

**State-Level Complaint WSC 2022:549
Disability Law Colorado v. Colorado Department of Education**

AMENDED DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on September 30, 2022 by Sara Pielsticker, Attorney at Disability Law Colorado (“Complainant”) against the Colorado Department of Education (“CDE”) on behalf of youth between the ages 18 to 21 (“Youth”) incarcerated in a county jail and potentially eligible for special education services under the Individuals with Disabilities Education Act (“IDEA”). *20 U.S.C. §1400, et seq.* After receipt of the complaint, CDE assigned an independent complaint investigator (“Investigator”) to review the written complaint and conduct an impartial investigation. The Investigator determined that the complaint identified two allegations subject to the jurisdiction of the state-level complaint process under IDEA and its implementing regulations at 34 C.F.R. §§300.151 through 300.153. The CDE has jurisdiction and the authority to resolve the complaint pursuant to these regulations.

In compliance with the IDEA, the corresponding federal regulations at 34 C.F.R. §300.1 et seq., and the Colorado the Exceptional Children’s Educational Act (ECEA), CDE issues this report containing Findings of Fact, Conclusions, Decision and Order for Corrective Action.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), the CDE has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from October 1, 2021 through September 30, 2022 for the purpose of determining if a violation of the IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance shall be limited to the time one year prior to the date of the complaint.

COMPLAINT ALLEGATIONS

1. Whether CDE exercised its general supervisory responsibility pursuant to 34 C.F.R. §300.149 to ensure the provision of a free appropriate public education (FAPE) to eligible youth between the ages of 18 to 21 incarcerated in county jails; and

2. Whether CDE has a policy, practice, or procedure in place to monitor county jails or their adjoining school districts to ensure that youth with disabilities have FAPE available to them.

INVESTIGATORY PROCESS

The Investigation included the following components:

- The Investigator reviewed the following records:
 - The original complaint filed by the Complainant;
 - The CDE’s response to the allegations raised in the complaint and supporting exhibits;
 - The CDE’s supplemental response and supporting documentation; and
 - The Complainant’s reply.
- The Investigator conducted interviews with the Complainant and CDE’s Director of General Supervision and Monitoring (“Director”), accompanied by legal counsel.
- The Investigator provided the opportunity for all parties to submit additional information for consideration during the complaint investigation.

RELEVANT LEGAL AUTHORITY

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| 20 U.S.C. §1400 et seq. | Individuals with Disabilities Education Act |
| 34 C.F.R. §300.2 | Applicability to State and Local Agencies |
| 34 C.F.R. §300.101 | Free Appropriate Public Education |
| 34 C.F.R. §300.102 | Exception to FAPE for Certain Ages |
| 34 C.F.R. §300.111 | Child Find |
| 34 C.F.R. §300.149 | State Education Agency (SEA) Responsibility for General Supervision |
| C.R.S. 22-32-141 | Student Awaiting Trial as an Adult |
| 1 CCR 301-8 | Rules for the Administration of the Exceptional Children’s Educational Act |

FINDINGS OF FACT

After thorough and careful analysis of all information relevant to the investigation, the Investigator makes the following findings:

1. In its response to this complaint, the CDE acknowledged its role in the general supervision of Administrative Units (AU) and county jails that deliver services to eligible youth, including those ages 18 to 21. The CDE concluded that its guidance, support, and monitoring efforts may not adequately capture this population. *CDE October 25, 2022 response*. Specifically, the CDE stated: “It appears that current monitoring procedures may not be specific enough to ensure that IDEA-eligible youth with disabilities between the ages of 18 and 21 detained in county jails have a FAPE available to them.”
2. Prior to filing the complaint, the Complainant requested data on youth in county jails. On July 27, 2022, the Complainant submitted a request to the CDE pursuant to Colorado’s Open Records Act pertaining to juveniles detained in jails or facilities awaiting trial as an adult. *Ex. 13, CDE supplemental response*.
3. On July 28, 2022, the CDE attempted to clarify the data request, and the Complainant replied, indicating that the data requested is the type of data mentioned on CDE’s Educational Services for Students Awaiting Trial as an Adult web page. Subsequently, the CDE responded that it was not in possession of any documents responsive to the request. *Ex. 12, CDE supplemental response*.
4. The Complainant also submitted a request to the Colorado Department of Public Safety pursuant to the Colorado Open Records Act on August 17, 2022. *Ex. 8, CDE supplemental response*. The request pertained to the number of youth detained in jails or facilities awaiting trial as an adult.
5. The Colorado Department of Public Safety responded to the Complainant on August 18, 2022 via email explaining that there was no data to report in response to Complainant’s request for information. *Ex. 9, CDE supplemental response*. The response stated, in relevant part:

