

Legal Aid of North Carolina, Inc.

ADVOCATES FOR CHILDREN'S SERVICES

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5/29/20

Via U.S. Mail and email (sherry.thomas@dpi.nc.gov and state_ec_complaints@dpi.nc.gov)
Sherry H. Thomas, Director of EC Division
NC Department of Public Instruction
6356 Mail Service Center
Raleigh, NC 27699-6356

Re: Formal Systemic State Complaint filed against Vance County Schools

To Whom It May Concern:

Please consider this a Formal Systemic State Complaint filed on behalf a student with mental health disabilities and related behavior needs who has experienced a complete deprivation of appropriate supports and protections while incarcerated in adult jail. This student complainant has experienced significant violations of his special education rights. For this student, his experiences while incarcerated mark the continuation of a long history of the school district's failure to serve him appropriately. Vance County Schools (hereinafter referred to as "VCS") has violated the named student's rights by failing to provide him with special education services while he has been incarcerated. These actions in violation of the Individuals with Disabilities Education Act ("IDEA") and corresponding federal regulations and state laws, regulations, and policies have deprived the named students of a free appropriate public education ("FAPE") in the least restrictive environment ("LRE").

The violations alleged against VCS are systemic in nature and are raised together in this complaint because we believe, due to the similarity of the violations, that they are indicative of a statewide failure of school districts to serve incarcerated students with disabilities in accordance with requirements under the IDEA. Individual remedies alone are insufficient to ensure that VCS students, and other students with disabilities across the state are not treated in the same manner in the future.

In addition to the systemic violations alleged regarding the failure to educate students incarcerated in adult jail, this complaint also alleges individual violations against VCS related to the named complainant STUDENT 1. Specifically, VCS violated STUDENT 1's rights by:

- (1) failing to conduct manifestation determination review ("MDR") meetings according to North Carolina Policies' Procedural Safeguards;
- (2) failing to provide continuation of services guaranteeing a free appropriate public education ("FAPE") starting on the 11th day of suspension;

"The test of the morality of a society is what it does for its children." -Dietrich Bonhoeffer



A United Way Agency



(3) failing to conduct adequate functional behavior assessments (“FBAs”) and implement adequate behavior intervention plans (“BIPs”), resulting in continued behavior challenges and denial of access to a FAPE

(4) failing to craft and implement timely Individualized Education Programs (“IEPs”) that were reasonably calculated to afford him access to a FAPE.

INTRODUCTION

In *Brown v. Board of Education*, the Supreme Court stated, “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”¹ For incarcerated youth, the denial of access to education deprives our most vulnerable children whose lives have lacked opportunity in a multitude of ways. The stakes are especially high for incarcerated youth. The link between education and reduced recidivism rates is well-established in research.² When we fail to educate these youth, we return them to their communities without the knowledge that will allow them to function in society. In essence, we thwart their opportunity for rehabilitation and commit them to failure.

The population of incarcerated juveniles is disproportionately poor and minority. It also includes a staggering, disproportionate number of youth with mental and behavioral health disabilities.³ In North Carolina, among boys incarcerated in Youth Detention Centers, 89 percent have been diagnosed with disruptive, impulse-control and conduct disorders, 69 percent have been diagnosed with neurodevelopmental disorders, 55 percent have been diagnosed with substance-related and addictive disorders, 40 percent have been diagnosed with trauma and stressor related disorders, and 24 percent have been diagnosed with depressive disorders.⁴ These figures are equally striking for girls.⁵ Given the high prevalence of these disabilities in the population of incarcerated youth, they are the exact population the IDEA was intended to provide for. The IDEA and its predecessor laws were passed in large part to limit the deprivation of a FAPE for students with mental health and behavior disabilities. Referring to the IDEA’s predecessor law, the Supreme Court of the United States stated: “Among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that

¹ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

² Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, Vol. 94 Virginia Law Review, 765, May 2, 2008.

³ Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, Vol. 94 Virginia Law Review, 765, May 2, 2008.

⁴ *NC DPS Juvenile Justice Section 2018 Annual Report*, North Carolina Department of Public Safety, <https://www.ncdps.gov/documents/juvenile-justice-section-2018-annual-report> (accessed April 29, 2020).

