

**DELAWARE DEPARTMENT OF EDUCATION
EXCEPTIONAL CHILDREN RESOURCES**

STATE COMPLAINT DECISION

DE SC # 20-12

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 Department 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, including the Student’s Individualized Education Program (IEP), enrollment records, and other records as necessary. 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 § 923.52.1, 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 failing to provide Student with special education instruction despite Student’s eligibility and requests for instruction. The complaint also alleges that similarly situated students, meaning pretrial detainees eligible to receive special education and related services, have not received such services.

FINDINGS OF FACT

Identification of Student

1. 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.”
2. APER follows a “Pre-Trial Detainees Revised Procedures for Identifying and Providing Services To Special Education Eligible Detainees’ in Pretrial” (Pre-Trial Detainees Revised Procedures) process. According to APER, the list of inmates in pre-trial status

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.

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 Unit who are under the age of 21 and eligible to receive special education and related services. A summary of the process used by APER is as follows:

- a. Educational diagnosticians review the “List of Offenders Under 21” once a month in order to identify inmates under 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 varies; 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.
3. Student is REDACTED years of age and was determined eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA) and 14 *Del. C.* § 3101 *et. seq.* as early as the 2010-2011 school year. Student currently has a primary educational classification of Emotional Disability as outlined in 14 DE Admin. Code §

925.6.9. Student has a secondary educational classification of Other Health Impairment as outlined in 14 DE Admin Code § 925.6.14 due to a medical diagnosis of Attention-deficit/hyperactivity disorder (ADHD).

4. Student is a pre-trial detainee at REDACTED NAME OF PRISON. Student entered REDACTED NAME OF PRISON on November 4, 2019.
5. In November 2019, APER received the “List of Offenders Under 21” from the DOC and Student’s name did not appear on the list.
6. On December 6, 2019, APER received the “List of Offenders Under 21” from the DOC and the Student’s name was on the list.
7. On January 3, 2020, Student’s name appeared on the “List of Offenders Under 21” a second time. APER checked DELSIS to determine if Student received special education and related services. APER reported that records did not indicate the Student had an active IEP at REDACTED NAME OF FACILITY. Thus, Student was not identified to be offered special education and related services.
8. A DELSIS report indicates Student’s prior educational placements and special education status as follows for the 2018-2019 and 2019-2020 school years:

District Name	School Name	Year	Entry	Exit	Spec Ed Code
REDACTED	REDACTED NAME OF FACILITY	2020	9/4/2019	11/4/2019	0
REDACTED	REDACTED NAME OF FACILITY	2019	3/12/2019		0
REDACTED2	School 1	2019	9/28/2018		0
District 1	School 2	2019	9/26/2018	4/17/2019	200
District 1	School 3	2019	9/4/2018	9/25/2018	200
REDACTED2	School 1	2019	8/28/2018	9/17/2018	0
District 1	School 5	2019	8/15/2018	8/31/2018	200
District 1	School 2	2019	7/1/2018	8/14/2018	200

9. According to the above data from DELSIS, the last recorded time Student received special education and related services was when Student exited School 2 on April 17, 2019. Student’s placement prior to REDACTED NAME OF PRISON was the REDACTED NAME OF FACILITY and DELSIS does not indicate a special education code for Student.
10. On May 28, 2019, an IEP team meeting was held at REDACTED NAME OF FACILITY. During the IEP team meeting, the evaluation summary report (ESR) developed at School 3 was reviewed and the IEP team agreed to adopt it. The IEP team also developed an IEP. The initiation date of the IEP was May 28, 2019 and the end date was May 27, 2020.
11. DELSIS has no indication of the Student receiving special education and related services during this timeframe.

12. Student reported not having received special education and related services while in REDACTED NAME OF FACILITY. Student reported participation in regular education classes every day which included instruction in math, reading, and science.
13. Student reported not receiving special education and related services when Student entered REDACTED NAME OF PRISON.
14. In February 2020, Student reported having requested special education and related services. The day following this request, Student reported that the educational diagnostician at REDACTED NAME OF PRISON contacted Student.
15. On February 20, 2020, the educational diagnostician reported meeting with Student to ask if Student wanted special education and related services. Student reported wanting services.
16. On February 21, 2020, APER reported administering the TABE reading assessment 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. The Nelson Denny Reading Test was also administered.
17. On February 24, 2020, APER discussed the results of the Nelson Denny Reading Test with Student and administered the ACCESS Math Test.
18. On February 26, 2020, Student provided written consent for an evaluation and signed the Prior Written Notice (PWN), waiving Student's waiting period of 10 school days before implementation of the proposed action. On the same date, APER completed an IEP Transition Interview with the Student.