Looking back through prior reports, there were no juveniles reported to have been held in an adult facility for the time periods of FY2013-2014, FY2014-2015, FY2015-2016, FY2016-2017, FY2017-2018 while awaiting trial. There was one youth held in the Jefferson County Jail during the 2018-2019 time period. (That report is attached.) With the passage of HB12-1139 it changed the way the courts processed juveniles into adult court by transferring them from juvenile to adult district court instead of direct filing into adult court. With this change it limited the court’s ability to hold juveniles in adult facilities. This is why suddenly after FY 2011-2012 we no longer saw youth held in adult facilities. There was one outlier that was transferred in the FY2018-2019.

6. Also on August 17, 2022, the CDE began a pilot program in two AUs using a tool to assess program performance with respect to ensuring the provision of FAPE for children ages 3-21.

The first AU was notified of its participation in the pilot program on August 17, 2022. The second AU was notified on August 20, 2022. *CDE October 25 and November 8, 2022 responses*. The pilot program data collection and analysis are ongoing according to the Director. *November 8, 2022 interview*.

7. The State of Colorado, Division of Criminal Justice reported that no juveniles were held in an adult facility for the time period of FY2019-2020 and FY2020-2021 while awaiting trial. *Ex. 10 and 11, CDE supplemental response*. The Director indicated that reports had not yet been received for FY2021-2022. *November 7, 2022 interview, CDE November 8, 2022 supplemental response*.
8. The Complainant questioned whether the use of the term “juvenile” in the responses from correctional facilities confirmed only that no juveniles under the age of 18 were housed at the facilities as opposed to youth between the ages of 18 to 21. *September 29, 2022 complaint, November 16, 2022 reply, and November 17, 2022 interview*. It is the Complainant’s position that no data is collected on youth between the ages of 18 to 21 in county jails because those facilities are using the criminal code definition of “juvenile,” which is an individual under the age of 18.
9. When asked to clarify whether the term “juvenile” as used in the responses from the CDE and the Colorado Department of Public Safety specifically included youth between the ages of 18 to 21, the Director indicated that it was unclear. The Director acknowledged it is possible that the different agencies may be using different definitions and ages in the data collected and in the responses. *November 7, 2022 interview*.
10. The CDE special education monitoring data submitted during this investigation addressed monitoring activities at the Division of Youth Services (“DYS”) rather than county jails. *CDE October 25, 2022 response*. According to the Complainant, DYS facilities were not part of the original complaint and do not address youth incarcerated in county jails. *September 29, 2022 complaint, November 17, 2022 interview*.
11. The CDE described the following actions it has already commenced to ensure the provision of FAPE to IDEA-eligible youth between the ages of 18 and 21 detained in county jails, including the following:
 - a. Additional guidance and resources for AU’s specific to youth in county jails, including the web page Special Education Services for Eligible Youth with Disabilities Detained in County Jails, housing the guidance document “Special Education in County Jails,”

which describes the special education rights of detained youth ages 18 to 21 and the respective responsibilities of county jails and AUs for ensuring the rights of youth are protected.

- b. Revision of the landing page on the CDE's web page, Students Awaiting Trial as an Adult, to include additional information regarding IDEA-eligible youth.
- c. Revision of its financial reimbursement guidance on the Students Awaiting Trial as Adults web page.
- d. With input from the Complainant, development of a fact sheet specific to youth detained in county jails.
- e. Creation of a resource that will provide each AU with the contact information for each county jail within the AU's jurisdiction.
- f. Creation of a resource that will provide contact information for the school employee who has been designated by the AU as the educational contact for the county jail, consistent with the requirements of C.R.S. 22-32-141(3)(a).
- g. Creation of a web page for Youth in Correctional Facilities to house the newly developed resources described above.

CDE October 25, 2022 response.

12. In addition to the above actions already commenced, the CDE proposed the following resolutions to improve its monitoring, guidance, support, and training related to serving all children with disabilities including youth ages 18 to 21 incarcerated in county jails:

- a. Provide training to AUs about the obligation to provide special education services to IDEA-eligible, incarcerated youth (including those 18 to 21).
- b. Ensure relevant policies and procedures for AUs are consistent with IDEA and ECEA requirements for eligible youth detained in county jails.
- c. Develop and implement a monitoring protocol to account for IDEA-eligible youth detained in county jails, including a method for evaluating the need for compensatory services.
- d. Develop guidance and training for county jails concerning their obligation to request educational services and work with Administrative Units to ensure IDEA-eligible youth are identified and served in county jails.

