

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-07

PROCEDURAL HISTORY

On January 27, 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 Battle Ground School District (District). The Parent alleged the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On January 29, 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 February 19, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent that same day. OSPI invited the Parent to reply.

On February 19, 2020, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received the requested information on February 21, 2020 and forwarded it to the Parent on February 24, 2020.

On February 24, 2020, OSPI received additional information from the Parent. OSPI forwarded this additional information to the District that same day.

On March 5, 2020, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received the requested information on March 9, 2020 and forwarded it to the Parent on March 10, 2020.

On March 12, 2020, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received the requested information on March 12, 2020 and forwarded it to the Parent on March 13, 2020.

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

SCOPE OF INVESTIGATION

The time period under investigation begins on January 28, 2019, as OSPI may investigate only those issues occurring during a one-year period. Any information included from events prior to January 28, 2019 is mentioned for informative, background purposes only.

ISSUES

1. In placing the Student in the "off-site behavior classroom," did the District provide the Student with a free appropriate public education (FAPE) in his least restrictive environment (LRE)?

2. Did the District follow proper individualized education program (IEP) development procedures, including basing decisions on sufficient and relevant data, in:
 - a. Moving the Student to the "off-site behavior classroom;" and,
 - b. Changing the Student's eligibility category?
3. Regarding the location of the "off-site behavior classroom," was this location as close as possible to the Student's home, as required by WAC 392-172A-02060(3)¹?

LEGAL STANDARDS

Least Restrictive Environment (LRE): 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.

A student's individualized education program (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 (9th Cir. 1994).

Rationale for IEP Team Determinations: An IEP team's decisions must be based on sufficient, relevant, and accurate data. *See generally* WAC 392-172A-03020; *see also* WAC 392-172A-03110(1)(a)-(d), -(3); WAC 392-172A-03090(k)(i).

Evaluation/Reevaluation Standards: In completing an evaluation, the evaluation group must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This must include information provided by the parents that may assist in determining whether the student is or remains eligible to receive special education services, and if so the content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum. No single test or measure may be used as the sole criterion for determining the student's eligibility or disabling condition and/or determining the appropriate education program for a student. An evaluation must be conducted in all areas of suspected disability and must be sufficiently comprehensive to identify all of the student's special education needs and any necessary related services. 34 CFR §300.304; WAC 392-172A-03020.

¹ WAC 392-172A-02060(3) reads: "Unless the IEP of a student requires some other arrangement, the student shall be educated in the school that he or she would attend if nondisabled. **In the event the student needs other arrangements, placement shall be as close as possible to the student's home**" (emphasis added).

Reevaluation – Review of Existing Data: As part of a reevaluation, the IEP team and other qualified professionals must review existing data on the student. Existing data includes previous evaluations, independent evaluations or other information provided by the parents, current classroom-based assessments, observations by teachers or service providers, and any other data relevant to the evaluation of the student. 34 CFR §300.305(a); WAC 392-172A-03025.

Parent Participation in IEP Development: The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents: (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child’s need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,472, 12,473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 5).

Definition of Developmental Delay: Developmental delay means a student three through eight who is experiencing developmental delays that adversely affect the student's educational performance in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development or adaptive development and who demonstrates a delay on a standardized norm referenced test, with a test-retest or split-half reliability of .80 that is at least: (1) Two standard deviations below the mean in one or more of the five developmental areas; or (2) One and one-half standard deviations below the mean in two or more of the five developmental areas. WAC 392-172A-01035(d).

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). No one team member has ‘veto power’ over individual IEP provisions or the right to dictate a particular educational program. For example, while the district must consider the parent’s concerns and any information the parent provides, the district is not required to adopt all recommendations proposed by a parent. An IEP may be properly developed under IDEA procedural requirements, yet still not provide the student all of the services that the parent believes are necessary components of the student’s educational program. 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. 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 (9th Cir. 2003). *See also, Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1182-83 (9th 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.)

Physical Location of Student's School: Unless the student's IEP requires some other arrangement, the student must be educated in the school that the student would attend if not disabled. If the student needs other arrangements, placement must be as close as possible to the student's home. 34 CFR §300.116; WAC 392-172A-02060(3).

FINDINGS OF FACT

2018-2019 School Year

1. At the start of the 2018-2019 school year, the Student was eligible for special education services under the category of autism, was in the first grade, and attended a District elementary school (school 1). At that time, the Student's January 2018 individualized education program (IEP) was in effect. The January 2018 IEP stated the Student would be in the *general education setting* for 55.68% of the day.
2. On October 12, 2018, the Student's IEP team amended the Student's January 2018 IEP. According to the October 2018 Amended IEP, from October 15, 2018 through January 30, 2019, the Student would receive the following specially designed instruction in a *special education setting*:
 - **Behavior/Social:** 175 minutes 5 times a week (to be provided by a special education assistant)
 - **Adaptive:** 30 minutes 5 times a week (to be provided by a special education teacher)
 - **Communication:** 20 minutes twice a week (to be provided by a speech language pathologist (SLP))

The October 2018 IEP provided the Student with the following related service in a *special education setting* from October 15, 2018 through January 30, 2019:

- **Occupational therapy:** 30 minutes 1 time a week (to be provided by an occupational therapist (OT))

The October 2018 IEP provided the Student with the following accommodations:

- Sensory breaks and tools; and,
- Visual supports: picture schedule, behavior charts, timers, vocabulary, social stories, curriculum vocabulary, etc.

