

**DELAWARE DEPARTMENT OF EDUCATION
EXCEPTIONAL CHILDREN RESOURCES**

STATE COMPLAINT DECISION

DE SC # 24-12

Date Issued: June 3, 2024

On March 18, 2024, REDACTED (Attorney 1) and REDACTED (Attorney 2) from Community Legal Aid Society Inc. (CLASI), filed a complaint on behalf of their client, REDACTED (Student), with the Delaware Department of Education (Department). 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). The complaint has been investigated as required by federal regulations at 34 C.F.R. §§ 300.151–300.153 and according to the Department’s regulations at 14 DEL. ADMIN. CODE §§ 923.51.0–923.53.0.

The investigation included a review of Student’s educational records, as well as correspondence and interviews with Attorneys 1 and 2 from CLASI, Parent/Educational Representative (Parent), Director of APER, APER Teacher Supervisor, APER General Education Teacher, APER Special Education Teacher, APER Educational Diagnostician and Student. In addition, the hearing order DP 23-02 was reviewed.

COMPLAINT ALLEGATIONS

CLASI alleges APER violated Part B of the IDEA and implementing regulations, as follows:

1. Failed to meet Student’s behavioral needs;
2. Failed to follow IDEA procedures;
3. Failed to provide Student with instruction in the Least Restrictive Environment;
4. Delayed finalizing a new IEP and the continued inadequacy of Student’s IEP; and
5. Failed to provide Student with a full educational opportunity.

FACTUAL FINDINGS

1. Complainant, Student, filed DP 23-02 against APER on August 1, 2022. The hearing was held on September 13, 2022, September 14, 2022, September 19, 2022, and October 11, 2022 and a decision was ordered and amended on December 15, 2022.
2. APER’s response to the State Complaint SC 24-12, dated April 2, 2024, stated, “Currently, there are two motions pending before the United States District Court for the District of

Delaware in REDACTED v. Adult and Prison Education Resources Workgroup, REDACTED (Consolidated), which concerns a prior due process complaint Student filed against APER. The issues raised in the State Complaint are similar to issues that are currently on appeal, pending before the District Court. Additionally, some questions of law raised in the State Complaint are the same questions of law that are currently being addressed in the appeal...”

3. Student is REDACTED years old and is currently incarcerated at REDACTED REDACTED
4. Student was incarcerated at REDACTED REDACTED on December 18, 2020 and transferred to REDACTED on July 18, 2022.
5. Upon entering REDACTED, Student requested education and enrolled in the education program.
6. Student attends REDACTED (REDACTED) which is jointly administered by APER and Delaware Department of Corrections (DDOC).
7. Student is currently receiving special education and related services under the educational classifications of Emotional Disability and Specific Learning Disability in Mathematic Computation.
8. During the November 18, 2022 IEP meeting, the IEP Team determined Student had the capacity to make REDACTED own educational decisions. Student voluntarily granted this decision-making authority to REDACTED (Parent) at that meeting. However, Parent never signed the form, which is a required component. This authority expired on November 18, 2023.
9. Student signed the Consent for Release of Personally Identifiable Information on April 8, 2024.
10. On April 25, 2024, Attorney 2 sent Investigator a copy of the Grant of Decision-Making Authority, signed by Student on April 8, 2024 and signed by Parent on April 17, 2024.
11. Currently, Student is housed in the REDACTED REDACTED due to disciplinary reasons.
12. According to DDOC website, REDACTED houses inmates who have demonstrated that they cannot be housed in a lesser security setting and/or whose behavior and history are conducive to maximum security housing. An inmate may earn their way out of REDACTED by exhibiting appropriate behavior, complying with institutional rules and participating in treatment, education, and/or work programs.
13. On January 20, 2023, Student and Parent were sent an invitation to attend an Individual Education Program (IEP) meeting on February 3, 2023. The purpose of the meeting was to conduct an annual review of Student’s IEP and to determine eligibility for special education and related services documented in an Eligibility Summary Report (ESR). A draft IEP was sent with the meeting invitation.