- e. Subject to appropriations and approval, designate one full-time employee (FTE) to support IDEA-eligible youth in correctional facilities, including eligible youth residing in the Department of Corrections (DOC), the Division of Youth Services (DYS), and county jails.
13. The Complainant concurred with the proposed resolutions of the CDE with one exception. The Complainant believes that some action should be taken to attempt to identify youth ages 18 to 21 who have been incarcerated in county jails during the last year for the purpose of providing student level remedies for potential lost services. *November 17, 2022 interview.*

CONCLUSIONS OF LAW

1. The overarching purpose of the IDEA is to ensure that a student with a disability has available to them a Free Appropriate Public Education (FAPE), including special education and related services that meet the unique needs of individual students and prepare them for further education, employment and independent living. *34 C.F.R. §300.1.*
2. The IDEA requires that FAPE be provided to each eligible student. *34 C.F.R. §§300.1 and 300.101(a).* FAPE must be individually designed to meet the unique needs of an eligible student, and a school district must offer an Individualized Education Program (“IEP”) that is reasonably calculated to enable a student to make progress appropriate in light of the student’s unique circumstances. *Bd. of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley, 553 IDELR 656 (1982) and Andrew F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174 (2017).*
3. Federal regulations implementing the IDEA apply to state and local education agencies, as well as state and local juvenile and adult correctional facilities. *34 C.F.R. §300.2(b)(1).*
4. Each state must ensure that FAPE is available to all children with disabilities who are of eligible ages under state law, including individuals detained in juvenile and adult correctional facilities. *Letter to Yudian, 39 IDELR 270 (OSEP 2003).*
5. Absent a specific exception, all IDEA protections apply to students with disabilities in correctional facilities and their parents. *Dear Colleague Letter, 64 IDELR 249 (OSEP and OSERS 2014).*
6. The CDE is responsible for ensuring that the requirements of IDEA, federal regulations, and state rules are carried out in all education programs serving students with disabilities in the state, including correctional facilities. Each education program for students with disabilities

falls under the general supervision of the CDE, including those programs in correctional facilities. *34 C.F.R. §300.149(a)*.

7. The CDE must have in effect policies and procedures to ensure that it complies with the monitoring and enforcement requirements as prescribed by IDEA and the federal regulations. *34 C.F.R. §300.149(b)*.
8. The CDE must work in collaboration with other agencies to ensure its general supervisory obligations are met. “Every agency at any level of government that is involved in the provision of special education and related services to students in correctional facilities must ensure the provision of FAPE, even if other agencies share that responsibility.” *Dear Colleague Letter*, 64 IDELR 249 (OSEP and OSERS 2014). Absent that collaboration, states agencies risk large scale findings of noncompliance as demonstrated in a recent class action suit where the federal court found both the SEA and a county sheriff liable for IDEA violations after failing to protect incarcerated students with disabilities. *T.H. v. Dekalb County Sch. Dist.*, 79 IDELR 196 (N.D. Ga. 2021).
9. Colorado specifically addressed the rights of youth ages 18 to 21 incarcerated in county jails through legislation, offering clarification on the rights of youth beyond the exception noted in the IDEA. The CDE incorporated the language of statute into the “Special Education in County Jails” guidance document as follows:
 - Youth with disabilities under the age of 21 who have not graduated with a regular high school diploma. Because a General Educational Development (GED) does not count as graduation with a regular diploma, a student with disabilities who has obtained a GED is still entitled to special education and related services. *34 C.F.R. §300.102(a)(3)(iv); C.R.S. 22-32-141(2)(c)*.
 - Youth awaiting trial as an adult who were under the age of 18 when the crime was committed and currently under the age of 21. *C.R.S. 22-32-141(3)(a)*.
 - Youth ages 18-21 who were identified as a student with a disability and received special education and related services through an individualized education program (IEP)— even if they left school prior to incarceration, or identified as a student with a disability under IDEA—even if they did not have an IEP in their last educational setting. *34 C.F.R. §300.102(a)(2)*.
10. There is no disagreement between the CDE and the Complainant regarding the right of youth detained in county jails to receive FAPE or the applicability of the CDE’s general supervisory responsibility to youth between the ages of 18 to 21 incarcerated in county jails.