The October 2018 Amended IEP stated the Student would be in the general education setting for 40.81% of the day.

3. On November 9, 2018, the Student's evaluation team completed a functional behavioral assessment (FBA) of the Student, and the Student's IEP team created a behavioral intervention plan (BIP) for the Student.

The November 2018 BIP addressed the following 'Target Behaviors' by the Student: inappropriate language; refusing to do work; and running around the room. It addressed these behaviors with various strategies, including the following: allow the Student to take a break when he got frustrated; praise the Student when he demonstrates the correct behavior; use

first/then and visual cues to remind Student how to behave appropriately in situations wherein he experiences difficulty; and teach Student how to self-advocate for breaks, as needed.²

4. According to the District:

There was a meeting on December 18, 2018. The purpose of the meeting was to review the reevaluation results and determine continued eligibility as well as give the IEP team information for placement. [The following individuals] were invited to attend the December 18, 2018 meeting: [general education teacher, Parent, psychologist, special education teacher, OT, and SLP]. Results obtained up to that point were reviewed with the Parent. The team considered changing the disability category to emotional/behavioral disability. The Parent objected to this category. After discussing the potential eligibility categories and listening to the Parent's input, the team decided to extend the reevaluation in order to gather further information that would assist in determining the appropriate category.

5. On January 3, 2019, the Parent emailed the school psychologist, stating, in part:

1. We would like to formally request dedicated, full-time, one-on-one support for Student.

We feel that all of the behavioral issues highlighted at the meeting could be satisfactorily and quickly mitigated with the close support of a dedicated assistant...The District has expressed concern that a one to one could have the effect of making Student 'person dependent.' We feel that this rapport is exactly what is needed and that the benefits of a dedicated one on one would far outweigh any negative effect. This is evidenced by the fact that at home, a person dependent environment, Student does not attempt the behaviors that he exhibits at school or on [the] occasion that he does, his behavior is quickly corrected. One on one support could be gradually phased out once Student is able to function appropriately on his own.

...

2. We are strongly opposed [to] the District's suggestions that Student's disability category be changed to 'Emotional/behavioral disability.'

...

We do not feel that because Student has met certain goals and no longer requires special services in those areas that his remaining behavioral/social deficiencies are somehow not related to his underlying diagnosis of autism.

3. We are strongly opposed to the District's assertions that an offsite location would be more appropriate or less restrictive for Student's [free appropriate public education] FAPE.

The District has stated that Student's behaviors greatly impede his learning and the learning of others. We agree with this concern but emphatically reiterate that the full use of

² As part of this investigation, OSPI's investigator asked the District if the Student's November 2018 BIP was ever amended in response to the continued and/or changed behavioral needs of the Student. The District stated: "The BIP did not help reduce the Student's challenging behaviors. The November 2018 BIP was in effect until the time the Student was withdrawn in spring 2019. While it was not revised, there were adjustments made: additional assistant time [and] minor adjustments to specific elements like incentive, the frequency of break times, and the work completion requirement before a break."

supplementary aides and services, to the maximum extent appropriate, would easily allow Student to receive his education in a general education environment with students who are nondisabled, at the school he would attend if nondisabled. We do not feel that the District has met this burden.

Because we both live and work [near school 1], we are very concerned about the time it would take to travel to another school in the District if Student were to experience an illness or injury during school.

We are concerned that an extended bus ride (without adult support) to an alternate location would only serve to exacerbate Student's behavior upon arrival.

(emphasis in original).

6. As part of this investigation, OSPI's investigator asked the Parent for clarity on his January 3, 2020 email. Specifically, OSPI's investigator asked: "What additional supplementary aides and services [did you believe] Student required in order to more fully participate in the general education environment?" In response, the Parent stated, in part:

For all of Student's kindergarten year and most of Student's first grade year he had an assistant with him for certain activities only, but was otherwise unassisted in his general education classroom. Once he would inevitably become disruptive he would be removed and placed in the center-based classroom (CBC)³, at a desk outside his regular classroom, or in isolation. Over time, due to this, he would spend less and less time in his general education classroom. This was the primary reason we started asking for a dedicated one-on-one assistant in his kindergarten year. When we asked for a one-on-one again, in writing, was when the five week trial began. We did not feel that this was enough time for him to adjust to being in his regular classroom full time, especially since he spent so little time there in the months preceding this. We also feel that he was benefiting from the weekly [occupational therapy] but we were told he tested out of receiving that service...Additionally, we feel that classroom aides such as visual aids, timers, and sensory tools could have been more available.

7. The timeline for this complaint began on January 28, 2019.
8. On January 29, 2019, the Student's evaluation team completed a reevaluation of the Student. It read, in part:

Review of Existing Data

...

