

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

**FINAL REPORT  
ADMINISTRATIVE COMPLAINT RESOLUTION**

**DE AC 10-2 (October 5, 2009)**

On August 6, 2009, 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.<sup>1</sup> The complaint alleges the Department of Education, through its Prison Adult Education Program (“the PAEP”), failed to provide educational services to Student during two periods of incarceration, and to other similarly situated inmates, generally.

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 DE Admin Code §§ 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 involved a review of Student’s educational records, including his IEP, meeting notices, progress reports, evaluation data, and other educational records provided by the PAEP. A phone interview was also conducted with Student’s counsel.

**One Year Limitations Period**

Specifically, the complaint alleges Student was denied special education services during two periods of incarceration: (1) from January 2008 through May 2008 (i.e., the first period); and (2) from September 17, 2008 through approximately February 12, 2009 (i.e., the second period).

State and federal regulations require a state complaint to allege a violation that occurred not more than 1 year prior to the date the Department receives the complaint. 14 DE Admin Code § 923.53.2.4.; 34 C.F.R. § 300.153(c). This rule assures problems are raised and addressed promptly so that children receive a free, appropriate public education. In this case, the Department received the complaint on August 6, 2009. The scope of the Department’s investigation is therefore limited to alleged violations occurring not more than 1 year prior to August 6, 2009. Thus, the allegation that Student was denied special education services during the first period of incarceration (from January 2008 through May 2008) is time-barred.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> The prior federal regulation permitted complaints to be filed for claims alleging continuing violations, or for claims involving compensatory services, using a period longer than one year. On October 13, 2006, however, the regulation was amended to remove references to these circumstances in order to expedite the resolution of complaints. See, OSEP’s *Analysis of Comments and Changes*, 71 Fed. Reg. 46606 (August 14, 2006).

## FINDINGS OF FACT

1. Student is currently 20 years of age, and incarcerated in a correctional facility (“Facility”) within the State. As recently as July 30, 2007, Student was determined eligible for special education and related services under the Individuals with Disabilities Education (“IDEA”) and 14 *Del. C.* § 3101 *et seq.* Student currently has an educational disability classification of “Learning Disability” as defined in 14 DE Admin Code § 925.9.0.
2. By way of background, the PAEP provides special education services to student inmates identified with disabilities, ages 18-21, including those inmates housed in the “Pre-trial unit”. Persons entering the correctional system are assigned a security level of Level I through V. The PAEP provides educational services to inmates assigned to Level V facilities.
3. 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 Pre-trial 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 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 fewer 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 Test of Basic Adult Education (“TABE”), request educational records from prior providers, and convene an IEP meeting to develop an IEP based on available information.

4. In Student's case, he became incarcerated in the Facility on or about September 18, 2008. Student was first assigned to the "Pre-trial" unit on the west side of the Facility. At the time, he was not formally sentenced and was awaiting trial.
5. Student has a history of receiving special education services since elementary school. Student's most recent evaluation and eligibility determination was conducted by the Department of Services for Children, Youth, and their Families on July 30, 2007. The evaluation team identified Student as a student with a learning disability in the areas of math calculation, math reasoning, reading comprehension, and written expression.
6. From June through August 2008, Student participated in the ABE certificate program administered through the New Castle County Vocational Technical School District. On August 14, 2008, Student received a Certificate of Reading Attainment Low Intermediate ABE.
7. When Student was incarcerated on September 18, 2008, the PAEP did not learn about his special education status through the procedures described in Paragraph 3(a)-(d). Rather, Student self-reported his status to the Educational Diagnostician ("the ED"). The ED visited Student in the Pre-trial unit on or about September 29, 2008, and asked questions about his educational history. The ED was collecting general information from inmates. During the ED's interview with Student, the PAEP believes Student told the ED he received special education services before his incarceration.
8. On October 3, 2008, the ED administered the TABE to Student to determine the level at which Student should begin receiving instruction. But, the ED did not complete the full battery. Shortly thereafter, the ED abruptly left his position, and was granted leave from his employment. At the time, the PAEP was not aware of the communication between the ED and Student.
9. On October 15, 2008, Student filed a grievance with the Facility claiming he was entitled to special education services until the age of 21, and no educational services were being provided. The PAEP responded to the grievance acknowledging Student, as well as other inmates, were entitled to educational services, but the PAEP was working "short-handed". The ED and Adult Basic Education ("ABE") teacher were both out on leave, and the Facility had no functioning ABE classroom at the time. The PAEP responded that Student would be contacted in the very near future to complete the process to start receiving services.
10. On December 23, 2008, Student filed a second grievance with the Facility again stating no services were being provided. The PAEP answered the second grievance with the same response it submitted to the first grievance. Sometime in December 2008, the ABE teacher returned to his position and ABE classes resumed.
11. On February 4, 2009, the Teacher/Supervisor and the DOC-DOE liaison met with Student to discuss his education. At the time, Student was still housed in the Pre-trial unit located in the west side of the Facility. The DOC informed the PAEP inmates

assigned to the west side were not permitted to receive services due to various issues. Shortly thereafter, Student was transferred to the east side of the Facility.

