

**DELAWARE DEPARTMENT OF EDUCATION
EXCEPTIONAL CHILDREN AND EARLY CHILDHOOD EDUCATION BRANCH**

**FINAL REPORT
ADMINISTRATIVE COMPLAINT RESOLUTION**

DE AC 14-1 (*July 3, 2013*)

On July 3, 2013, the Disabilities Law Program filed a complaint with the Delaware Department of Education on its own behalf, on behalf of Student, and on behalf of a class of similarly situated students.¹ The complaint has been investigated as required by federal regulations at 34 C.F.R. §§ 300.151 to 300.153 and according to the Department of Education's regulations at 14 Del. Admin. C. §§ 923.51.0 to 53.0. The investigation included interviews with the Director of Adult Education, the Teacher/Supervisor, and the current Educational Diagnostician assigned to Student. The investigation also included a review of Student's educational records, including his IEP, attendance records, completed assignments, and other records.

COMPLAINT ALLEGATIONS

The complaint alleges the Department of Education ("DOE"), through its Prison Adult Education Program ("PAEP"), has failed to provide a free and appropriate public education ("FAPE") to Student and to other inmates similarly situated to Student.

FINDINGS OF FACT

1. The PAEP provides special education services to student inmates identified with disabilities, ages 18-21, including those inmates housed in the "Pre-Trial Unit." The PAEP provides educational services to sentenced inmates – and to pretrial detainees designated as eligible for special education – assigned to Level V facilities.
2. According to the PAEP, the list of inmates in the Pre-Trial Unit changes frequently as inmates are moved to other locations in the correctional system based on the status of their individual charges and circumstances. In general, there is a high rate of transition in and out of the Pre-Trial Unit and the length of an inmate's stay can range from a few days to several months. The PAEP therefore implements a specific procedure to locate and identify inmates in the Pre-Trial Unit who are under age 21 and eligible to receive special education services, while also taking into account the transitory nature of the Pre-Trial Unit. A *summary* of the process used by the PAEP is as follows:

- (a) The Department of Correction ("DOC") issues a "Pre-Trial Detainee List" on a

¹ The Final Report identifies some people and places generically, to protect personally identifiable information about the student from unauthorized disclosure. An index of names is attached for the benefit of the individuals and agencies involved in the investigation. The index must be removed before the Final Report is released as a public record.

daily basis listing all the inmates housed in the Pre-Trial Unit on a given day.

- (b) The PAEP first reviews the Pre-Trial Detainee List to identify any inmates under the age of 21. If an inmate is listed on the Pre-trial Detainee list and is under the age of 21, the PAEP places the inmate on a second list titled “Potential Special Education Pre-Trial Detainee.”
 - (c) If a “Potential Special Education Pre-Trial Detainee” appears 30 or more days later on the “Pre-Trial Detainee List,” the PAEP checks the Delaware Student Information System (“DELSIS”) to determine if the student had formerly been receiving special education services.
 - (d) If the inmate is identified on DELSIS as a special education student, the PAEP will, during the next 35 days or less, contact the inmate and explain the educational program. If the inmate chooses to receive services, the PAEP will evaluate the inmate using the Tests of Adult Basic Education (“TABE”), request educational records from prior providers, and convene an IEP meeting to develop an IEP based on available information.
3. Student is twenty years of age and was determined eligible for special education and related services under the Individuals with Disabilities Education (“IDEA”) and 14 *Del. C. § 3101 et seq* as early as the 2000-2001 school year. Student currently has an educational disability classification of “Emotional Disturbance” as defined in 14 *Del Admin. C. § 925.9.0*.
 4. Student has been incarcerated in a correctional facility within the State (“Facility”) since on or about February 25, 2012.
 5. On or about May 15, 2012, the Educational Diagnostician (“ED”) met with Student to discuss Student’s education.
 6. On or about May 16, 2012, the ED requested Student’s records from Student’s prior educational agency.
 7. On or about May 22, 2012, the ED began providing instruction to Student pending the development of an IEP.
 8. Between May 22, 2012 and July 7, 2012, Student received one hour of instruction per week, with the exception of one week, when Student received zero hours of instruction.
 9. An IEP meeting was scheduled for July 8, 2012. However, because Student was in twenty-four hour lockdown at the Facility on July 8, 2012, the IEP meeting was rescheduled for July 24, 2012.
 10. On July 13, 2012 and July 19, 2012, Student received approximately one-half hour of instruction.