⁵ In North Carolina, among girls incarcerated in Youth Detention Centers, 93 percent have been diagnosed with disruptive, impulse-control and conduct disorders, 73 percent have been diagnosed with neurodevelopmental disorders, 47 percent have been diagnosed with substance-related and addictive disorders, 80 percent have been diagnosed with trauma and stressor related disorders, and 60 percent have been diagnosed with depressive disorders. See *NC DPS Juvenile Justice Section 2018 Annual Report*, North Carolina Department of Public Safety, <https://www.ncdps.gov/documents/juvenile-justice-section-2018-annual-report> (accessed April 29, 2020).

for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet.”⁶

The failure to provide incarcerated youth with the educational services to which they are entitled is a longstanding problem of national proportions.⁷ Fortunately, this problem has not gone entirely unnoticed. One source which compiled a list of some of the lawsuits filed between 1975 to 2005 found that plaintiffs have filed over 30 class action lawsuits under the IDEA challenging deficiencies in educational services provided to incarcerated students with disabilities.⁸ Some of those listed were filed in North Carolina. Some more recent cases have elicited the involvement of the federal government. The United States has filed a Statement of Interest in some of the cases which included allegations that incarcerated youth were not receiving educational services that should have been provided to them under the IDEA.⁹

In North Carolina, with regard to their education, the most neglected of juveniles reside in adult correctional facilities. As outlined using the examples in this complaint, these juveniles typically receive no education. Though the number of juveniles in adult facilities has been reduced considerably due to recently enacted legislation, some still remain, and more will continue to enter these facilities. Prior to the 2019 implementation of the “Raise the Age” legislation, juveniles sixteen years and older were automatically transferred to adult criminal court and the adult correctional system. The recently enacted legislation raised the age of juvenile jurisdiction from 16 to 18, but with some exceptions.¹⁰ Little data exists on the current size of the population of children still housed in adult jails. What is clearer is that these children are valuable members of society who not only deserve an education, but are legally entitled to one.

⁶ *Honig v. Doe*, 484 U.S. 305, 309 (1988).

⁷ See United States Department of Education, Office of Special Education and Rehabilitative Services, Dear Colleague Letter on Students with Disabilities in Correctional Facilities (Dec 5, 2014). See also The Atlantic, The Education Problem in Juvenile Detention Centers (December 24, 2017), <https://www.theatlantic.com/politics/archive/2017/12/juvenile-solitary-confinement/548933/> (accessed May 7, 2020).

⁸ National Center on Education, Disability and Juvenile Justice, *Class Action Litigation Involving Special Education for Youth in Juvenile and Adult Correctional Facilities* (2005), <http://www.edjj.org/Litigation/> (accessed April 28, 2020).

⁹ See Statement of Interest for the United States, *G.F. v. Contra Costa County*, No. 3:13-cv-03667-MEJ (N.D. Cal.) (filed Feb. 13, 2014). See also Statement of Interest for the United States, *H.C v. Bradshaw*, No. 9:18-cv-80810-WPD (F.L.S.D) (filed Oct. 1, 2018)

¹⁰ The “Raise the Age” legislation that went into effect on Dec. 1, 2019, mandated that all criminal cases for juveniles up to age 18 will begin in juvenile court. However, for Class A-G felony complaints, transfer to adult (superior) court is mandatory upon notice of an indictment, or a finding of probable cause after notice and a hearing; For Class H or I felonies, any transfer to adult (superior) court requires a transfer hearing. Moreover, emancipated and married juveniles are excluded from juvenile jurisdiction. Finally, all G.S. Chapter 20 motor vehicle offenses committed by 16 and 17 year olds are entirely excluded from the “Raise the Age” legislation. Those offenses are still automatically transferred to adult court and the adult correctional system. *Raise the Age- NC*, North Carolina Department of Public Safety, <https://www.ncdps.gov/our-organization/juvenile-justice/key-initiatives/raise-age-nc> (accessed April 28, 2020).

NC Policies Governing Services for Children with Disabilities (“NC Policies”) 1501-1.1(d) requires a District to provide FAPE to students with disabilities incarcerated in local jails who were eligible for FAPE prior to their incarceration. In general, a FAPE must be available to all children with a disability residing in the State between the ages of three through 21, including children with disabilities who have been suspended or expelled from school.¹¹ No exception is made for children who are being educated in state operated adult correctional facilities. In fact, the law specifically states that special education provisions “apply to all public agencies within the State that are involved in the education of children with disabilities, including: (iv) state and local juvenile and adult correctional facilities.”¹² These laws are binding on the public agency regardless of whether that agency is receiving funds under Part B of the IDEA.¹³ The requirements in 34 CFR §300.2(b)(1)(iv) and (2) and 34 CFR §300.154 govern the responsibilities of noneducational public agencies for the education of students with disabilities in correctional facilities.

