setting, then they have to admit that every IEP in his class that required a general education setting is *OUT* of compliance...If an IEP required a special education setting, they are out of compliance because they were placed in a class that was meant to be a general education setting. If an IEP required a general education setting, they were out of compliance because, as they state, the composition of students in the classroom did not meet the requirements of a general education setting.

(Emphasis in original.)

After March 2023, the Parent stated:

It was not until [Student's] annual IEP review that his LRE was changed to a general education setting. At that point, if protocols had been followed and [Student] had been placed in a special education setting at the beginning of the school year, he should then have been moved to a general education setting with a different teacher. Instead, he remained in the same intended-to-be general education classroom where he was originally placed in at the beginning of the school year, and his IEP remained out of compliance.

17. On June 21, 2023, the Student's IEP team amended his IEP to provide additional special education services in a general education setting. The IEP indicated the Student would participate in an inclusive preschool classroom and spend 100% of his time in a general education setting.

### **Student B**

18. At the start of the 2022–23 school year, the Student was not yet eligible for special education services.
19. On December 1, 2022, the Student's IEP team developed an initial IEP for the Student. The Student was in preschool and was eligible for special education services under the eligibility category autism. The IEP included annual goals and specially designed instruction in adaptive, social skills, and language skills. Specially designed instruction was to be provided in the general education setting by special education teachers or special education staff and the Student would spend 100% of his time in the general education setting. The IEP indicated the Student's placement would be a regular early childhood program of less than

or equal to 10 hours and specially designed instruction in the early childhood program. The IEP noted, “[Student] will participate in an inclusive preschool classroom.”

20. Student B’s parents provided consent for the initial provision of special education services on December 1, 2022.

21. Student B attended the special education teacher’s afternoon preschool class, which the District stated was intended to be an inclusive general education setting. The District stated:

The class initially consisted of 50 percent students with IEPs and 50 percent students without IEPs. However, during the school year, one student without an IEP left the District and another was transferred to a different preschool class. As a result, for a portion of the end of the school year, Student B’s class had fewer than 50 percent of students without IEPs. Parents were informed of the ratio of students in the classroom and did not request an IEP team meeting to discuss Student B’s placement, nor did they request a change to his classroom assignment. Nonetheless, the District acknowledges that Student B’s class did not consist of at least 50 percent general education peers for the duration of the school year.

22. As of May 24, 2023, the Student’s preschool special education teacher noted, in response to an email from Student B’s parent, that the makeup of her class included:

- AM Class: “8 students on IEP’s [sic] 8 neurotypical students”
- PM Class: “8 students on IEP’s [sic] 6 neurotypical students”

The email further stated, “The PM class had 2 more neurotypical students but one moved to my AM class and 1 moved out of the district.”

23. In the reply to the District’s response, the Parent that filed this complaint stated that, “No dates are given as to when these events may have occurred and no attempt was made to inform [Parent of Student B] of these changes prior to her requesting the information.”

24. According to progress reporting, as of January 30, 2023, Student B making sufficient progress on his IEP goals.

## CONCLUSIONS

**Issue: IEP Implementation in a Regular Early Childhood Program** – The Parent alleged that the District failed to implement IEPs as written with respect to least restrictive environment and regular early childhood program placement, in the District’s preschool program during the 2022–23 school year. The Parent provided examples of her child (Student A) and another Student (Student B) and stated that the IEPs stated the placement would be “Regular Early Childhood Program of  $\geq$  10 hours and [specially designed instruction] in Early Childhood program” and that the Students would participation in an “inclusive preschool classroom.”

### IEP Implementation

Here, for the two specific Students reviewed, both IEPs indicated the Students would be in a regular early childhood program. Student A’s March 2023 annual IEP and June 2023 amended

IEP and Student B's December 2022 IEP indicated the Students would receive services in a general education setting and be placed in a regular early childhood program.<sup>1</sup>

The District acknowledged that Student A's classroom was intended to be an inclusive general education setting, due to enrollment, "the class included one more student with an IEP than without an IEP." Therefore, Student A's class did not consist of at least 50% general education peers for the duration of the school year. Student B's class initially consisted of 50% students with IEPs and 50% student without IEPs, making it a regular early childhood program; however, during the school year, two students without IEPs left the class, causing the classroom to be a special education, not general education setting or regular early childhood program.

However, here, the IEP teams wrote the annual IEPs for both Students and included on the IEP that services would be provided in a general education setting, and the Student's would be in a regular early childhood program, when the IEP team likely knew that the current composition of the preschool classes were not regular early childhood programs, as there were more students with IEPs in the classes. Thus, the District failed to implement the IEPs as written and finds a violation.

The District proposed written guidance as a corrective action, which OSPI finds appropriate.

#### Inclusive Preschool Model

As part of the complaint, the Parent raised the concerns that the parents did not receive prior written notice when the developmental preschool transitioned to an inclusive model at the beginning of the 22-23 school year. Based on the documentation provided in the complaint, it does not appear prior written notice was provided with respect to the shift to an inclusive preschool, although emails were sent out, wherein the District it was "moving to a fully inclusive program, blending classes with children with and without special needs."

