

DELAWARE DEPARTMENT OF EDUCATION
EXCEPTIONAL CHILDREN RESOURCES
STATE COMPLAINT DECISION

DE SC #20-11

Date Issued: May 29, 2020

On February 27, 2020, the Disabilities Law Program (DLP) of Community Legal Aid Society, Inc., filed a complaint with the Delaware Department of Education (Department) on behalf of Student, as well as similarly situated students. The complaint alleges Adult and Prison Education Resources (APER) violated state and federal regulations concerning the provision of a free, appropriate public education (FAPE) to Student under the Individuals with Disabilities Education Act (IDEA).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's regulations at 14 DE Admin Code § 923.51.0 to 53.0.

The investigation included interviews with the Director of APER, APER staff, and Student. The investigation also included a review of the Student's educational records. The complaint investigation and decision are based on the specific issues stated in the complaint.

The original due date for the complaint decision was April 27, 2020. Pursuant to 14 DE Admin Code § 923.52.2, the Department extended the sixty (60) day calendar timeline for the complaint investigation due to exceptional circumstances presented by the COVID-19 pandemic. The due date for the complaint decision was extended to May 29, 2020.

COMPLAINT ALLEGATIONS

DLP alleges APER violated Part B of the IDEA and implementing regulations by: 1) failing to provide Student with FAPE despite Student's eligibility and requests to the REDACTED NAME OF PRISON staff; 2) providing Student *de minimis* educational services without an IEP in place, and 3) failing to provide Student's educational records upon request.

¹ The complaint decision identifies some people and places generally, 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 complaint decision is released as a public record.

FINDINGS OF FACT

Student's Educational History

1. Student entered pretrial detention at REDACTED NAME OF PRISON on October 3, 2019 and currently remains detained there.
2. Student is REDACTED (REDACTED) years of age and is identified as a student with a Learning Disability as defined in 14 DE Admin Code § 925.6.11 according to an evaluation summary report dated February 3, 2020.
3. Delaware Student Identification System (DELSIS) records indicate that Student has a history of receiving special education and related services as early as the 2010-2011 school year.
4. On May 31, 2017, Student's parent called Student's School District at the time, District 1, to withdraw Student from school. Student reportedly registered for the Job Corps.
5. On November 8, 2017, while enrolled at School 1 at REDACTED an IEP was initiated.
6. During the 2017-2018 school year, Student earned 1.0 credit from REDACTED Adult High School while placed at REDACTED.
7. From February 13, 2019 through April 16, 2019, Student was enrolled at REDACTED Adult High School and completed approximately 10 hours of instruction.
8. On October 3, 2019, Student entered pretrial detainee status at REDACTED NAME OF PRISON.

Provision of Special Education and Related Services

9. APER provides special education and related services to sentenced inmates, as well as to pretrial detainees (those not adjudicated or sentenced) housed in the "Pre-Trial Unit."
10. APER follows a "Pre-Trial Detainees Revised Procedures for Identifying and Providing Services To Special Education Eligible Detainee's in Pre-Trial" (Pre-Trial Detainees Revised Procedures). According to APER, the list of inmates in pre-trial status changes frequently as inmates are moved to other locations in the correctional system. APER implements the Pre-Trial Detainees Revised Procedures to locate and identify inmates in the Pre-Trial who are under age 21 and eligible to receive special education and related services. A summary of the process used by APER is as follows:
 - a. The education diagnosticians review the "List of Offenders Under 21" once a month in order to identify inmates under the age of 21. This list is provided by the

Department of Correction (DOC). According to an educational diagnostician at APER, the exact date that this list is provided to APER each month is variable; however, the list is usually provided to APER during the first week of each month.

- b. Detainees who are under 21 are placed on a “Potential Special Education Pre-Trial Detainee” listing.
 - c. The educational diagnostician takes the “List of Offenders Under 21” and checks the list with the Delaware Student Identification System (DELSIS) to determine if a student has formerly received special education and related services.
 - d. If a “Potential Special Education Pre-Trial Detainee” appears 30 or more days later on the next month’s issuance of the “List of Offenders Under 21,” the educational diagnostician again checks DELSIS to determine if the student had formerly received special education and related services.
 - e. For those detainees identified on DELSIS as a special education student, APER will initiate a “Special Education Portfolio,” and over the next 37 days an APER staff member will contact the detainee; explain the educational program and the detainee’s eligibility for special education and related services; and ask if the detainee wants to receive special education and related services.
 - f. If the detainee chooses to participate, the following next steps occur:
 - i. Detainee is assessed by APER using the Test of Adult Basic Education (TABE);
 - ii. APER initiates contact with the previous educational providers requesting records;
 - iii. APER convenes an IEP team meeting to design an IEP based on available educational records, TABE assessment/WRAT 4 results, student input and establish a follow-up meeting date, not more than 60 days after the initial start of the IEP process. According to the Director of APER, the start of the IEP process is the date that the individual’s name shows up on the “List of Offenders Under 21” for a second time.
 - g. If the detainee declines to participate in the program, APER documents the refusal in the detainee’s portfolio (records) and the detainee signs a waiver.
11. Student entered pretrial detention at REDACTED NAME OF PRISON on October 3, 2019 and currently remains detained there.
 12. Student reports having requested special education services on more than one occasion and had been told by REDACTED NAME OF PRISON staff that an inmate needs to be sentenced to receive services.
 13. APER reports that they did not receive communication from Student or DOC, prior to December 20, 2019, requesting special education and related services. APER reports their office would not have told Student special education and related services were unavailable.
 14. APER reports Student may have requested special education services to REDACTED NAME OF PRISON staff. APER indicates that REDACTED NAME OF PRISON staff do not know to report such requests directly to the APER office.