14. Student's draft IEP of February 3, 2023, which would have been in effect during the timeframe of the filed complaint, contained three goals: behavior, reading comprehension and math problem-solving.
15. The February 3, 2023 draft IEP identified the Post Secondary Education and Training Strengths as "Student is a self-advocate. Student has become more flexible in REDACTED expectations, giving leeway whereas before REDACTED strongly preferred to stick with clear and transparent expectations. Student remains comfortable expressing REDACTED preferences and considering what works best for REDACTED. Student works in a focused and dedicated manner when expectations are clarified. Student is not afraid to ask questions when REDACTED needs information. Student feels that REDACTED is a hard worker, genuine and good at reading. Student is goal-oriented and likes to have indicators of progress shared with REDACTED. Student has become much more willing to rebound from setbacks."
16. The February 3rd draft IEP indicated that Student's disability presents challenges when REDACTED deals with frustration, circumstantial variances or changes in expectation and situations where some flexibility might be required. Student needs supports in place to manage feelings of frustration and negativity, which can be obstacles to academic success. Academically, Student is capable and hard-working, frustration can impact REDACTED ability to persevere. In situations of frustration or conflict, Student benefits from supports and strategies to vent and advocate for REDACTED."
17. The behavior goal stated, "Based on teacher observation, in an educational setting, Student, on average, requires less than 1 prompt per class to follow staff directions, as measured by classroom staff across 10 observations." The accommodations for the behavior goal included daily/weekly check-ins, teacher provided journal, writing utensils, and composition book, as needed. Services, aides and modifications included one-on-one instruction, frequency is two times a week for 15 minutes. The IEP Team determined that Student did need positive behavior interventions, supports or strategies when discussing other factors to consider when developing the IEP.
18. In addition, within the Discipline section of the February 3rd draft IEP, the IEP Team wrote, "Student is incarcerated in an adult correctional facility. Students participating in education are required to follow Department of Corrections security policies and procedures."
19. The reading comprehension goal stated, "Student will independently use at least two pieces of evidence to support an explicitly stated central idea of a 9th grade complex text with 90% accuracy on three out of three consecutive opportunities." Accommodations include: graphic organizers, review of directions, additional time assignments/assessments (in accordance with REDACTED curriculum), preview of comprehensions questions, preview/pre-teach vocabulary, provision of notes/outlines/graphic organizers/writing frames, concrete examples, scribe note taking, breaks in instruction, study sheets, extra verbal cues and prompts, answers dictated (in accordance with REDACTED curriculum), re-direction by teacher, frequent checks for understanding, timely or real-time feedback, oral testing (in accordance with REDACTED curriculum), untimed tests (in accordance with REDACTED curriculum), open-book, open note assessments (in accordance with REDACTED curriculum), read-alouds,

highlighting, discursive instruction. Services, aides and modifications included one-on-one instruction, frequency is one times a week for 30 minutes.