Student's behavior during his kindergarten and first grade years has had a significant impact on his general education class. Student will frequently say inappropriate things to his classmates (i.e., 'who wants to see where poop comes from?') and insult or threaten the teacher (i.e., 'you are a dirty peasant' and 'I will crush your body and blow up the school

³ According to the District, the center-based classroom (CBC) was "a special education classroom. Generally speaking, students served in a CBC require a high level of support in the following areas: cognitive ability; adaptive functioning; general education; academic performance; communication; and behavior/social/sensory. The CBC is designed to support students with significant disabilities and global needs who may not [be] success[ful] in a less restrictive environment."

with bombs'). He will also run around the classroom shouting to try and get away having to complete work. He also will cry and roll on the [floor if he] does not get what he wants.

As a response to the behavior, Student's [FBA] and [BIP] were updated on November 9, 2018. His behaviors are his use of inappropriate language and refusing to do work. The function of these behaviors is to gain peer attention and avoid an undesired task, respectively. For the inappropriate language the staff response is to remove the audience, calm student down, and get student to complete some work before he is allowed to rejoin the classroom. For refusing to do work, staff is to maintain the expectation that work will be completed and if necessary, remove the audience. Student is not allowed a preferred activity until work has been completed.

Whenever student leaves the CBC, he has an adult with him to help manage his behavior. With this support, student is typically able to manage in the other setting⁴ for about 30 minutes before he needs to be removed for being escalated.

...

The...Student's disability impacts progress in the general education curriculum by preventing him from having access to the general education classroom because of how much he disrupts the classroom. Student also has several meltdowns per day that require help from an adult get calm again.

...

Observation

When Student is asked to do work that he perceives as taking too long he can escalate when he is in the quiet work room. He will cry 'you can't make me,' 'I hate you,' and roll on the ground. This behavior can last several hours and he does it to avoid the task. Sometimes this happens around recess time, and if he misses recess because he is not in control of his body, he cries, yells at the teacher, throws things, and rolls on the floor. If he is told that it is getting close to recess time, sometimes he gets so excited that he cannot control his body. Refusing to do work happens about 5 to 10 times per day.

The other behavior that is of significant concern is when student runs around the classroom, calling to other students to try and get them to run around the classroom with him. Student also uses inappropriate language frequently. What is important to note about both of these behaviors is that neither one of them is related to his medical diagnosis of autism. When student refuses to do work or follow adult directions, it does not come from being overwhelmed with stimulus, a change in schedule, or other things generally associated with a student with autism. These behaviors are not directly related to his autism.

...

During the observation, Student followed directions and initiated contact with adults. Student demonstrated safe behaviors and was quiet (non-disruptive). Student also demonstrated good social interaction with peers, although there was little interaction (mainly at recess). Student used his chew necklace appropriately, however, he often became hyper-focused on chewing the necklace or playing with the string. At times, Student asked 'why?' when an instruction was provided...This behavior observation is not typical for

⁴ According to the District, 'the other setting' refers to "any setting other than the CBC classroom. It was typically the general education classroom but it also included specialists, lunch, assemblies, and library."

student. The observation happened when a new stimulus was tried (the necklace) and it was done during the honeymoon after winter break when Student behavior was the best it has been all year. No academic tasks happened to be planned during the observation and that [is] when the majority of his behavior occurs.

Significant Findings:

Student was assigned a 1:1 on January 14, 2019. Notes were kept about his day including: daily point sheets; frequency data; antecedent-behavior-consequence data; and lists of interventions tried. The most common interventions tried with Student were social stories, visuals, behavior chart, behavior levels, and first/then charts...If you take the average across the whole two weeks, Student engages in an average of 63 instances of disruption of off task behavior and requires being reminded 29 times. This number is slightly lower than it could be given that if Student has a meltdown for 45 minutes, that is counted as 1 instance of disruption and 1 reminder...Student [has] a 50% success rate [with demonstrating safe, respectful, and responsible behavior]...He is averaging 2.6 meltdowns per day.

...

Overall, with the 1:1 intervention, Student has not shown any growth in his ability to maintain control of his body or follow directions. He still spends a majority of his day outside the general education setting, is a great distraction to other students, and has difficulty showing expected behaviors.

Behavior/Social

...

In October, Student's IEP was amended to give him more behavior minutes, which reduced his time general education room down to 40%, and he was accompanied by an adult for the majority of that time. With an adult sitting next to him, he was still not successful in the general education classroom. He still shouted out and refused to do work. The amount of impact that it had on the classroom was significant enough that Student's time was reduced again to him spending very little time in the general education classroom. He starts every day attempting to stay in the general education classroom and typically after 5 minutes his behavior is significantly impacting the classroom and he transitions to the [CBC].