15. On October 3, 2019, the same date Student entered pretrial detention, the Expungement and Post-Disposition Coordinator from the Office of Defense Services (Student’s criminal legal counsel), notified the APER Education Associate by email, that Student was a new detainee in REDACTED NAME OF PRISON and was interested in receiving special education and related services. Student’s criminal legal counsel shared a copy of the following documents with the APER Education Associate:
 - a. Student’s IEP, which was due for annual review on November 6, 2018, from REDACTED
 - b. Student’s evaluation summary report (ESR), dated November 7, 2017, from REDACTED
 - c. Student’s REDACTED High School Transcript
 - d. Student’s transcript from School 2
 - e. Student’s report card from REDACTED Adult High School.
16. The APER Education Associate responded to the Student’s criminal legal counsel via an email and phone call, acknowledging receipt of the communication. The APER Education Associate notified the Student’s criminal legal counsel of the Pre-Trial Detainees Revised Procedures.
17. A DELSIS report below indicates Student’s prior educational placements and special education status for the 2016-2017 and 2017-2018 school years as these are the last two school years reported in DELSIS. It appears that Student last received special education and related services at the School 1 at REDACTED in 2017.

District Name	School Name	Year	Entry	Exit	Spec Ed Code
District 1	School 3	2018	09/13/2017	09/14/2017	0
REDACTED	School 1	2018	09/13/2017		300
REDACTED	REDACTED FACILITY	2018	09/07/2017	09/07/2017	0
District 1	School 3	2017	10/10/2016	05/31/2017	300
District 1	School 4	2017	10/05/2016	10/07/2016	300
District 1	School 4	2017	07/20/2016	07/21/2016	300
REDACTED 2	School 2	2017	05/16/2017		0

18. APER reportedly reviewed the October “List of Offenders under 21” provided by the DOC, and Student was not listed at that time. APER reports the Student entered REDACTED NAME OF PRISON after the DOC list was generated.
19. APER reports Student’s name appeared for the first time on the DOC “List of Offenders Under 21” in November 2019.

20. On December 6, 2019, APER reports Student's name appeared for the second time on the DOC "List of Offenders Under 21" provided to APER.
21. Following the APER procedure, the educational diagnostician confirmed through DELSIS that Student received special education and related services from REDACTED during the 2017-2018 school year.
22. On December 20, 2019, the educational diagnostician contacted Student and asked if Student wanted to receive educational services. Student said yes.
23. Educational diagnostician asked Student to complete forms to initiate the process for receiving special education and related services.
24. On January 6, 2020, APER began administering the Test of Adult Basic Education (TABE), as per the next step of the Pre-Trial Detainees Revised Procedures once a student indicates they are interested in receiving special education and related services. Student completed the test during the week of January 27, 2020.
25. On January 10, 2020, the Student began receiving instructional services without an IEP. Instruction ranged from 15 minutes to a maximum of one hour. When asked how the duration of time was determined for instruction, APER indicated that instructional time for detainees is regularly provided ranging between 30 and 60 minutes.
26. APER reported that Student refused education services 9 times from January 10, 2020-March 13, 2020 (the date of APER's written response to the complaint).
27. On January 29, 2020, Student met with the educational diagnostician to complete a transition interview.
28. Prior to the IEP team meeting on February 3, 2020 to develop Student's IEP, Student participated in 9 instructional sessions.
29. On February 3, 2020, and IEP team meeting was held to review the ESR, determine eligibility for special education and related services, and to develop the IEP.
30. APER reports using Student's history of special education services, review of current and past records, administration of TABE, teacher-made writing assessment and teacher observation to determine that Student was eligible to receive special education and related services as a student with a Learning Disability in accordance 14 Del C §925.6.11.
31. Student participated in the review and development of the ESR and IEP.
32. The IEP was developed and implemented on February 3, 2020. The student participated in 15 instructional sessions between February 3 and March 12, 2020. Each session ranged between 15 and 45 minutes (7 sessions were 30 minutes; 7 sessions were minutes and 1 session was 15 minutes; Student refused attendance for 7 instructional sessions)