Provision of Special Education and Related Services

19. According to the APER Pre-Trial Detainees Revised Procedures, the following is the procedure that is followed for providing special education and related services:
 - a. No later than 31 days after the detainee's name has appeared for a second time on a "List of Offenders Under 21," tutorial instruction will be provided by a prison education teacher in accordance with the benchmarks and goals/objectives outlined on the detainee's IEP or IEP from a district.
 - b. Any missing information such as the Special Education Portfolio must be acquired, e.g. if a psychological evaluation is needed to complete the portfolio, then the educational diagnostician will contact the contracted psychologist for the needed assessments.
20. According to an interview with APER staff, eligible pretrial detainees are offered special education and related services. Regular education is not offered to pretrial detainees. Those eligible for special education and related services typically receive approximately

45 minutes of instruction per instructional session. IEPs for all eligible pretrial detainees provide for a maximum of 60 minutes of instruction per instructional session.

21. On May 26, 2020, an IEP team meeting was purportedly held for the Student in which the evaluation was reviewed to determine potential eligibility for special education and related services. Student chose to waive all services.

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 and related services in Delaware. *See* 14 Del Admin. Code § 922 through 929. Such regulations are applicable to APER.

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 those same students, 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. *See* 34 C.F.R. § 102(a)(2)(ii).

The sole action APER used to determine whether Student was previously identified as a child with a disability or had an IEP, was to review Student's record on DELSIS. APER has a list of liaisons in each district that they are to reach out to and request special education records if they know or suspect a student has a disability. If the district does not have records to provide, APER is supposed to contact the APER liaison in Exceptional Children Resources (ECR), at the Delaware Department of Education, who can search for records in IEPPLUS². Student's educational placement prior to REDACTED NAME OF PRISON was at REDACTED NAME OF FACILITY. DELSIS does not show a special education code for Student at REDACTED NAME OF FACILITY. According to the data from DELSIS, the last recorded time Student received special education and related services was when Student exited the School 2 on April 17, 2019. There is no indication from DELSIS that Student received special education or related services while at REDACTED NAME OF FACILITY. However, IEPPLUS shows that on May 28, 2019, an IEP team at REDACTED NAME OF FACILITY developed an IEP plan for Student.

² IEPPLUS is a database that local education agencies use to create IEPs and upload special education documents such as the evaluation summary report, finalized IEP, prior written notice etc.

The initiation date of the IEP is May 28, 2019 and the end date was May 27, 2020.

While there appears to have been errors in DELSIS with respect to whether Student received special education and related services in Student's previous educational placement, DELSIS indicates a history of special education eligibility beginning in the 2010-2011 school year. This fact, along with the fact that the exit dates for several educational placements were missing on the DELSIS report, should have prompted APER to explore the Student's history further by contacting the district or ECR liaison, rather than just focusing on the Student's last educational placement on the DELSIS report. Further exploration would have revealed that the Student's IEP which was initiated on May 28, 2019 was still current. Therefore, the exception found in 34 CFR 102(a)(2)(i) does not apply and APER was responsible for providing FAPE to Student. **Thus, I find a violation of federal and state regulations with respect to the provision of FAPE.**

ii. APER failed to adopt or develop an IEP for Student on or before February 4, 2020.

State regulations require that when students transfer from one public agency to another public agency within Delaware, the receiving agency must either adopt the student's IEP from the previous public agency at an IEP team meeting convened for that purpose, or develop, adopt, and implement a new IEP that meets the applicable requirements within 60 days of the student's initial attendance in the receiving public agency. 14 Del. Admin. Code § 925.23.4.1.

Student entered REDACTED NAME OF PRISON on November 4, 2019. REDACTED NAME OF PRISON is not a school, it is a prison. Pre-trial detainees have not been adjudicated. Their status changes frequently and they are moved frequently to other locations in the correctional system. Therefore, the question of what date is considered Student's date of initial attendance is more complicated than simply Student's date of entrance into REDACTED NAME OF PRISON. On December 6, 2019, APER received the "List of Offenders Under 21" from the DOC with Student's name on the list. I find December 6, 2019, and not January 3, 2020 (the date Student's name appeared on the "List of Offenders Under 21" for a second time), to be the date of initial attendance such that APER should have convened an IEP team meeting to adopt or develop an IEP for Student within 60 days of December 6, 2019. As such Student's prior IEP should have been adopted or a new one developed on or before February 4, 2020, which APER failed to do. APER reported that an IEP team meeting was not held until May 26, 2020. **Therefore, I find APER violated 14 Del. Admin. Code § 925.23.4.1 by failing to adopt or implement a new IEP for Student prior to February 4, 2020. Additionally, I find that APER violated 34 C.F.R. § 300.10 and 14 Del. C. § 3120 by not providing Student with FAPE.**

iii. APER failed to obtain Informed Written Consent from the Student Prior to Evaluation