In the [CBC], his behavior continues to significantly impact the other students. His FBA and BIP were written to specifically address a behavior where he would run around the classroom and intentionally try to pull two other students off task. If he was in the study room with an adult he would also bang on the window and call out for the other students to come and 'rescue him.' If the other students joined him, he would run around with them, make animal noises and try to avoid all the adults. This behavior could continue for a long time if not interrupted by adults. When Student begins calling out to the other students, he is then separate from the other students by going into the quiet work room to complete his work. Once he has completed work he is invited back into the classroom.

The following interventions have been tried with Student. He was put on a point sheet, where he could earn starts for completing work, ignoring distractions and following directions. He was working for a prize of his choosing. This worked for about a week before he stopped caring about getting starts and earning prizes. He will sometimes be motivated to work for it in the morning, but in the afternoon, reminders of his prize and how close he is does not affect his behavior. We implemented sensory support, including: heavy work;

fidgets tools, sensory breaks; lap belts; weighted vests; wiggle seats and headphones. Some of them were successful for a short period of time, but they typically become toys when he has them for longer than 15 minutes. [We have noticed that they do not do much in the way of regulating his body].⁵ We use problem solving sheets, home communications sheets, used the zones of regulation curriculum, and increased his 1:1 time in the general education setting.

When he was in the general education setting with a 1:1, he would typically be able to maintain for about 30 minutes before he becomes escalated and needs to transition to the center-based classroom. The 1:1 started out their time by being right next to Student, helping him work and stay on task. This led to Student arguing about completing tasks, saying, 'Noooo!' 'You can't make me,' and 'I don't need to listen to you.' The 1:1 then stayed further back and this led to Student shouting out to the class, trying to distract others and not complete work. When the 1:1 moves in to redirect him, then he goes back to arguing. He has attempted to start every day in the general education setting, but he is frequently not able to maintain past 30 minutes. Sometimes he is able to maintain for only 5 minutes.

...

Student's mother rated Student's [Autism Spectrum Rating Scale (ASRS)] score as falling within the very elevated range, while his teacher's fell within the elevated range. This indicates that slightly more behaviors typical of those with autism spectrum disorder are being seen at home than at school.

...

Parent and the special education teacher completed the Behavior Assessment System for Children, Third Edition (BASC-2). [Parent's results were as follows: Externalizing Problems (At-Risk); Internalizing Problems (At-Risk); Behavioral Symptoms Index (At-Risk); Adaptive Skills (At-Risk). The special education teacher's results were as follows: Externalizing Problems (Clinically Significant); Internalizing Problems (At-Risk); Behavioral Symptoms Index (Clinically Significant); Adaptive Skills (At-Risk).]

...

Other

Student's special education teacher completed the Sensory Processing Measure (SPM) to provide a unique and comprehensive perspective on his sensory functioning at school. The SPM is an integrated system of rating scales that enables assessment of sensory processing issues, praxis, and social participation in school-aged children...Based on findings from the SPM, Student received standard scores in: a) 'Some Problems' in the areas of: Vision; Balance; and Planning/Ideas; and b) 'Definite Dysfunction' in the areas of: Social; Hearing; Touch; Body Awareness; and Total.

The challenges present as:

- Never resolves peer conflicts without teacher intervention.
- Never handles frustration without outbursts or aggressive behavior.
- Never enters play with peers without disrupting ongoing activity.
- Occasionally has friends and chooses to be with them when possible.

⁵ In the evaluation report, this sentence read: "We have also not noticed that they do much in the way of regulating his body." During this investigation, the District clarified that the language in brackets, above, most clearly articulates what was meant by this sentence.

- Occasionally shifts conversation topics in accordance with peer interest.
- Always becomes distracted by nearby visual stimuli.
- Occasionally spins or flicks objects in front of eyes.
- Occasionally shows distress at loud sounds (i.e., other students screaming).
- Always makes noises, hums, sings, or yells during quiet class time.
- Always yells, screams, or makes unusual noises to staff.
- Always speaks too loudly or makes excessive noises during transitions.
- Frequently shows distress when hands or face are dirty (with glue).
- Always is distressed by accidental touch of peers.
- Always touches classmates inappropriately during class or when standing in line.
- Frequently tries to taste or lick objects or people.
- Always chews or mouths clothing, pencils, crayons, or classroom materials.
- Frequently runs, hops, or bounces instead of walking.
- Frequently rocks in chair while seated at desk or table.
- Frequently fidgets when seated at desk or table.
- Always does not perform consistently in daily tasks, quality of work varies widely.
- Always is unable to solve problems effectively.
- Occasionally fails to complete tasks with multiple steps.
- Always shows poor organization of materials in, on, or around desk area.

Student may benefit from sensory activities and supports presented throughout his day to help increase self-regulation and appropriate participation in school activities and social interaction with peers. Some examples of strategies that promote calm body and optimal arousal for learning are:

- Wearing weighted or pressure/compression garments.
- Use of lap pad.
- Joint compressions, shoulder squeezes.
- 'Heavy work' activities like: stacking chairs; cleaning boards; pulling activities before work time.
- Engage in eating, chewing, sucking, and blowing activities.
- Reducing visual distractions.
- Use of headphones to shield noise or active environment.
- Use of fidgets.
- Alternate seating options like: wobble seat.
- Using visual schedule and times to help prepare for transitions.
- Promoting regulation and calming by providing opportunities for quiet time.