20. The math problem solving goal stated, “Student will, with or without teacher support, complete linear equations using rational numbers in any form (for example, fractions or decimals) to represent real world situations with 80% accuracy on three out of three consecutive opportunities.” Accommodations include: use of calculator, use of concrete examples, security-approved manipulatives, teacher provided notes/study guides, frequent checks for understanding, pre-teach vocabulary, direct/explicit instruction in concepts, open book/open note assessments (in accordance with REDACTED curriculum), answers dictated (in accordance with REDACTED curriculum), oral responses to tests, discursive instruction, scaled questioning, growth-based mastery, personalized examples. Services, aides and modifications included one-on-one instruction, frequency is four times a week for 20 minutes.
21. The February 3rd draft IEP indicated that Student was not eligible for reading-based Extended School Year (ESY) services or federal ESY services. The rationale for the decision was Student does not require services beyond the scope of a typical school day and school year. Student’s Least Restrictive Environment/Placement was noted as “G. Correctional Facilities.” It was stated that “Placement is court mandated. Student is housed in the REDACTED of the facility. Security can restrict a student’s access to general educational services and materials based on changes in housing and security concerns.”
22. On February 3, 2023, the IEP Team determined Student’s eligibility to continue receiving special education services under the primary classification of Emotional Disability and documented the decision through an Evaluation Summary Report (ESR). At that time, REDACTED (Teacher Supervisor) stated that Student is very good at asking for help. REDACTED (General Education Teacher) felt that Student never shuts down, that Student is independent and advocates for REDACTED when needed. REDACTED (Classroom Teacher) stated that Student is neat, organized and can think critically, express REDACTED ideas clearly, comprehend assignments, recall what REDACTED has been taught in class, and has creative ideas. However, Classroom Teacher did say that although Student’s attitude toward school has improved, REDACTED is easily distracted, easily frustrated and, at times, has trouble getting along with others. The IEP Team conducted the annual IEP review and determined that Student continues to need extra support in Mathematics Problem Solving, Reading Comprehension and behavior within the classroom environment. This decision was reached after discussions among the IEP Team referencing a need for mental health interventions within the classroom environment.
23. On March 17, 2023, Parent signed a Permission to Evaluate/re-evaluate (PTE) for a neuropsychological evaluation.
24. On March 31 and May 11, 2023, REDACTED (Neuropsychologist) conducted a neuropsychological evaluation on Student. The recommendations by REDACTED included:
 - Continuing education until age 22 by not accepting REDACTED high school diploma;

- Weekly therapy and the opportunity to speak with a psychiatrist about medication that might help REDACTED;
 - Direct intervention in building social thinking skills;
 - Job coaching and support for negotiating task responsibilities, communication with supervisors and problem solving as issues come up in further education or entering the job market;
 - Accommodations in post-secondary settings under the Americans with Disability Act.
25. Neuropsychologist also suggested the following recommendations would be helpful to Student: preferential seating away from noise or near focus of instruction, provision of PowerPoints and lecture notes, opportunity to type when taking notes, allowance to use software like Sonocent, use of study guides, knowledge of format for exams, notetaking service, allowance to email assignments to teacher, provision of specific guidelines regarding expectations for assignments and timelines for longer assignments. If Student chooses to pursue further education, Student will need support for the language and learning needs identified in the report. In addition, multiple choice or matching formats for assessments are preferred.
26. REDACTED (Contracted Psychologist 1) conducted a clinical interview, via zoom, with Student on May 5, 2023, and recommended that REDACTED see a mental health therapist and/or primary care physician to rule out depression and anxiety or other mental health conditions. REDACTED recommended that the Student try mindfulness techniques based on relaxation techniques.
27. Subsequent IEP meetings were held on May 22, 2023, June 22, 2023, July 25, 2023 and September 19, 2023 in order to complete the annual IEP.
28. From the June 22, 2023 IEP meeting, the Prior Written Notice (PWN) (dated July 12, 2023) stated the IEP Team reviewed the reports from the Neuropsychologist and Contracted Psychologist 1, as well as questions presented by CLASI from the February 3, 2023 IEP meeting. The IEP meeting ended when the allotted time expired. Student was escorted back to cell. No further date for a new meeting was discussed.
29. On July 25, 2023, an IEP meeting was held to continue answering questions posed by CLASI, dated June 15, 2023. In the meeting, according PWN (dated September 5, 2023), after a discussion, the IEP team determined that it was not appropriate to write CLASI's request for a Behavior Intervention Plan (BIP) into the IEP. The IEP Team then discussed Student's LRE. However, no revision to Student placement was made pending a conversation between APER and Exceptional Children Resources. LRE remained as G on the IEP. After further discussion, minor revisions were made to the IEP.
30. At the September 19, 2023 IEP meeting, the IEP Team met with REDACTED, new medical providers for REDACTED. The IEP Team discussed the recommendations from three mental health providers for further psychiatric evaluations for Student. REDACTED responded that

Student receives Level 3 Behavioral Health and is seen by staff in accordance with policy. REDACTED received psychiatric and medicinal evaluations per policy every 90 days.