Federal law makes clear that incarcerated students have a right to access education.¹⁴ As the U.S. Department of Education’s Office of Special Education and Rehabilitative Services stated in 2014, “the fact that a student has been charged with or convicted of a crime does not diminish his or her substantive rights or the procedural safeguards and remedies provided under the Individuals with Disabilities Education Act (IDEA) to students with disabilities and their parents.”

FACTS

STUDENT 1, Vance County Schools

STUDENT 1 is an X-year-old, Xth grade African American student with mental health disabilities. He began receiving special education services under the IDEA in elementary school. His area of eligibility is Other Health Impairment (“OHI”).

STUDENT 1 has experienced longstanding behavioral struggles. He has received mental health diagnoses including Oppositional Defiant Disorder, Disruptive Mood Dysregulation Disorder, and Attention Deficit Hyperactivity Disorder. His symptoms have escalated during periods marked by traumatic events such as X, Y, and Z.

STUDENT 1’s symptoms have also escalated as a result of his school’s refusal to provide him with desperately needed services to which he was entitled by federal law. As described below, VCS egregiously violated STUDENT 1’s special education rights for years leading up to his incarceration. The flagrant and persistent nature of these violations was made even worse by the fact that fundamental safeguards, including prior written notice, were consistently ignored at every stage. By plainly disregarding his needs, failing to serve him, and excluding him from

¹¹ 20 U.S.C. 1412(a)(I)(A); 34 CFR 300.101; NC Gen. Stat. §115C-107.1; NC Policy 1501-1.1.

¹² See NC Policy 1500-1.2(b); See also 34 CFR 300.2(b).

¹³ *Id.*

¹⁴ 20 U.S.C. 1412(a)(I)(A); 34 CFR 300.101; NC Gen. Stat. §115C-107.1; NC Policy 1501-1.1.

school, the school facilitated STUDENT 1's path to incarceration. Even though some of these incidents occurred more than a year ago, the exceptional nature of these longstanding violations and the harm that they have caused warrant scrutiny and action from DPI.

Once STUDENT 1 was incarcerated, the school district abdicated its responsibilities entirely. This occurred on multiple occasions with the knowledge of the Vance County Exceptional Children's Director, who appeared wholly unequipped to formulate a plan for an incarcerated student. When combined with the other longstanding and unlawful failures of the school district, such facts not only demonstrate individual violations of STUDENT 1's rights, but also alarming systemic concerns.

Eighth Grade: 2017-2018 School Year

In the Fall of 2017, STUDENT 1 enrolled in Vance County Schools' X Middle School as an 8th grade student. He soon began to struggle, and his school failed to provide him with the appropriate supports that would allow him to succeed despite his challenges. Instead of opting for therapeutic, proactive measures, the school began to constantly suspend him. In total, he was disciplinarily removed from school for 53 days during a 5-month span of time.

- In the Fall of 2017, he received a two-day out-of-school suspension ("OSS") for "other school defined offense."
- In the Fall of 2017, he received five days of OSS for disorderly conduct and aggressive behavior.
- In the Fall of 2017, he received three days of OSS for property damage.
- In the Fall of 2017, he received three days of OSS for skipping school.
- In the Winter of 2017, he received ten days of OSS for aggressive behavior.
- In the Winter of 2017, he received five days of OSS for disrespect of faculty/staff.
- In the Winter of 2017, he received ten days of OSS for insubordination, disorderly conduct, and inappropriate language/disrespect.
- In the (early) Winter of 2018, he received five days of OSS for disorderly conduct.
- In the (early) Winter of 2018, he received ten days of OSS for "assault on a non-student without a weapon."

Although the school should have held several manifestation determination reviews beginning with X suspension, not a single manifestation determination review was held. Further, although the school was required to begin providing him alternative education services beginning on his 11th cumulative day of suspension, STUDENT 1 received no instruction whatsoever during his 53 days of suspension.

It was not until the Spring of 2018 that the school finally drafted a Functional Behavior Assessment and Behavior Intervention Plan. The target behaviors were aggressive behavior and "emotional outburst"(sic). The plan offers an even fuller picture of STUDENT 1's pattern of disability-related behavior, making it even more remarkable that it took so long to address it proactively. The plan describes the aggressive behavior as "Turning tables over, punching walls,

threatening staff and peers, walking out of class and evading staff.” The frequency noted was 5 out of 5 days with an intensity of 8 out of 10. The “motional outburst”(sic) was described as “When STUDENT 1 is off task and is redirected, he shuts down and walk(sic) out of class shouting and screaming.” The frequency noted for these behaviors were also 5 out of 5 days with an intensity of 8. The hypothesis statement provided that “STUDENT 1 presents with significant difficulties managing feelings of anger and frustrations within school and home environment. STUDENT 1 struggles to maintain appropriate behaviors in an academic setting and will often respond to redirection by becoming escalated and engaging in aggressive behaviors, as well as destruction of property.” The next meeting was scheduled for Spring of 2018.