Sensory processing is not an area of specially education eligibility in the school system. Sensory needs may be supported via collaborative consultation with classroom staff and use of sensory supports and routines in the classroom that support participation in instructional activities.

As a result of the January 2019 reevaluation, the Student's evaluation team changed the Student's eligibility category to developmental delays.⁶

⁶ According to the District, "there was still disagreement regarding the [proper] eligibility category when the team met on January 29, 2019. [Ultimately], the team decided to go with developmental disability [rather than emotional/behavioral disability]."

9. On January 29, 2020, the District issued the Parent a prior written notice that read, in part:
We are proposing to change Student's eligibility category from autism to developmental delay. Student does not meet the eligibility category for autism despite his diagnosis of autism.⁷ [We rejected] qualifying Student under emotional behavioral disability. Student does not qualify for autism but he does qualify for developmental delay. He can receive the same services under the developmental delay as he can under emotional behavioral disability.

[In making this decision, the evaluation team relied on:] school-wide screening information, classroom-based assessments, teacher input...assessment data, team discussion, Parent input, and observational data.

10. During the course of this investigation, the District acknowledged that neither the January 2019 evaluation report, nor the January 29, 2019 prior written notice, included a "specific statement...that shows Student meets the definition" of developmental delay under WAC 392-172A-01035(d).⁸

During the course of this investigation, though, the District did provide the following statement: "The Student was two standard deviations below in the area of behavior. The BASC-3 assessment showed that the Student had a T-score of 88 and percentile of 99 on the Behavioral Index. These scores fall two standard deviations from the mean score of 50."

11. On January 29, 2019, the Student's IEP team created a new IEP for the Student. According to the January 2019 IEP, from January 30, 2019 through April 30, 2019, the Student was to receive the following specially designed instruction in a *general education setting*:

- **Behavior/Social:** 270 minutes 5 times a week (to be provided by a special education assistant)

The January 2019 IEP provided the Student with the following supplementary aide and service in a *general education setting* from January 30, 2019 through April 30, 2019:

- **1:1 Assistant:** 370 minutes 5 times a week (to be provided by a special education assistant)

The January 2019 IEP provided the Student with the following supplementary aide and service in a *special education setting* from January 30, 2019 through April 30, 2019:

⁷ In its response, the District provided clarity on this statement: "WAC 392-172A-01035(2)(a)(i) describes autism as a 'developmental disability affecting verbal and nonverbal communication and social interaction.' Although the Student had a medical diagnosis of autism, the team was unable to support that the Student's verbal and nonverbal communication skills were affected in the educational setting. The team also felt that the Student's behavior was the primary causative factor impeding his educational progress."

⁸ WAC 392-172A-01035(d) reads, in part: "Developmental delay means a student three through eight who is experiencing developmental delays that adversely affect the student's educational performance in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development or adaptive development and who demonstrates a delay on a standardized norm referenced test, with a test-retest or split-half reliability of .80 that is at least: (A) Two standard deviations below the mean in one or more of the five developmental areas; or (B) One and one-half standard deviations below the mean in two or more of the five developmental areas."

- **Occupational Therapy Consultation:** 30 minutes once a month (to be provided by an OT)

The January 2019 IEP provided the Student with the following accommodations:

- Allow breaks (during work, between tasks, during testing, etc.);
- Behavior plan/contract;
- Sensory breaks and tools; and,
- Visual supports including picture schedule, timers, and social stories.

The January 2019 IEP stated the Student would be in the general education setting for 100% of the day.

12. On January 29, 2019, the District provided the Parent with a prior written notice that read, in part:

We are proposing to continue Student's IEP with the added support of a 1:1...Student requires 1:1 support across all school settings [to] maintain control of his body and demonstrate safe, respectful, and responsible behaviors. Description of any other options considered and rejected: having the 1:1 support permanently placed in his IEP. [This] was considered but rejected...the team needs more data to make a decision about the effectiveness of 1:1 support.

13. On March 6, 2019, the District completed an 'Assessment Revision' of the Student. It read, in part:

Student has been assigned a 1:1 for the past 7 weeks. When the team met on January 29, 2019, there was not enough information to decide if the 1:1 was working or not because we had been only collecting data for 2 weeks. The following is the data taken by the 1:1. She kept track of the number of behaviors he had per day, the number of meltdowns he had, as well as the number of minutes that he spent out of class because of behavior. The behaviors that were being tracked included: blurting out; being off task; being disruptive.

...

His overall average between all the weeks is 48.52 behaviors. This number is right where his baseline behavior rate was and...this shows that he has not made any progress overall with the 1:1 in reducing his behaviors.

...

His overall number of meltdowns per day across all the weeks is 2.27. He started at 2.8, which shows an overall reduction in the number of meltdowns per day by about 20%.

The third [data source was] how many minutes per day Student is being removed from the classroom for behavior...If you take the average across all 7 weeks, you get 74 minutes on average per day.

...