31. The PWN of September 27, 2023 stated that since REDACTED (Contracted Psychologist 2) was not in attendance, REDACTED summary notes were to be shared with the Team. These notes included: "...since Student wants to prepare REDACTED for transition out of prison and would like to develop coping strategies for frustrating and stressful situations, I recommend Student receive counseling as a related service for 30 minutes a week to work on frustration tolerance and transition planning." Contracted Psychologist 2 also recommended that Student meet with a clinical psychologist and a psychiatrist to provide REDACTED with the most appropriate support.
32. The PWN also stated the IEP Team heard the concerns raised by Parent that Contracted Psychologist 2 services were being cut off with no notice provided. The Team was informed that the School Psychologist 2 had a personal issue arise and was unable to provide services. APER was working on acquiring a new provider. CLASI requested that Student receive services until more intensive services be provided.
33. At the time Student was called to return to cell, the IEP Team began discussing time on task, reading and math goals. Based on data, the IEP Team believed "Student continued to need extra support in these areas and proposed to continue to provide a skill sequence of study with goals and benchmarks for specifically designed instruction to address deficiencies in math, reading and behavior as it pertains to the classroom environment."
34. On January 18, 2024, Student and Parent received a meeting notice to attend an IEP meeting to develop, review or revise Student's IEP on February 1, 2024.
35. At the February 1, 2024 IEP meeting, the IEP Team reviewed and discussed the special education services and current evaluation reports. Upon discussion, the IEP Team agreed that Student continues to qualify under the Special Education Classification of Emotional Disability. Due to TABE scores and requested services by Student and Parent, the IEP Team agreed that Student qualified for a Secondary Classification of Specific Learning Disability in Math Calculation.
36. In addition, at the February 1st IEP meeting, changes were made to the IEP, including the addition of Psychological Services of Counseling, one time a week for 30 minutes per session and Consultative Psychiatric Services to be determined by the psychiatrist.
37. Attorneys requested ESY be included in the February 1st discussion. The IEP Team agreed to review the regulatory considerations of eligibility for ESY at a subsequent meeting. The IEP Team considered Attorneys' request to have LRE changed from "G" setting but the IEP Team rejected changing the LRE setting because the student is enrolled in the Prison Education Program and is housed inside a Department of Correction facility.
38. A PWN was written on February 1, 2024 and sent to Parent and Student on March 5, 2024 proposing to adopt the ESR and IEP of February 1, 2024.

39. A revised PWN of April 12, 2024 was sent to Parent and Student on April 17, 2024 regarding REDACTED having a clinical psychologist on its team.
40. REDACTED (Special Education Teacher) reported that Student has only expressed frustration and needed a break from work to regroup twice in the past year. The two breaks were provided to Student when requested.
41. On May 8, 2024, Investigator interviewed Parent to confirm allegations and facts contained in the state complaint filed by Student's attorneys. In addition, Parent expressed frustration with the IEP process, lack a mental health services due to the Student and overall lack of educational support from APER.
42. On May 24, 2024, Investigator held a teleconference with Student to confirm and clarify facts, documents and correspondence related to this case. Student expressed frustration with APER for lack of educational support and follow through on promises made regarding prior relief. Student's attorneys were present during the interview.

CONCLUSIONS

The purpose of the IDEA is to ensure that "all children with disabilities have available to them a free and appropriate public education that emphasizes the special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). A "free appropriate public education" is defined within the IDEA as specially designed instruction and related services as may be required to assist a student with a disability to benefit from an education that: (a) is provided at public expense, under public supervision and direction, and without charge; (b) meets the standards of the State Educational Agency; (c) includes an appropriate preschool, elementary school, secondary school, or vocational school in the State; (d) is provided in conformity with the individualized education program designed to meet the student's unique needs; (e) provides significant learning; and (f) confers meaningful educational benefit that is gauged to the student's potential. 20 U.S.C. § 1401(9) and 14 Del. C. § 3101(5).