In the Spring of 2018, STUDENT 1 became incarcerated at the X County Juvenile Detention Center. He was released two days later.

Not long after STUDENT 1’s return to school from his incarceration, he continued to get suspended. Yet again, the school failed to address his disability-related needs. Although his next BIP review meeting was scheduled for the Spring of 2018, there is no evidence that this meeting was held. As had been the pattern, his behaviors persisted and the school continued to address them, not through therapeutic means, but through out-of-school suspensions:

- In the Spring of 2018, he received two days of out-of-school suspension for “other.”
- In the Spring of 2018, he received six days of out-of-school suspension for “repeat offender.”

As with several other suspensions where the school was required to hold manifestation determination reviews and failed to do so, no manifestation determination review was held for these suspensions. Without the proper processes in place, he missed 61 days of school due to suspensions throughout his eighth grade year. He received no alternative education during any of those suspensions.

In addition to the school’s many failures related to STUDENT 1’s suspensions, the school also failed to craft an IEP that adequately addressed his needs. In the Winter of 2017, the school was required to conduct an annual review of STUDENT 1’s IEP. No such meeting was held.

It was not until Spring of 2018 that the school met to draft an IEP addendum. No Prior Written Notice, Minutes, or Invitation to Conference were included in the documents for this meeting. At the outset, the IEP states, “He has a current BIP that will be updated every 30 days to fit his behavioral needs.” Not a single record of a Behavior Intervention Plan review exists after the first one from Vance County was drafted in the Spring of 2018. Although numerous severe behavior concerns are cited throughout and the IEP includes a behavior goal, the only specialized instruction provided was reading instruction. No social-emotional instruction was included. Moreover, the IEP team failed to include any related services such as counseling.

STUDENT 1's behaviors subsequently continued to escalate. In the Spring of 2018, he was incarcerated at the X County Juvenile Detention Center. He was released two days later. In the Summer of 2018, he was incarcerated at the Y County Juvenile Detention Center. He was released in the Summer of 2018.

Ninth Grade: 2018-2019 School Year

STUDENT 1's behaviors continued to escalate during his ninth-grade year. At the beginning of the school year, in the Fall of 2018, he became incarcerated at the Y County Juvenile Detention Center. He was released in the Fall of 2018.

Just a few weeks after he was released from detention, the school began suspending STUDENT 1 again without providing him with any behavioral support:

- In the Fall of 2018, he received three days of out-of-school suspension for disruption of school.
- In the Fall of 2018, he received three days of out-of-school suspension for skipping class.

In the Fall of 2018, North Carolina Department of Public Safety records indicate that he entered the X Juvenile Detention Center and was not released until the Winter of 2018. In the interim, however, school records note that STUDENT 1's school was still X High School.

A Prior Written Notice, which was the only record documenting an IEP meeting in the Fall of 2018, alleged that STUDENT 1 attended X High School despite the fact that he was in juvenile detention. Per STUDENT 1's mother, like other meetings during his ninth grade year, this meeting did not actually occur. No actual IEP, Invitation to Conference, or Minutes were included in his file. The prior written notice documents that it was "determined that STUDENT 1 will need an IEP for academic school year 2018-2019 in order for him to be successful in the academic setting," and would be placed in a regular setting. The prior written notice indicated that the only records consulted were "Teacher observation, work samples, EOGs, and regular report card period."

In the Winter of 2018, an Annual Review IEP was drafted and included in his file. No minutes or Prior Written Notice were included in the records. Although an Invitation to Conference was included, it was not signed by STUDENT 1's mother. Per STUDENT 1's mother, this IEP meeting did not actually occur and the school misrepresented its occurrence in the records. This could help explain why in the overall strengths portion of the IEP, the documents appeared to be talking about another female student, stating, "STUDENT 1 has the ability to be a very good student in the academic setting. There are times when she can be a very hard-working student and other times when she just does nothing." In the documents, it was later acknowledged that "STUDENT 1 has had behavior issues in the classroom and need(sic) additional assistance with social skills." However, no behavior goals were listed for STUDENT 1 to work towards, and no social-emotional instruction was provided to help teach him coping

and other related skills. Moreover, no related services were included. The documents indicated consideration only of regular setting.