This shows Student is having difficulty generalizing the expected behaviors that the 1:1 is teaching him. It shows a reliance on a person rather than gaining skills toward independence.

14. On March 6, 2019, the District provided the Parent with a prior written notice that stated: the District proposed meeting to discuss appropriate placement options for the Student and the

District believed the Student's IEP team now had sufficient information to make a placement decision.

15. A separate prior written notice, also dated March 6, 2019, and provided to the Parent on that date, read, in part:

[The District proposes updating Student's IEP, including] present levels, [measurable annual] goals, and time in [a] special education setting to address behavior. [The District also proposes to place Student] in a Structured Learning Center...Current data shows that Student has not made anticipated progress in reducing target behaviors since the addition of the 1:1 assistant. He has to be removed from the general education setting due to his behavior an average of 74 minutes a day. Due to intensive behavioral needs, the team recommends a Structured Learning Center (SLC).

16. According to the District, "SLCs are designed to provide intensive behavioral interventions for students whose problem behaviors have been identified as the most significant factor impacting their educational progress and whose needs cannot be met by other programming options in a less restrict environment."

17. On March 6, 2019, the Student's IEP team created a new IEP for the Student. According to the March 2019 IEP, from March 7, 2019 through March 15, 2019, the Student would receive the following specially designed instruction in a *general education setting*:

- **Behavior/Social:** 250 minutes 5 times a week (to be provided by a special education assistant)

From March 7, 2019 through March 15, 2019, the Student would receive the following supplementary aid and service in a *special education setting*:

- **OT Consultation:** 30 minutes once a month (to be provided by an OT)

And from March 7, 2019 through March 15, 2019, the Student would receive the following supplementary aid and service in a *general education setting*:

- **1:1 Assistant:** 350 minutes 5 times a week (to be provided by a 1:1 assistant)

According to the March 2019 IEP, from March 16, 2019 through March 6, 2020, the Student would receive the following specially designed instruction in a *special education setting*:

- **Behavior/Social:** 353 minutes 5 times a week (to be provided by a special education teacher)

From March 16, 2019 through March 6, 2020, the Student would receive the following supplementary aid and service in a *special education setting*:

- **OT Consultation:** 30 minutes once a month (to be provided by an OT)

The March 2019 IEP provided the Student with the same accommodations as the January 2019 IEP. According to the March 2019 IEP, starting March 16, 2019, the Student would spend 0% of his time in the general education setting. (According to the District, this is because, beginning on or about March 16, 2019, the Student would attend school in an SLC.)

18. According to the District, on March 12, 2019, the Parents met with the principal, indicating that they planned on withdrawing the Student in order to for him to be homeschooled.

19. Also, on March 12, 2019, the District provided the Parent with a prior written notice that read, in part:

We are proposing to continue Student's special education eligibility and IEP in accordance with the plan that was shared with Student's family on March 6, 2019. Student has been withdrawn from school 1 and Parents have expressed their intent to home school...Student remains eligible for special education services. The District stands ready to provide services outlined in his current IEP should Parents chose to re-enroll him in the District.

20. According to the District, school 1 did not have an SLC classroom. The District further stated, "The District spans 273 square miles. Approximately 13,000 students are served in 18 schools, 7 of which are primary schools...There are 4 primary schools that have SLC programs. Three of those four are [equally close] to school 1 but they are [each] 12-14 miles away."

The District further stated:

We believe that one of the schools [with an SLC] was decided on, however, we cannot remember which school it was or if this information was communicated to the Parent. The Parent voiced his disagreement at the March 6, 2019 meeting, [as well as the fact] that they were not interested in pursuing a visitation to the program or meeting with the new team.

[Of the] three schools with SLC programs that are closest to school 1: school 2 is 12.7 miles away; school 3 is 13.2 miles away; and school 4 is 13.5 miles away.

21. According to the District, on March 15, 2019, the Student was withdrawn from the District.⁹

CONCLUSIONS

Issue 1: Least Restrictive Environment – The Parent alleged that placement in the Structured Learning Center (SLC) program was not the Student's least restrictive environment.

School districts shall ensure that each student eligible for special education shall be educated: 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.

A student's individualized education program (IEP) team has the responsibility to determine the student's least restrictive environment (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 (Consideration 1); the nonacademic benefits of interaction with students who are not disabled (Consideration 2); the effect of the student's presence on the teacher and other students in the classroom (Consideration 3); and, the cost of mainstreaming the student in a general education classroom (Consideration 4).

⁹ According to the District, "the Student is still withdrawn/unenrolled [and] the Parents do still live within the District."