State and federal regulations require informed written consent prior to conducting an evaluation for eligibility determination. *See* 34 C.F.R. § 300.300; 14 Del. Admin. Code § 925.1.0. In addition, state and federal regulations also require the public agency to provide a PWN ten (10) school days before proposing to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. *See* 34 C.F.R. § 300.503; 14 Del. Admin. Code

§ 926.3.0. On February 26, 2020, Student provided written consent for an evaluation and signed the PWN, waving Student’s waiting period of 10 school days before implementation of the proposed action. However, the TABE was administered on February 21, 2020. According to the APER Pre-Trial Detainees Revised Procedures, the administration of the TABE is part of the evaluation process. Thus, the evaluation process began prior to gaining Student’s informed written consent and providing Student with prior written notice. **Therefore, I find that APER violated 34 C.F.R. § 300.300 and 14 Del. Admin. Code § 925.1.0 by failing to obtain informed written consent prior to initiating an evaluation of Student. Additionally, I find that APER violated 34 C.F.R. § 300.503 and 14 Del. Admin. Code § 926.3.0 by failing to provide Student with PWN prior to initiating an evaluation of Student.**

B. Provision of FAPE to all pre-trial detainees eligible for services

i. APER’s practice of limiting instruction for all pretrial detainees violates FAPE

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

APER staff reported that those detainees eligible for special education and related services typically receive approximately 45 minutes of instruction per instructional session. IEPs for all eligible pretrial detainees provide for a maximum of 60 minutes of instruction per instructional session. 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. But a blanket practice limiting IEPs for all pre-trial detainees to a maximum of 60 minutes of instruction per instructional session fails to comport with the requirement that instruction be individualized to meet the unique needs of the student. **Therefore, I find that APER’s practice of limiting IEPs for all pre-trial detainees to a maximum of 60 minutes of instruction per instructional session violates 34 C.F.R. §300.101, 14 Del. C. § 3120 and 14 DE Admin. Code §925.20.0**

ii. APER’s Pre-Trial Detainees Revised Procedures pertaining to Evaluation Procedures violate Federal and State Regulations

State and federal regulations require that in conducting an evaluation, the public agency shall use a variety of assessment tools and strategies to gather information about the student. In addition, the assessment tools and strategies selected must provide relevant information that directly assists persons in determining the educational needs of the student. *See* 34 C.F.R. § 300.304; 14 Del. Admin. Code § 925.4.0. Public agencies may not develop standardized policies using the same assessment tools and strategies to evaluate each student but must instead, select assessment tools and strategies to meet the needs of each individual student.

APER's Pre-Trial Detainees Revised Procedures require an IEP team (teacher/supervisor, educational diagnostician and classroom teacher and inmate) to convene at an IEP team meeting to design an IEP based on the available educational records, TABE assessment/WRAT4 results and student input. **I find that APER violated 34 C.F.R. § 300.304; 14 Del. Admin. Code § 925.4.0 by implementing a written policy requiring the TABE and WRAT4 assessments be used to evaluate each student.**

CORRECTIVE ACTIONS

- 1) If an IEP team meeting was held on May 26, 2020 to adopt or develop the ESR and the IEP, APER must send a copy of the ESR, IEP and PWN to the Director of Exceptional Children Resources. If Student chose to waive all services, then APER must forward a copy of the PWN in which it is stated that the Student waived special education services and the written waiver if applicable to the Director of Exceptional Children Resources.
- 2) If an IEP was developed on May 26, 2020, then APER will develop a plan to award Student with any compensatory education services owed from February 4, 2020 until the IEPs development. This plan should be developed and submitted to the Director of Exceptional Children Resources by **June 30, 2020**. It should be noted that Student can refuse compensatory education services under the same procedures Student can refuse special education services. If the student refuses, APER must forward a copy of the PWN and written refusal to the Director of Exceptional Children Resources by the same date.
- 3) By **July 1, 2020**, APER will provide a detailed plan to the Director of Exceptional Children Resources addressing how 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. evaluation policies and procedures
 - d. steps to be taken to determine student's educational history when they transfer to REDACTED NAME OF PRISON
 - e. importance of and how to individualize evaluation procedures and all components of the IEP
- 4) By **July 31, 2020**, the APER shall provide a detailed plan to the Director of Exceptional Children Resources addressing: how APER will determine individualization of instructional hours based upon the unique needs of its students.
- 5) 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. evaluation procedures
 - b. 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
 - c. the ESR and IEP transfer process for incoming eligible 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