Students who are incarcerated do not forfeit their right to special education and related services merely because they are in a correctional facility. Congress explicitly included the right to FAPE for eligible students in "state and local juvenile and adult correctional facilities." 34 C.F.R. § 300.2(b)(1)(iv). "Absent a specific exception, *all* IDEA protections apply to students with disabilities in correctional facilities and their parents." *U.S. Department of Education, Dear Colleague Letter* (Dec. 05, 2014). The exceptions to making FAPE available applies only where (1) a student aged 18-21 was not identified as having a disability prior to incarceration and State law does not otherwise require that special education and related services be provided; or (2) the State has a bona fide security or compelling penological interest that cannot otherwise be accommodated. 34 C.F.R. § 300.324(d)(2)(i).

In addition, all of the IEP content requirements apply to students with disabilities in correctional facilities (34 CFR §300.320),¹ including, but not limited to, a statement of: (1) the student’s present levels of academic achievement and functional performance (IEP Teams need to have the student’s academic and other school records in order to determine the student’s present levels of achievement and performance); (2) measurable annual academic and functional goals; and (3) the special education and related services and supplementary aids and services that will be provided to the student to enable him or her to advance appropriately toward attaining his or her IEP goals and to be involved in and make progress in the general education curriculum (the general education curriculum is the same curriculum provided to students without disabilities in the State).

1. CLASI alleged APER failed to meet Student’s behavioral needs.

U.S. Department of Education, Dear Colleague Letter (Dec. 05, 2014) states, “in addition, the special factors that the IEP Team must consider in developing, reviewing, and revising the IEP of each student with a disability are particularly relevant to students with disabilities in correctional facilities. Among these special factors is the requirement for the IEP Team to consider the use of positive behavioral interventions and supports and other strategies to address behavior in the case of a student whose behavior impedes his or her learning or the learning of others (34 CFR §300.324(b)(2)). Appropriate implementation of these positive behavioral interventions and supports and other strategies to address behavior should ensure that the student is able to benefit from his or her educational program in the correctional facility and hasten the student’s transition from the facility and reentry into the community.”

At this time, a determination regarding the current issues is unwarranted due to the pendency of similar, if not identical issues, before the United States District Court for the District of Delaware. It appears that the outcome of the pending appeal will be determinative of this matter.

2. CLASI alleged APER failed to follow IDEA procedures.

At this time, a determination regarding the current issues is unwarranted due to the pendency of similar, if not identical issues, before the United States District Court for the District of Delaware. It appears that the outcome of the pending appeal will be determinative of this matter.

3. CLASI alleged APER failed to provide Student with instruction in the Least Restrictive Environment.

U.S. Department of Education, Dear Colleague Letter (Dec. 05, 2014) states “the IDEA emphasizes the importance of educating students with disabilities in regular classes and in extracurricular and other nonacademic activities with nondisabled students to the maximum extent appropriate (34 CFR §§300.114, 300.117, and 300.320(a)(4) and (5)). Therefore, each public agency must ensure that special classes, separate schooling, or other removal of students

¹ In States that have opted to make available FAPE to students with disabilities convicted as an adult under State law and incarcerated in an adult prison, the LEA may modify an IEP for such a student if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated (34 CFR §300.324(d)(2)).

with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (34 CFR §300.114(a)(2)). If a determination is made that a student with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that student then could be placed in a setting other than the regular educational setting. Placement decisions must be made on an individual basis by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options (34 CFR §300.116(a)). In addition, the IEP must also include an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular classroom or in extracurricular or other nonacademic activities (34 CFR §300.320(a)(5)).

Each public agency must ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education and related services (34 CFR §300.115). These options must be available to the extent necessary to implement the student's IEP. Any alternative placement selected for the student outside of the regular education environment (education with nondisabled peers) must maximize opportunities for the student to interact with nondisabled peers, to the extent appropriate to the needs of the student. Accordingly, IEP Teams must make individualized placement decisions, and may not routinely place all students with disabilities in correctional facilities in classes that include only students with disabilities, even if this means creating a placement that is appropriate for the student, through methods such as having special education and general education teachers co-teach in the regular classroom (34 CFR §§300.116(a) and (b)).