Considerations 1 and 2

In determining a student's LRE, an IEP team must consider the educational benefits to the student of a placement in a general education classroom, as well as the nonacademic benefits of interaction with students who are not disabled. This requirement exists, at least in part, because numerous studies have shown that students with disabilities benefit, both academically and socially, from inclusion in the general education setting.¹⁰

Here, in deciding the Student's needs resulting from his disability required that he be educated in a SLC program, the Student's IEP team followed proper IEP development procedures. See Issue 2, below. In particular, the Student's IEP team gathered numerous sources of data, including, but not limited to: Parental input; numerous classroom observations; at least one private medical report; detailed, significant data on Student's behavioral challenges; the effect of providing the Student with additional minutes of behavioral instruction beginning with the Student's October 2018 IEP; the effect of previously providing the Student with several sensory-related interventions; the effect of providing the Student with 1:1 assistance for approximately seven weeks; and the results of three standardized assessments. The fact that the Student's IEP team followed proper IEP development procedures in deciding to place the Student in the SLC program shows that the IEP team gave proper consideration to the academic and social benefits of educating the Student in the general education environment.

Considerations 3 and 4

In determining a student's LRE, an IEP team must also consider the effect of the student's presence on the teacher and other students in the classroom. Here, the Student's IEP team specifically addressed both of this consideration. For example, the January 2019 evaluation report noted, "Student's behavior during his kindergarten and first grade years has had a significant impact on his general education class," as he repeatedly demonstrated inappropriate language, disruptive behavior, and work refusal. The March 6, 2019 prior written notice read, in part:

Current data shows that Student has not made anticipated progress in reducing target behaviors since the addition of the 1:1 assistant [approximately 7 weeks ago]. He has to be removed from the general education setting due to his behavior an average of 74 minutes a day [and Student has] intensive behavioral needs.

In sum, the District properly considered the required factors in determining the Student's LRE and OSPI finds no violation.

Issue 2: IEP Development – The Parent alleged the District did not follow proper IEP development procedures in: i) determining the Student required an SLC program; and ii) changing the Student's eligibility category to developmental delay. Specifically, the Parent alleged these decisions were not based on sufficient, relevant data.

¹⁰ See, e.g., Baker, E.T., Wang, M., & Walberg, H. (1995). The Effects of Inclusion on Learning. *Educational Leadership*, 52(4), 33-35; see also Katz, J., & Miranda, P. (2002). Including students with developmental disabilities in general education classrooms: social benefits.

In determining a free appropriate public education (FAPE) for a student, a district must utilize sufficient, relevant data. For example: an evaluation must be conducted in all areas of suspected disability and must be sufficiently comprehensive to identify all of the student's special education needs and any necessary related services; in completing an evaluation, the evaluation group must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student; no single test or measure may be used as the sole criterion for determining the student's eligibility or disabling condition and/or determining the appropriate education program for a student; and as part of a reevaluation, the IEP team and other qualified professionals must review existing data on the student, such as previous evaluations, independent evaluations or other information provided by the parents, current classroom-based assessments, observations by teachers or service providers, and any other data relevant to the evaluation of the student.

Furthermore, a district must ensure that parents are given an opportunity to be active participants in determining the contours of FAPE for their child. Districts effectuate this, in part, by permitting parents to: i) participate in discussions about their child's needs; and ii) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child.

Here, in determining the Student required an SLC program, as well the fact that the Student's eligibility category needed to be changed, the Student's IEP team utilized sufficient, relevant data, including information provided by the Parent. For example, the Student's IEP team relied, in part, on the following data:

- From November 2018 through early March 2019, the Student's BIP "did not help reduce the Student's challenging behaviors," even though several minor adjustments were made over that time period;
- The Parent did not agree the Student's eligibility category should be changed to emotional/behavioral disability¹¹;
- The Parent believed additional visual aids, timers, and sensory tools would reduce the Student's challenging behaviors, and, if given these supports, the Student would not need an "offsite location" for his schooling;
- **Review of Existing Data:** During his kindergarten and first grade years, the Student repeatedly demonstrated behavior challenges, including the use of inappropriate or threatening language, work refusal, and disrupting the classroom by yelling, running, and/or rolling on the ground;
- **Observation:** The Student's behavior escalated if "asked to do work that he perceives as taking too long" or, occasionally, when he knows the recess period is coming up¹²;
- The provision of a 1:1 from January 14, 2019 through January 29, 2019 did not permit the Student to show "any growth in his ability to maintain control of his body or follow directions;"

¹¹ The Parent believed the Student's "behavioral/social deficiencies [were] related to his underlying diagnosis of autism."

¹² The January 2019 evaluation report posited: "neither [of these challenging behaviors] is the related to his medical diagnosis of autism. When Student refuses to do work or follow adult directions, it does not come from being overwhelmed with a stimulus, a change in schedule, or other things generally associated with a student with autism."