11. Based on the facts in this investigation, it is reasonable to conclude the reason that the CDE and the Colorado Department of Public Safety were unable to identify any youth who may be entitled to receive FAPE pursuant to the IDEA and Colorado law was likely caused by the difference between the criminal code definition of juvenile as an individual under the age of 18 years and the more recently enacted definition of youth pursuant to C.R.S. 22-32-141 to include individuals ages 18 to 21.
12. The CDE has committed to clarifying the definition of “juvenile” in all relevant documents, including worksheet instructions and its web landing page, using the statutory definition in C.R.S. 22-32-141 to clarify that IDEA eligible youth include individuals detained in county jails and other facilities in the state. *November 8, 2022 supplemental response.*
13. The actions already commenced by the CDE and those proposed by the CDE, once completed, are likely to ensure that the special education rights of eligible youth detained in county jails are protected in the future. However, the purpose of the state complaint system is, in part, to remedy past failure to provide appropriate services by requiring corrective action appropriate to address the needs individual students and also ensuring the appropriate future provision of FAPE for all children with disabilities. *34 C.F.R. §300.51(b).* In light of this requirement, the CDE must take reasonable steps outlined in the corrective action to identify those youth detained in county jails who may have been eligible to receive services during the last year.

DECISION

Whether the CDE exercised its general supervisory responsibility pursuant to 34 C.F.R. §300.149 to ensure the provision of a free appropriate public education (FAPE) to eligible youth between the ages of 18 to 21 incarcerated in county jails.

The CDE is found to be in violation for its failure to exercise its general supervisory responsibility to ensure the provision of FAPE to eligible youth between the ages of 18 to 21 incarcerated in county jails.

Whether the CDE has a policy, practice, or procedure in place to monitor county jails or their adjoining school districts to ensure that youth with disabilities have FAPE available to them.

The CDE is found to be in violation for its failure to adequately monitor county jails in order to ensure that youth with disabilities have FAPE available to them.

CORRECTIVE ACTION PLAN

To ensure the appropriate future provision of FAPE to eligible youth, the actions already commenced and the resolutions proposed by the CDE are appropriate to rectify the violations noted in this decision with the addition of the following requirements outlined below.

1. The deadlines for completion of the CDE's commenced and proposed activities shall be:
 - a. By December 30, 2022, electronically publish a list of each designated child find coordinator responsible for the ongoing child identification process.
 - b. By December 30, 2022, electronically publish a list of each school district employee designated to act as the contact person for county jails(s).
 - c. By December 30, 2022, provide verification that the designated employees' names and contact information have been provided to county jail officials.
 - d. By February 15, 2023, provide at least 1.5 hours of training to AUs regarding the obligation to provide special education services to IDEA eligible incarcerated youth ages 18 to 21. The provision of training shall be verified by February 28, 2023, by CDE trainers submitting training materials and participant attendance documentation to the CDE Supervisor of Dispute Resolution and Policy or designee.
 - e. By February 15, 2023, develop guidance and training for county jails concerning their obligation to request educational services and work with AUs to ensure IDEA eligible youth are identified and served in county jails.
 - f. By March 1, 2023, subject to appropriations and approval, designate one full-time employee to support IDEA eligible youth in correctional facilities in the state.
 - g. By June 1, 2023, develop and implement a monitoring protocol to account for IDEA eligible youth detained in county jails, including a method for evaluating the need for compensatory services.
 - h. By October 1, 2023, ensure relevant policies and procedures for AUs are consistent with IDEA and ECEA requirements for eligible youth detained in county jails.
2. To address the potential needs of individual students, by December 30, 2022, the CDE shall send a written request to all county jails to request data (including at least name,

birthdate, and date(s) of incarceration) specific to any individual ages 18 to 21 that have been detained in county jails from September 30, 2021 to September 29, 2022. The written request shall specify that the data shall be returned to the CDE by February 1, 2023. For any individuals ages 18 to 21 identified by the county jails, the CDE shall make reasonable attempts to:

- a. By March 1, 2023, determine whether any of these youth should have been identified as eligible to receive FAPE while detained during the year preceding the filing of the current complaint;
- b. By April 1, 2023, provide written notification to the relevant AU of the requirement to develop a compensatory service plan those youth determined eligible to receive FAPE during the period of incarceration.
- c. By May 1, 2023, require the AUs submit compensatory service plans for any youth determined eligible to have received FAPE during the period of incarceration. Also by this date, the AUs shall submit schedules for any compensatory services to be delivered, evidence that the youth has declined the service, or evidence from the facility that the youth cannot be safely served due to a bona fide penological interest.
- d. By September 1, 2023, the CDE shall verify that all compensatory services have been provided.

Please submit the documentation detailed above to CDE as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant
1560 Broadway, Suite 1100
Denver, CO 80202-5149

NOTE: Failure by District to meet any of the timelines set forth above may adversely affect District's annual determination under the IDEA and subject District to enforcement action by the Department.

CONCLUSION

The Decision is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13.

This Decision shall become final as dated by the signature of the undersigned Investigator.

Dated this 22nd day of November 2022.



Lenore Knudtson
CDE Appointed Investigator