



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

January 29, 2019

Melissa Duncan
Legal Aid Society of Palm Beach County
423 Fern Street, Suite 200
West Palm Beach, Florida 33401

Dear Ms. Duncan,

This letter responds to your correspondence to the Office of Special Education Programs and follow-up discussions with members of my staff. You ask whether the Florida Department of Corrections fails to provide a free appropriate public education (FAPE) under Part B of the Individuals with Disabilities Education Act (Part B or IDEA) to students with disabilities when the State offers such students only a General Education Development (GED) credential rather than the opportunity to earn a regular high school diploma because the students are incarcerated in a particular adult corrections facility. We regret the delay in responding.

We note that section 607(d) of the IDEA prohibits the Secretary from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA section 607(e), this response is provided as informal guidance and is not legally binding. This response represents an interpretation by the U.S. Department of Education of the requirements of IDEA in the context of the specific facts presented, and does not establish a policy or rule that would apply in all circumstances.

Under IDEA, States must make FAPE available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, consistent with State law. 20 U.S.C. § 1412(a)(1)(A). IDEA limits FAPE for children aged 18 through 21 to the extent that State law does not require that special education and related services under Part B be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility, were not actually identified as being a child with a disability under 34 C.F.R. § 300.8, and did not have an individualized education program (IEP) under Part B. 20 U.S.C. § 1412(a)(1)(B)(ii) and 34 C.F.R. § 300.102(a)(2)(i). This exception does not apply to a child with a disability aged 18 through 21 who –

- 1) Had been identified as a child with a disability under 34 C.F.R. § 300.8 and had received services in accordance with an IEP, but left school prior to their incarceration. 34 C.F.R. § 300.102(a)(2)(ii)(A); or
- 2) Did not have an IEP in their last educational setting, but who had actually been identified as a child with a disability under 34 C.F.R. § 300.8. See 34 C.F.R. § 300.102(a)(2)(ii).

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If, under 20 U.S.C § 1412(a)(1)(B) and 34 C.F.R. § 300.102, a child with a disability aged 18 through 21 incarcerated in an adult correctional facility is eligible for FAPE, additional limitations regarding transition planning and services, participation in general assessments, and IEPs and least restrictive environment (LRE) requirements may apply. The requirements in 20 U.S.C. § 1414(d)(1)(A)(i)(VIII) and 34 C.F.R. § 300.320(b) (relating to transition planning and transition services) do not apply with respect to the children whose eligibility under Part B of the IDEA 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. 20 U.S.C § 1414(d)(7)(A)(ii) and 34 C.F.R. § 300.324(d)(1)(ii). Additionally, the requirements contained in 20 U.S.C. § 1412(a)(16) and 34 C.F.R. § 300.320(a)(6), relating to the participation of children with disabilities in general assessments, do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. 20 U.S.C § 1414(d)(7)(A)(i) and 34 C.F.R. § 300.324(d)(1)(i).

Finally, limitations on FAPE apply to students where there is a bona fide security interest or compelling penological interest that cannot otherwise be accommodated. Under 20 U.S.C. § 1414(d)(7)(B) and 34 C.F.R. § 300.324(d)(2), the 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. Specifically, the requirements of 34 C.F.R. §§ 300.320 (relating to IEPs), and 300.114 (relating to LRE), need not apply when considering modifications based on a bona fide security or compelling penological interest. The Department declined to define the term bona fide security or compelling penological interest, “given the individualized nature of the determination and the countless variables that may impact on the determination.” However, the Department stated that “a State’s interest in not spending any funds on the provision of special education and related services or in administrative convenience will not rise to the level of a compelling penological interest that cannot otherwise be accommodated, because States must accommodate the costs and administrative requirements of educating all eligible individuals with disabilities.” See *Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities*, Final Rule, 64 FR 12406, 12577 (March 12, 1999).

The IEP Team for each child with a disability who is convicted as an adult under State law and incarcerated in an adult correctional facility must determine the special education and related services necessary to provide the child FAPE, taking into account the exceptions described above. Absent a demonstration by the State of a bona fide security or compelling penological interest that cannot be accommodated, under 34 C.F.R. § 300.320(a)(4), the child’s IEP must include, among other things, a statement of the special education and related services, and supplementary aids and services to be provided to enable the child to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum (i.e., the same curriculum as for nondisabled children). Depending on the individual needs of the child, this could include the special education and related services necessary to enable the child to be awarded a regular high school diploma. However, if the State demonstrates to the IEP team that there is a bona fide security or compelling penological interest that cannot otherwise be accommodated for that child, the IEP Team may modify the child’s IEP and the IEP requirements in 34 C.F.R. § 300.320 need not apply. Therefore, where there is a

bona fide security or compelling penological interest that cannot be accommodated so as to allow the child to receive the special education and related services necessary to enable the child to be awarded a regular high school diploma, the child’s IEP may be modified to include the special education and related services necessary to enable the child to be awarded the GED credential.

It also is important to note that a student’s right to FAPE generally ends upon graduation from high school with a regular high school diploma. Under the IDEA regulations at 34 C.F.R. § 300.102(a)(3)(iv), a “regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential” (such as a GED credential). Therefore, if the IEP Team determines that GED courses would be an appropriate modification to the IEP because the State has demonstrated a bona fide security or compelling penological interest that cannot be accommodated, the student in question would continue to have a right to FAPE after completing the GED program, subject to any relevant limitations discussed above and the State’s age limit for the provision of FAPE. 20 U.S.C. § 7801(43); 34 C.F.R. § 300.102(a)(3).

If you have any further questions, please do not hesitate to contact Ms. Lisa Pagano at 202-245-7413 or by email at Lisa.Pagano@ed.gov.

Sincerely,

/s/

Laurie VanderPloeg
Director
Office of Special Education Programs

cc: Monica Verra-Tirado, Ed.D.
State Director of Special Education