APER's Provision of Educational Records

33. On January 29, 2020, the DLP's Law Clerk provided APER with an "Authorization for Release of Information and Records" form, signed by Student and dated January 7, 2020, requesting educational records.
34. On February 5, 2020, APER responded to the DLP's Law Clerk that the "Authorization for Release of Information and Records" form, provided on January 29, 2020, did not "specify the purpose of the disclosure" as required by the Family Education Rights and Privacy Act (FERPA). The APER response indicated that the Student would need to resubmit the "Authorization for Release of Information and Records" form with the following information: 1) the records to be disclosed; 2) the purpose of the disclosure; and 3) the identity of the party or class of parties to whom the disclosure may be made.
35. On February 7, 2020, the DLP Law Clerk replied to APER that the records were not being requested as a third party but rather on behalf of Student, as Student's representative.
36. On February 21, 2020, the DLP Law Clerk submitted, via email, a new signed release from the Student that included: 1) the records to be disclosed; 2) the purpose of the disclosure; and 3) identified the party or class of parties to whom the disclosure may be made. In the email, the DLP Law Clerk stated that the DLP maintained the position that they were entitled to the records as the Student's representative.
37. On February 21, 2020, APER provided the Student and the DLP Law Clerk with the education records requested.

CONCLUSIONS

A. Provision of FAPE to Student

i. APER was responsible for providing Student with FAPE

As a general rule, eligible students are entitled to FAPE. *See*, 34 C.F.R. §300.101; 14 Del. C § 3120; and 14 Del. Admin. C. § 923.1.2. The Department is responsible for providing FAPE to eligible student inmates, ages 18 through 21. 14 Del. C. § 122(b)(18); 11 Del. C. § 6531A. The Department 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 APER. *See* 14 Del. Admin. C. § 922.2.0.

The obligation to make FAPE available to eligible student inmates ages 18 through 21 does not apply to students who, in their 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).

Student was identified as a child with a disability as early as the 2010-2011 school year. Student received services in accordance with an IEP off and on from that point until November 2018 when Student's last IEP expired. Student's last educational placement prior to incarceration at REDACTED NAME OF PRISON was with REDACTED. Even if the exception to the provision of FAPE in 34 C.F.R. § 300.102(a)(2)(i) applies, it is indisputable that Student was identified as a child with a disability who left school prior to their incarceration. *See*, 34 C.F.R. § 102(a)(2)(ii). **Therefore, the exception found in 34 CFR § 102(a)(2)(i) does not apply and APER was obligated to provide FAPE to Student.**

ii. APER failed to provide FAPE to Student

Federal regulations and State law require that students suspected of needing special education and related services be identified and evaluated. 34 C.F.R. § 300.111 and 14 *Del. C.* § 3122. An identified student's IEP team conducts an evaluation and documents data and eligibility determinations on an ESR. *See*, 20 U.S.C. § 1414(b)(4). Revaluations should occur at minimum every three years. 34 C.F.R. § 300.303 and 14 Del. Admin. Code § 925.3.2. Public agencies must develop an IEP within 30 days of a determination that a student needs special education and related services; and to make special education and services available as soon as possible following the development of the IEP. *See* 34 C.F.R. § 300.323; and 14 Del. Admin. Code § 925.23.2. IEPs must be reviewed annually. 14 Del. Admin. Code § 925.24.7.

On October 3, 2019, the same date that the Student entered REDACTED NAME OF PRISON as a pre-trial detainee, the Expungement and Post-Disposition Coordinator, Office of Defense Services, notified the APER Education Associate by email, that Student was a new detainee at REDACTED NAME OF PRISON and was interested in special education. The Expungement and Post-Disposition Coordinator shared the Student's ESR dated November 7, 2017, and Student's last IEP dated November 6, 2017. Therefore, as of October 3, 2019, APER was aware that Student was determined to be eligible for FAPE and that a reevaluation was not required until November 7, 2020. *See*, 14 Del. Admin. Code § 925.23.2. APER was also aware that Student had an IEP, although it was out-of-date. Instead of acting immediately on this information, APER following the Pre-Trial Detainees Revised Procedures, waited until December 2019 to confirm Student's history of special education and related services and contact Student to ask if Student was interested in received educational services. APER did not adopt in full or implement parts of Student's existent (although out-of-date) IEP and did not develop a new IEP until February 3, 2020. Although, according to APER, Student began receiving special education and related services on January 20, 2020, it is not clear what instruction was provided or if it was sufficient to sustain APER's obligation to provide Student with FAPE.