- **Behavior/Social:** "In October, the Student's IEP was amended to give him more behavior minutes... [Even] with an adult sitting next to him, he was still not successful in the general education classroom. He still shouted and refused to do work;"
- **Behavior/Social:** "In the center-based classroom, Student's behavior continues to significantly impact the other students. His FBA and BIP were written to specifically address a behavior where he would run around the classroom and intentionally try to pull...other students off task;"
- **Behavior/Social:** The following interventions were tried with the Student, but not shown to be particularly effective at reducing the Student's problem behaviors: reward system; sensory supports, including heavy work, fidget tools, breaks, lap belts, weighted vests, wiggle seats, and headphones;
- **Behavior/Social:** "Student's mother rated Student's ASRS score as falling within the very elevated range, while his teacher's fell within the elevated range. This indicates that slightly more behaviors typical of those with autism spectrum disorder are being seen at home than at school;"
- **Behavior/Social:** Parent and the special education teacher completed the BASC-2 and rated the Student in the at-risk and clinically significant levels.
- **Other:** "Special education teacher completed the SPM to provide a unique and comprehensive perspective on his sensory functioning at school... Student received standard scores in: a) 'Some Problems' in the areas of: Vision; Balance; and Planning/Ideas; and b) 'Definite Dysfunction' in the areas of: Social; Hearing; Touch; Body Awareness; and Total...Student may benefit from sensory activities and supports."
- January 29, 2019 prior written notice: "Student does not meet the eligibility category for autism despite his diagnosis of autism [because the team was unable to support a finding that the Student's verbal and nonverbal communication skills were affected in the education setting. We rejected] qualifying Student under emotional behavioral disability. Student does not qualify for autism but he does qualify for developmental delay. He can receive the same services under the developmental delay as he can under emotional behavioral disability."
- March 2019 Assessment Revision: The provision of a 1:1 from January 29, 2019 through March 6, 2019 did not permit the Student to make "any progress overall...in reducing his behaviors...[The] Student is having difficulty generalizing the expected behaviors that the 1:1 is teaching him. It shows a reliance on a person rather than gaining skills toward independence."

The foregoing information represents reliable data from multiple sources, including knowledge provided by the Parent. Therefore, OSPI finds no violation of the requirement that FAPE determinations be based on sufficient, relevant data, including information provided by the Parent.

OSPI does note, though, that while the January 2019 evaluation report, as well as the January 29, 2019 prior written notice, both stated the Student qualified under the category of developmental delay, neither document specifically stated why or how the Student meet the definition of developmental delay. In other words, while certain data in the January 2019 evaluation report supported a finding that the Student qualified under the category of developmental delay, this specific data was not highlighted and applied to the definition of developmental delay. For example, in the course of this investigation, the District stated: "The Student was two standard deviations below in the area of behavior. The BASC-3 assessment showed that the Student had a T-score of 88 and percentile of 99 on the Behavioral Index. These scores fall two standard deviations from the mean score of 50." While such a specific statement is not explicitly required by the regulations, OSPI recommends that, in the future, the District specifically delineate how a student meets a particular eligibility category in the evaluation report.

OSPI also recognizes the Parent disagrees with the decision to change the Student's eligibility category, as well as to place the Student in an SLC program. OSPI notes the following: an IEP team should work toward consensus, but a district has ultimate responsibility to ensure the IEP includes the services a student needs in order to receive FAPE. No one team member has the right to dictate a particular educational program. For example, while a district must consider the parent's concerns and any information the parent provides, a district is not required to adopt all recommendations proposed by a parent. If an IEP team cannot reach consensus, a district must provide the parents with prior written notice of the district's proposals or refusals.

Here, as documented above, the District considered the Parent's input on the two contested decisions, and, on January 29, 2019, March 6, 2019, and March 12, 2019, it provided the Parent with prior written notices, clearly documenting its proposals and refusals. Therefore, there has been no violation of the IDEA.

Issue 3: Physical Location of Student's School – The Parent alleged the District violated WAC 392-172A-02060(3) in determining the Student would not be able to participate in an SLC program at school 1. Unless the student's IEP requires some other arrangement, the student must be educated in the school that the student would attend if not disabled. If the student needs other arrangements, placement must be as close as possible to the student's home.

Here, the Student's IEP team determined the Student's needs resulting from the Student's disability required that he be educated in an SLC program. The District had four schools that had an SLC program. Three of these four schools were roughly twelve to fourteen miles from school 1 (the Student's resident school); one of these four schools was more than fourteen miles from school 1. The District does not recall whether one of the three closest schools was selected by the Student's IEP team, and if a specific school was chosen, whether this was communicated to the Parent.

It appears a definitive decision was not reached because the Student withdrew from the District soon after the IEP team determined an SLC program was warranted. On March 6, 2019, the Student's IEP team determined the Student needed to attend an SLC program—according to the March 2019 IEP, this placement was to begin on March 16, 2019. On March 12, 2019, the Parents met with the principal and indicated they planned on withdrawing the Student from the District. On March 15, 2019, the Parents did, in fact, withdraw the Student from the District. On these facts, OSPI does not find a violation of WAC 392-172A-02060(3).

Still, OSPI notes: were the Student to: i) re-enroll in the District; and ii) still be in need of special education services—specifically, an SLC program, then the Student would need to be educated at school 2. Of the four District schools that have an SLC program, school 2 is closest to school 1.

CORRECTIVE ACTIONS

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

RECOMMENDATIONS

OSPI recommends that when the District finds a student eligible under a particular disability category, that the District include, in both the evaluation report and the prior written notice, a statement detailing the specific data showing the student meets the pertinent eligibility category definition.

Dated this ____ day of March, 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.)