12. The ED assigned to the Facility remained on leave. The PAEP therefore assigned another ED to the Facility who promptly assisted with Student's case, as well as the other inmates in the Facility who were eligible for, but not receiving special education services, due to the PAEP's staff shortages.
13. On February 6, 2009, the PAEP administered to Student the remaining sections of the TABE. In reading, Student received a 6.8 grade level equivalent, and in math, a 6.6 grade level equivalent placing Student at the "high intermediate" level. Student was also given a writing assessment placing him between the "low and high intermediate" levels. On February 9, 2009, the PAEP requested educational records from Student's prior educational providers.
14. On February 12, 2009, the PAEP developed a temporary IEP for Student pending the receipt of his educational records. The team developed an IEP containing goals and objectives in the areas of reading and math with Student receiving: (a) individualized math instruction with the use of a calculator and periodic assessments to determine Student's skill level; (b) leveled text for individualized reading instruction with periodic assessments to determine his skill level, and supplemental vocabulary instruction with a one on one tutor; and (c) graphic organizers and concepts maps to organize writing, as well as a word processor to assist in organizing ideas and correcting grammar and spelling errors.
15. Under the February 12, 2009 IEP, Student was placed in the ABE program where he received, on average, 60 minutes of total instruction each day, with 20 minutes each designated to the areas of math, reading, and writing. Student began receiving instructional services on or about February 12, 2009.
16. On March 4, 2009, the PAEP re-administered the TABE to Student. His scores increased in reading from a 6.8 to a 9.0 grade level equivalent, and in math, from a 6.6 to a 7.6 grade level equivalent. Once a student scores a 9.0 on a TABE subject, the student has tested out of the ABE program for that subject.
17. Because Student received a 9.0 on the TABE in reading, Student moved out of the ABE program, and began receiving instruction in the GED/Groves program, while also continuing some work in the ABE program for math. GED/Groves instruction allows inmates to work toward credits for a high school diploma, while also preparing for the GED. When Student was moved to the GED/Groves program, his total instructional time also increased to about 3 hours a day, on average.
18. In addition to classroom instruction, the PAEP provided Student with some individualized tutoring in his areas of academic need. The Teacher/Supervisor also met with Student each week to monitor his academic progress and social-emotional concerns, as well as provide additional academic support. The ED and Teacher/Supervisor

conducted observations of Student in the classroom, consulted with Student's teachers, and reviewed the progress reports submitted by Student's teachers.

19. By mid-March 2009, the PAEP was planning to revise Student's IEP goals and benchmarks to align with his current performance levels. But, Student declined to participate in an IEP meeting until his attorney could attend. On March 20, 2009, Student and his attorney met with the Teacher/Supervisor, and Student expressed his interest in obtaining his GED. Student's attorney also requested the PAEP conduct a full psychological evaluation of Student.
20. The PAEP agreed to do so, and contracted with a certified school psychologist. The PAEP also repeated the TABE on March 30, 2009 and shared the results with the school psychologist. Student's scores in the area of math computation increased from a 7.8 to a 10.4 grade level equivalent, and in applied math, from a 7.3 to a 8.8 grade level equivalent. Student's March 30, 2009 scores demonstrated Student was capable of obtaining a GED or a high school diploma. The PAEP noticed Student was becoming more self-confident about his academics and abilities. He discussed changing his goal from obtaining a GED to a high school diploma.
21. The school psychologist reviewed and administered a number of assessments to evaluate Student's academic and social-emotional functioning. Once completed, the school psychologist summarized her findings and recommendations in an April 1, 2009 psychological report and shared it with Student and the PAEP.
22. On May 20, 2009, the PAEP convened an IEP team meeting to review the psychological evaluation and revise student's IEP. Student attended and participated in the meeting. The team revised Student's IEP to align with his academic performance levels at the time. Student signed in agreement with the May 20, 2009 IEP after consulting with his attorney.
23. On July 20, 2009, the PAEP re-administered the TABE to Student. This time, his scores increased in reading from a 9.0 to a 10.8 grade level equivalent, and in total math, to a 12.0 grade level equivalent. At Student's request, the PAEP also increased Student's total instructional time to 3 to 4 hours a day, on average. To date, Student has met his IEP benchmarks in math and reading, and he continues to receive Groves/GED instruction. Student's teachers report Student continues to make academic progress, and he attends class focused and ready to work.
24. On September 24, 2009, Student took the GED with accommodations.
25. According to the PAEP, those inmates who did not receive instruction for a period of time starting in October 2008 due to staff shortages are currently receiving special education services and instruction. The Facility currently has an assigned ED who is monitoring the provision of services to inmates eligible for special education in the Facility.