It is important to note two things underlying the discussion in this complaint. First, it appears that there has been a conflation of an "inclusive preschool program" with a general education setting or "regular early childhood program." OSPI notes there is no legal definition of an inclusive program or classroom, in that a specific ratio of students is not defined for inclusion. Rather OSPI offers guidance, technical assistance, and professional development on inclusive practices and notes that inclusion is "realized when all students, regardless of their designation

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<sup>1</sup> OSPI notes that Student A's March 2022 IEP, in place at the start of the 2022–23 school year, indicated that the Student would be in a general education setting for 0% of the time and attended a self-contained preschool. The District stated that while the Student's class was intended to be an inclusive setting at the start of the school year, the class had more students with IEPs, making it a special education setting. And thus, the District stated there was no violation at the start of the school year. OSPI notes this is largely true; the IEP was implemented as written and in a special education setting. Although, OSPI notes the Student was no longer in a self-contained setting as there were students without IEPs in the class. As discussed below, the District appropriately updated the Student's annual IEP to address this discrepancy; although, as also discussed, the classroom was still not yet a regular early childhood setting and thus presented a different issue.

to receive special education services, are provided with targeted services, supports, and accommodations; allowing them to learn in the general education classroom, interact with peers, and engage the core curriculum.”<sup>2</sup> In contrast, there is a specific legal definition of a regular early childhood program, “a program that includes fifty percent or more children who do not have an IEP.”

OSPI makes this point to highlight the fact that here, the District does appear to be working toward creating an inclusive preschool program. When looking at the Students in the preschool program organized by teacher/class, while most of the classes had more students with IEPs in the class (and therefore do not meet the definition of a regular early childhood program, discussed below), almost all the classes had several to many typically developing students in the class. At the same time, OSPI recognizes that preschool classes can be more fluid than K–12 classrooms as preschool students frequently enroll or move throughout the year, meaning the ratio of students eligible for special education and students without IEPs can fluctuate over the course of a school year. OSPI notes concern that, given the student ratios in the class, it does not appear that the District’s regular early childhood program model is sustainable—in many of the classes, if a single general education peer moves, the class is no longer a regular early childhood program or general education setting. OSPI recommends the District create a plan for the preschool program that builds in strategies for addressing student ratio fluctuations and plans to communicate to families on the front end.

That being said, a district must provide parents of students eligible for special education with prior written notice when it proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education (FAPE) to a student. In this case, the District should have provided prior written notice to families in the preschool prior to the start of the 2022–23 school year, as moving to an inclusive preschool program potentially impacted and represented a change to student placements and the provision of FAPE. Thus, OSPI finds a violation with respect to the lack of prior written notice. The District will be required to address this in the written guidance ordered above and provide families prior written notice at the start of the 2023–24 school year and an opportunity to request IEP meetings if the families would like to discuss how the work toward an inclusive preschool impacts the provision of FAPE for their students.

### **CORRECTIVE ACTIONS**

By or before **September 8, 2023, September 15, 2023, and October 6, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

None.

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<sup>2</sup> See OSPI’s “Inclusionary Practices Professional Development Project,” <https://www.k12.wa.us/policy-funding/special-education-funding-and-finance/inclusionary-practices-professional-development-project>.



## **DISTRICT SPECIFIC:**

### **Written Guidance**

By **September 29, 2023**, the District will ensure that the following individuals receive written guidance on the topics listed below: District special education administrators and all staff working at the District preschool. The guidance will include examples and discussion of best practices on the following topics:

- IEP implementation
- Least restrictive environment and regular early childhood programs
- Prior written notice

By **September 8, 2023**, the District will submit a draft of the written guidance to OSPI for review. OSPI will approve the guidance or provide comments by September 15, 2023.

By **October 6, 2023**, the District will submit documentation that all required staff received the guidance. This will include a roster of the required personnel. This roster will allow OSPI to verify that all required staff members received the guidance.

### **Prior Written Notice**

By **September 8, 2023**, the District will provide families prior written notice, describing the inclusive preschool model, any changes to the preschool model, and how the inclusive preschool model could impact FAPE. The prior written notices will offer families the opportunity to request IEP meetings if the families would like to discuss how the work toward an inclusive preschool impacts the provision of FAPE for their students.

By **September 15, 2023**, the District will provide OSPI with a copy of the prior written notice and documentation that the notices were provided to families.

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**

OSPI commends the District for its work to create an inclusive preschool program. And recommends that the District create a plan for the preschool program that plans ahead for fluctuations in student ratios and plans to communicate those plans to families.

OSPI also recommends the District seek out technical assistance, coaching, and consultation on how to effectively blend programs and around how to provide regular classroom ratios through the Inclusionary Practices Professional Development Project: <https://www.k12.wa.us/policy-funding/special-education-funding-and-finance/inclusionary-practices-professional-development-project>; the District's ECSE implementation specialist; and reach out to OSPI's Special Education Division and Early Childhood Special Education/619 Coordinator to discuss other technical assistance and professional development options and resources.

Dated this 9th day of August, 2023

Dr. Tania May  
Assistant Superintendent of Special Education  
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**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.)