In addition, under 34 CFR §300.324(d), for otherwise eligible students with disabilities who have been convicted as adults under State law and incarcerated in adult prisons: (1) States and LEAs are not required to include such students in State and districtwide assessments under section 612(a)(16) of the IDEA and §300.320(a)(6); (2) the requirements in §300.320(b) (relating to transition planning and transition services) do not apply with respect to the students whose eligibility under IDEA, Part B will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release; and (3) the IEP Team of a student with a disability may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated including the requirements of §§300.320 (relating to IEPs) and 300.112 (relating to LRE).

REDACTED

At this time, a determination regarding the current issues is unwarranted due to the pendency of similar, if not identical issues, before the United States District Court for the District of Delaware. It appears that the outcome of the pending appeal will be determinative of this matter.

4. CLASI alleged APER delayed finalizing a new IEP and the continued inadequacy of Student's IEP.

All of the IEP content requirements apply to students with disabilities in correctional facilities (34 CFR §300.320),² including, but not limited to, a statement of: (1) the student's present levels of academic achievement and functional performance (IEP Teams need to have the student's academic and other school records in order to determine the student's present levels of achievement and performance); (2) measurable annual academic and functional goals; and (3) the special education and related services and supplementary aids and services that will be provided to the student to enable him or her to advance appropriately toward attaining his or her IEP goals and to be involved in and make progress in the general education curriculum (the general education curriculum is the same curriculum provided to students without disabilities in the State).

At this time, a determination regarding the current issues is unwarranted due to the pendency of similar, if not identical issues, before the United States District Court for the District of Delaware. It appears that the outcome of the pending appeal will be determinative of this matter.

5. CLASI alleged APER failed to provide Student with a full educational opportunity.

According to 14 Del.C. §3110 **26 DE Reg. 843**, *each public agency shall ensure full educational opportunity is offered to its eligible children with disabilities. The minimum length of the instructional school day for a child with a disability in Kindergarten through grade 12 shall be the same as it is for non-disabled children in those grades. The minimum length of the school day for disabled pre kindergarten children shall approximate that of non-disabled pre-Kindergarten children, except in a program for the hearing impaired in which the parent is involved in the educational program. In such a program, the school and the parent together shall determine the schedule for at least 5 hours per week of instruction. Provision of fewer hours of instructional time than required by these regulations is authorized only in unusual circumstances where a child is medically unable to endure the required length of school day, and then only by decision of the IEP team after disclosure of the above standards to the child's parents, guardian, or Relative Caregiver. Compulsory school attendance: Compulsory school attendance requirements shall be in accordance with 14 Del.C. §2702 and §705, and shall apply to children with disabilities between the ages of 5 and 16. Attendance of children with disabilities under or over the compulsory school attendance age range, as provided in 14 Del.C. §2702, shall be determined by the IEP team and subject to the eligibility criteria and procedural safeguards provided in these regulations.*

(Authority: 20 U.S.C. 1412(a)(2); 14 Del.C. §3110)

26 DE Reg. 843 (04/01/23)

² In States that have opted to make available FAPE to students with disabilities convicted as an adult under State law and incarcerated in an adult prison, the LEA may modify an IEP for such a student if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated (34 CFR §300.324(d)(2)).

At this time, a determination regarding the current issues is unwarranted due to the pendency of similar, if not identical issues, before the United States District Court for the District of Delaware. It appears that the outcome of the pending appeal will be determinative of this matter.

CORRECTIVE ACTIONS

At this time, a determination regarding the current issues is unwarranted due to the pendency of similar, if not identical issues, before the United States District Court for the District of Delaware. It appears that the outcome of the pending appeal will be determinative of this matter.

REDACTED

Investigator