## COMPLAINT ALLEGATIONS

The complaint alleges:

- (1) The Department of Education, through the Prison Adult Education Program, failed to provide special education services to Student during his incarceration from September 17, 2008 through approximately February 12, 2009; and
- (2) The Department of Education, through the Prison Adult Education Program, failed to provide special education services to other inmates, similarly situated to Student.

## CONCLUSIONS

### *No Educational Services Provided to Student from September 2008 through February 2009*

In accordance with state and federal law, the Department of Education 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 Department of Education has adopted administrative regulations that align with federal law and govern the provision of special education services in Delaware. *See*, 14 DE Admin Code §§ 922 through 929. Such regulations are applicable to the Department of Education and the PAEP. *See*, 14 DE Admin Code § 922.2.0.

As a general rule, eligible students are entitled to a free, appropriate public education (“FAPE”). But, 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).

But, 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).

In Student’s case, there is no dispute he was identified as a special education student and receiving services prior to his incarceration. The PAEP acknowledges Student is eligible to receive special education services. Student entered the Facility on September 18, 2008. The PAEP learned of Student’s special education status at least by October 15, 2008 when Student filed his first grievance. But, Student did not begin receiving services in a timely manner due to staff shortages at the Facility. Once the PAEP corrected its staffing problem, an IEP was developed for Student and he began receiving services on or about February 12, 2009. While the PAEP program was admittedly short-staffed, it does not alleviate the PAEP of the duty to provide FAPE to eligible students.

*For the reasons stated, I find a violation of state and federal regulations regarding the duty to make FAPE available to Student in a timely manner.*

***Delay in Providing Educational Services  
to Similarly Situated Students***

The complaint also alleges the Department of Education, through the Prison Adult Education Program, failed to provide educational services to other inmates, similarly situated to Student. The complaint does not address other students in a specific manner, nor does the complaint mention the individual circumstances of other students. Rather, the complaint states a generalized allegation the PAEP denied services to other inmates, similarly situated to Student.

The PAEP acknowledges there were other inmates in Pre-trial at the Facility eligible for special education who did not receive services for a period of time starting in October 2008. The PAEP reports once it was able to correct its staffing problem, the eligible Pre-trial inmates in the Facility began receiving services consistent with their individual needs. As mentioned, the staff shortages experienced by the PAEP do not alleviate the duty to provide FAPE to eligible students.

*For the reasons stated, I find a violation of state and federal regulations regarding the duty to make FAPE available to eligible student inmates in a timely manner.*

**CORRECTIVE ACTION PLAN**

**Compensatory Instruction to Student**

1. The Department shall provide compensatory instruction to Student for the period of time Student did not receive services between November 15, 2008 and February 11, 2009.

2. By **November 2, 2009**, the PAEP staff shall meet with Student and collaboratively develop a compensatory instruction plan to determine a schedule which describes the type of compensatory instruction to be delivered, and how the compensatory instruction time is calculated. The compensatory instruction time must be based on Student's current areas of academic need.

3. By **November 10, 2009**, the PAEP shall provide to the Department a written report which describes how the compensatory instruction will be delivered to Student, and how the compensatory instruction time was calculated.

3. If the PAEP and Student cannot agree on the compensatory instruction plan, either PAPE staff or the Student shall notify the Department.

**PAEP Staff Training on IDEA Requirements**

1. By **November 30, 2009**, the Department shall provide a minimum of a two hour training session to all PAEP administrators, teachers, and educational diagnosticians concerning the requirements to locate, identify, and serve all eligible inmates with disabilities, and provide FAPE in a timely manner.

**Compensatory Instruction for Similarly Situated Inmates**

1. By **December 5, 2009**, the PAEP shall:
  - (a) identify all other inmates who were eligible for special education services while in the Facility, but did not receive services starting in approximately October 2008 due to the staff shortages in the Facility associated with the absence of the ABE teacher and the Facility's ED;
  - (b) determine the number of hours (or partial hours) that each student did not receive, based on the frequency and duration of services in each student's IEP;
  - (c) develop a compensatory instruction plan for each student who is currently eligible to receive services through the PAEP to compensate the student for any time actually missed. The compensatory instruction plan should be based on the current educational needs of each student, describe how the compensatory instruction will be provided, and how the compensatory time was calculated for each student; and
  - (d) send the Department a written summary of the compensatory instruction plans for each student, including the number of affected students, and the total number of hours of undelivered services.
  
2. By **January 5, 2009**, the PAEP shall send the Department a final report:
  - (a) describing the status of the completion of the compensatory instruction plans for each student; and
  - (b) briefly summarizing the number of compensatory instruction hours delivered to students and describing how those services were delivered.

By: \_\_\_\_\_  
Jennifer L. Kline, Esq.  
Assigned Investigator  
Education Associate

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