On October 3, 2019, when APER received Student's prior ESR, IEP and other education documentation, APER was on notice that Student was determined to be eligible for FAPE and at

that point APER had 30 days to develop a new IEP and begin providing special education and related services. *See* 14 Del. Admin Code § 925.2.3. APER did not hold an IEP team meeting and develop an IEP for Student until February 3, 2020.

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. FAPE is individualized to meet the unique needs of the student, provide significant learning to the student, and confer meaningful benefit on the student with a disability that is gauged to the student's potential. *See* 34 C.F.R. § 300.17; 14 *Del. C.* § 3101(5) and 14 DE Admin. Code §922.3.0 An IEP team "of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated." 34 C.F.R. § 300.324. APER developed an IEP for Student that included instruction ranging from 15 minutes to a maximum of one hour according to a standardized instructional time used for all detainees. A standardized instructional time fails to comport with the requirement that instruction be individualized to meet the unique needs of Student. **Therefore, I find APER violated stated federal and state regulations by failing to provide Student with FAPE.**

B. Procedural Safeguards: Student's Opportunity to Examine Records

Federal regulations provide for the right of a parent of a child with a disability be afforded an opportunity to inspect and review all relevant educational records with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. *See* 34 C.F.R. §300.501. The State of Delaware expands opportunity to inspect and review educational records to a representative. 14 *Del. C.* § 3130(a). Access must be afforded, in relevant part, prior to an IEP meeting or no later than 45 days. 34 C.F.R. §300.613. Federal regulations allow states to determine whether to transfer rights accorded to parents under Part B to a child once they reach majority. 34 C.F.R. § 300.520. The State of Delaware presumes a child with a disability has capacity and will be accorded the rights of a parent once they reach the age of 18. 14 *Del. C.* § 3132(b)(1).

The Family Educational Rights and Privacy Act (FERPA) is a Federal law that protects the privacy of student educational records. FERPA prohibits disclosure of educational records without written consent that specifies the records to be released, the reasons for release and to whom. 20 *U.S.C.* 1232g(b)(2)(A). FERPA has no allowance for release of educational records to a representative under the circumstances present in this case.

Once APER received written consent to release of records in the form required under FERPA, APER mailed all requested educational records to DLP. The Supremacy Clause of the U.S. Constitution demands that where there is conflict between federal and state law that the federal law will take precedent. **As such, 20 U.S.C. 1232g(b)(2)(A) takes precedence over 14 Del. C. § 3130(a) and I find that APER did not violate Federal law with respect to providing Student the opportunity to examine records.**

CORRECTIVE ACTIONS

- 1) APER will convene an IEP team meeting no later than **June 26, 2020** to review and revise the IEP as necessary to meet Student's individual needs. The IEP team must consider the Student's individual needs and decide upon the number of instructional minutes to meet the Student's needs.

APER must submit a copy of the IEP and PWN to the Director of Exceptional Children Resources by **June 29, 2020**.

- 2) APER will develop a plan to award Student with compensatory education services from November 2, 2019 based on the revised IEP. This plan should include the number of hours that will be provided, how they were calculated, and a timeline for provision. The plan and calculation should be developed and submitted to the Director of Exceptional Children Resources by **July 6, 2020**. It should be noted that Student can refuse compensatory education services under the same procedures Student can refuse special education services.
- 3) By **July 1, 2020**, the APER will provide a detailed plan to the Director of Exceptional Children Resources addressing how the APER will train all APER staff (administrators, teachers, and educational diagnosticians) on the regulatory requirements for which violations were cited in these findings including the following:
 - a. informed written consent
 - b. prior written notice
 - c. identification and evaluation timeline
 - d. creation of IEPs
 - e. procedural safeguards: request for records.

The professional development must be completed and the related documentation (sign in sheet, agenda, copy of handouts, copy of power point, etc.) must be provided to the Director by **July 10, 2020**.

- 4) By **July 31, 2020**, APER will review and revise as necessary the "Revised Procedure for Identifying and Providing Services to Special Education Eligible Detainees in Pre-Trial" including the areas that address the following:
 - a. exception process: next steps when notified that a child has special education needs
 - b. communication process with DOC when a student requests special education services

c. student identification procedures via DELSIS and specify how far back they look to determine special education status and/or determine a more efficient procedure to implement

- 5) By **July 31, 2020**, the APER shall provide a detailed plan to the Director of Exceptional Children Resources addressing: how APER will allocate instructional hours based upon the unique needs of its students.
- 6) By **December 18, 2020**, APER will review the Memorandum of Understanding between the Department and DOC, 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 meeting federal and state regulations and provide evidence of review to the Director of Exceptional Children's Resources with any necessary revisions.

Complaint Investigator