11. On July 24, 2012, the ED held an IEP meeting with Student. Student was placed on a temporary IEP with an official start date of August 20, 2012. The IEP contained goals and objectives in the areas of writing and math with student receiving: (a) small group math instruction for one-half hour per week; and (b) small group writing instruction for one-half hour per week. Although Student's IEP provide for a total of one hour of specialized instruction per week, the PAEP confirmed that the maximum allowable educational time is one-half hour of instruction per week with Student alternating between math and writing instruction as needed.
12. On July 26, 2012, the PAEP began to administer the TABE to Student. Student continued testing on four separate occasions and completed the TABE on August 11, 2012. In reading, Student received a 5.7 grade level equivalent, and in math, a 5.3 grade level equivalent, placing Student at the low intermediate basic education literacy level for both reading and math.
13. On January 18, 2013, Student's temporary IEP was revised to provide for a math goal in Algebra.
14. On August 30, 2013, Student's temporary IEP was revised to include a reading goal.
15. Throughout the length of his stay at the Facility, Student has been involved in approximately twenty-two documented incidents, resulting in Student's movement among housing units with varying security levels that have directly affected Student's access to educational instruction and materials. Student has received zero hours of instruction on some weeks due to Student's placement in twenty-four hour lockdown and as many as six hours of instruction on other weeks.
16. Although, in practice, eligible pretrial detainees often receive more than one-half hour of instruction per week, the IEPs for *all* eligible pretrial detainees provide for a maximum of one-half hour of instruction per week. The PAEP limits all IEPs to one-half hour of instruction per week because the PAEP can guarantee eligible pretrial detainees *at least* one-half hour of instruction per week notwithstanding certain constraints imposed by the DOC.

CONCLUSIONS

In accordance with state and federal law, the DOE is responsible for providing special education services to eligible student inmates, ages 18 through 21. 14 *Del. C.* § 122(b)(18); 11 *Del. C.* § 6531A. The DOE has adopted administrative regulations that align with federal law and govern the provision of special education services in Delaware. *See* 14 *Del Admin. C.* §§ 922 through 929. Such regulations are applicable to the Department of Education and the PAEP. *See* 14 *Del. Admin. C.* § 922.2.0.

As a general rule, eligible students are entitled to FAPE. *See* 14 *Del. C.* § 3120; 14 *Del. Admin. C.* § 923.1.2. However, the obligation to make FAPE available to all children with

disabilities does not apply with respect to children aged 18 through 21 who, in the last educational placement prior to their incarceration in an adult correctional facility: (a) were not actually identified as being a child with a disability; and (b) did not have an IEP. 34 C.F.R. § 300.102(a)(2)(i).

The exception in 34 C.F.R. § 300.102(a)(2)(i) does not apply to children with disabilities, aged 18 through 21, who: (a) had been identified as a child with a disability and received services in accordance with an IEP, but who left school prior to their incarceration; or (b) did not have an IEP in their last educational setting, but who had actually been identified as a child with a disability. 34 C.F.R. § 102(a)(2)(ii).

“FAPE” is defined as specially designed instruction and related services as required to assist a child with a disability to benefit from an education that is provided at public expense, is *individualized* to meet the unique needs of the child, provides significant learning to the child, and confers meaningful benefit on the child with a disability that is gauged to the child’s potential. *See* 14 Del. C § 3101(5); 14 Del. Admin. C. § 922.3.0.

The PAEP acknowledges that, while eligible pretrial detainees often receive more than one-half hour of instruction per week, their IEPs are developed to provide for a maximum of only one-half hour of instruction. Although each student’s IEP may be individualized as a substantive matter based upon students’ TABE scores and/or students’ prior IEPs, it is clear that a blanket policy limiting IEPs for *all* pre-trial detainees to a maximum of one-half hour of instruction fails to comport with the requirement that instruction be individualized to meet the unique needs of the student. *See* 14 Del. C. § 3101(5). ***Therefore, I find a violation of state and federal regulations with respect to the development of Student’s IEP and the IEPs of eligible pretrial detainees.***

CORRECTIVE ACTIONS

- 1) By ***February 1, 2014***, the DOE shall provide a minimum of a full-day training session (6 hours) to all PAEP administrators, teachers, and educational diagnosticians regarding IEP development.
- 2) By ***February 14, 2014***, the PAEP shall provide a detailed plan to the Director of Exceptional Children for the Delaware Department of Education addressing 1) how the PAEP develops IEPs based on the unique needs of its students; and 2) how the PAEP will allocate instructional hours based upon the unique needs of its students.
- 3) By ***March 1, 2013***, the PAEP shall: 1) conduct a meeting to review and, if necessary, revise Student’s IEP based upon student’s unique needs, 2) conduct individual meetings to review and, if necessary, revise the IEPs of all students similarly situated to Student; 3) for those students whose revised IEPs provide for more than one-half hour of instruction, develop a compensatory instruction plan to compensate the student(s) for any instructional time that the student(s) would have received under the newly-developed IEP; and 4) provide a written summary of any compensatory instruction plans to the Director of Exceptional Children Resources for the Department of Education, including how the amount of compensatory

education time for each student was calculated.

4) By ***March 1, 2014***, the DOE and the DOC shall convene a meeting to review and revise, as determined necessary, the Memorandum of Understanding as it relates to the provision of special education services within DOC facilities, including the provision of special education services to eligible pre-trial detainees.

By: /s/ Michelle E. Whalen
Michelle E. Whalen, Esq.
Assigned Investigator
Education Associate

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