



COLORADO DEPARTMENT OF EDUCATION

EXCEPTIONAL STUDENT SERVICES UNIT

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TO: Superintendents
Administrative Unit Special Education Directors
BOCES Executive Directors
Charter School Administrators

FROM: Peg Brown-Clark, Assistant Commissioner

DATE: May 21, 2013

RE: Preschool Educational Environments and Least Restrictive Environment

This memo serves to provide guidance on the process to determine:

- Preschool Educational Environments as defined by the Office of Special Education Programs (OSEP)
- Number of classroom hours a child receives in preschool

Determining Educational Environment for a Child in Preschool

Definitions from the Office of Special Education Programs (OSEP):

- **“Regular Early Childhood Program”** – a program that includes **at least 50%** of nondisabled children
- **“Separate Class”** – a program that includes **less than 50%** of nondisabled children (i.e., children not on IEPs).

Questions have come to the department regarding situations in which a preschool classroom begins the year with at least 50% nondisabled children (by OSEP definition a regular early childhood program definition) but over the course of the year the percentages change to less than 50% nondisabled children (by OSEP definition a separate class definition). This can happen for various reasons:

- Children originally funded through Colorado Preschool Program (CPP) become identified as a child with a disability
- Children transition out of Part C (Early Intervention) and into preschool special education and are placed in available slots in existing classrooms
- Children paying tuition dis-enroll

Most Colorado school district preschool classrooms are intentionally designed to serve a majority of children who are not on an IEP and are considered Regular Early Childhood Programs as defined by OSEP. In other words, the plan is to fill 50% or more of the classroom “slots” with children who do not have IEPs. Children without disabilities in Regular Early Childhood Programs are most often children funded through CPP and in some instances Head Start, and tuition paying children. Even with careful planning to serve a majority of children who are not on an IEP, sometimes over the course of the year the composition of the classroom changes (for reasons listed above) and as a result, the percentage of children on IEPs becomes more than 50% of the children in the classroom. When this happens CDE’s guidance is to continue to use one of the Regular Early Childhood Program Educational Environment codes (209-212) as appropriate.

However, when a classroom is intentionally designed and set up to enroll **less than 50%** of nondisabled children, that classroom is considered to be a **Separate Class** and code 204 must be used. Determining a child’s educational placement is made by the IEP team, including the parents, and must be based on evaluation data and placement

options and in conformity with Least Restrictive Environments (LRE) provisions and is based on the child's IEP¹. The student's IEP team determines the appropriate educational environment based on individual needs and goals and NOT based solely upon what programs the district has to offer.

Determining Educational Environment for a Child Transitioning from Preschool to Kindergarten

The OESP educational environments codes are based on the child's age. Children transitioning from preschool to kindergarten who will turn 6 prior to December 1st must have a school age educational environments code (301-308).

Changing the Educational Environment

Changing a child's educational environment (percentage of time in the general education setting) is considered to be a significant change in placement under the ECEA Rules, and may be made by the IEP team only upon consideration of reevaluation². As with any significant change of placement, the team must consider existing evaluation data on the child, evaluations and information provided by the parents, classroom, local or State assessments, classroom observations, and observations by teachers and related service providers, and determine whether any additional data are needed to determine whether the change of placement is supported by current data.³ Importantly, the IEP team could determine that additional data are **not** needed; in such a situation, the IEP team has nonetheless properly discharged its duty to consider reevaluation.⁴ If the IEP team determines that no additional data are needed, the administrative unit must notify the parents of that determination and the reasons for that determination, and of the parents' right to request additional assessments notwithstanding the IEP team's determination.⁵

Free and Appropriate Public Education (FAPE) for Preschool Students in Special Education

Administrative Units are reminded of CDE's policy regarding preschool FAPE and LRE:

The 90-hour contact rule for counting preschool students with disabilities for public school finance purposes must not be confused with the administrative unit's obligation to provide a FAPE for preschool students with disabilities. Specifically, preschool students with disabilities are entitled to receive a FAPE in the least restrictive environment (LRE). LRE means that, to the maximum extent appropriate, preschool students with disabilities must be educated with children who are not disabled, and the removal of a child with a disability from the regular education environment occurs only if education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁶ The student's IEP Team must develop an IEP that will provide a FAPE in the LRE that will enable the student to be involved in and make progress in the general curriculum.⁷

The LRE for most preschool students with disabilities is in the general preschool classroom with their nondisabled peers. Preschool programs typically utilize a general curriculum that is sequential in nature for purposes of learning school readiness skills. From a practical standpoint, then, this means that most preschool students with disabilities

¹ 34 CFR §300.116

² ECEA Rule 4.03(8)(b)(ii)(B). The only exception to the "consideration of reevaluation" requirement is when the parent(s) and the administrative unit mutually agree to change the child's IEP after the child's annual IEP meeting; such changes must be made in writing via an amendment to the IEP and do not require consideration of reevaluation. *Id.*; see also 34 CFR §300.324(a)(4).

³ 34 C.F.R. § 300.305(a), (d).

⁴ *Id.*

⁵ 34 C.F.R. § 300.305(d).

⁶ 34 C.F.R. § 300.114

⁷ 34 C.F.R. § 300.320(a)(2); See, *L.B. and J.B. v. Nebo Board of Education*, 379 F.3d 966 (10th Cir. 2004).

will attend preschool for the same amount of time as their nondisabled peers - typically consistent with the requirements of the Colorado Preschool Program which requires a minimum of 180 contact hours per semester or 360 hours of program availability per academic year.

Ultimately, the student's IEP team must decide what is appropriate for the student based on the student's unique needs, not on the needs or convenience of the administrative unit or school district. In some cases, the IEP team may decide that the student needs more than 180 contact hours per semester; in other cases, the IEP team may decide that the student needs fewer than 180 contact hours per semester. Depending on the unique needs of the student, the IEP team also may decide that it is appropriate for the student to be educated in a setting different from the preschool general classroom for all or part of the typical preschool day.

Finally, preschool programs that establish a set number of contact hours for all preschool students with disabilities without regard for the unique needs of each child are noncompliant with the requirements of federal and state special education laws. To the extent that preschool students are systematically treated differently than their nondisabled peers, such practices raise serious equity concerns including compliance with federal and state nondiscrimination laws (i.e., Section 504 of the ADA).

For complete definitions of the OSEP Educational Environments codes go to:
https://cdeapps.cde.state.co.us/spd_env_codes_defs.pdf

If you have any questions regarding this policy please contact Penny Dell by email at dell_p@cde.state.co.us or (303) 866-6720.