In early Winter of 2019, an IEP Addendum meeting was held. STUDENT 1 had become incarcerated at the Y County Juvenile Detention Center again two days prior, and his mother sought to ensure a smooth transition back to his base high school. No Invitation to Conference, Prior Written Notice, or Minutes were included in the documentation for the meeting. At this meeting, it became more evident that the IEP team lacked the data to properly serve STUDENT 1 as the team had only grossly outdated data from the year 2015 to assess STUDENT 1's present levels:

Using data from 2015, STUDENT 1's FSIQ is 78. Additional testing revealed that his Verbal Comprehension skills is 71; Perceptual reasoning is 92, Working Memory is 97, and Processing Speed is 75. Overall, his broad reading is equivalent to late 3rd grade, broad math is equivalent to mid-year 4th grade, and broad written language is late 3rd grade also.

Without an updated assessment, it is clear that for years the school was making blind guesses regarding STUDENT 1's academic and behavioral needs and how to serve him. This failure to promptly and accurately assess his present levels and resulting needs is even more egregious given that the 2015 data reflected such a high level of need. This high level of need was also reflected in the fact that in both the eighth and ninth grades, STUDENT 1 failed the vast majority of his classes. While consent for a comprehensive reevaluation was obtained during this meeting, no reevaluation was ever subsequently performed. At this meeting, STUDENT 1 finally obtained a detailed behavior goal, social/emotional skills instruction, and counseling as a related service. Specifically, his specially designed instruction included 15 minutes of social/emotional skills instruction 3 times per week while removed from all peers, as well as 30 minutes of content support 5 times per week while in the general education classroom.

While STUDENT 1 was incarcerated, the Y County Juvenile Detention Center failed to perform a reevaluation and did not hold its own IEP meeting.

In the Spring of 2019, STUDENT 1 was released to his parents from Y County Juvenile Detention Center.

In the Spring of 2019, STUDENT 1 entered incarceration at ABC County Jail, an adult correctional facility. He was released in the Spring of 2019.

Tenth Grade: 2019-2020

In the Fall of 2019, STUDENT 1 again became incarcerated at ABC County Jail. He remained there until the Winter of 2019. In the interim, he received no education. Not a single meeting regarding his education was held during the entire time he was incarcerated, either at the jail or at his school. He received no schoolwork. He was due for an annual review in the Fall of 2019, but no review was held.

When STUDENT 1 was released, his mother tried to enroll him at the local alternative school. No one reached out to STUDENT 1 or his family regarding the transition back to school. Instead, his mother contacted the Assistant Principal of X High School, who directed her to the Superintendent's Assistant. When she did not respond to STUDENT 1's mother's phone calls and voicemails, STUDENT 1's mother reached out to STUDENT 1's attorney for her assistance in resolving this problem. STUDENT 1's attorney contacted counsel for the school who immediately put STUDENT 1's mother and attorney in contact with the Exceptional Children's Director for Vance County schools. After some emails were exchanged between the Exceptional Children's Director and STUDENT 1's mother, the Exceptional Children's Director connected with her by phone. The Exceptional Children's Director promised to follow up on that phone call with more information but failed to do so.

In the early Winter of 2020, STUDENT 1 became incarcerated for a third time at ABC County Jail. Exasperated with the previous complete lack of response from STUDENT 1's school regarding his education when he was last incarcerated, his mother proactively reached out to the school in order to prompt them to provide STUDENT 1 with the services to which he was entitled. After being unable to reach anyone by phone, in the Early Winter of 2020, she contacted the Exceptional Children's Director for Vance County Schools by email. The Exceptional Children's Director responded promptly and promised to respond to her no later than the following Thursday. She never fulfilled that promise. Several days later, STUDENT 1's mother sent her another email. That day, the Exceptional Children's Director responded by providing her cell phone number. STUDENT 1's mother called her the next day. The Exceptional Children's Director asked her questions including whether STUDENT 1 had an IEP, promised to follow up with her, then never contacted her again.

At the time of the filing of this complaint, STUDENT 1 remains incarcerated and still has not received any education. Instead, just as was the case during his second period of incarceration, Vance County Schools has provided him with no access to work of any kind. VCS has also failed to provide him with 15 minutes of social/emotional skills instruction 3 times per week while removed from all peers, as well as 30 minutes of content support 5 times per week while in the general education classroom in order to access a FAPE. As he described during his last visit with counsel, he has filled his time by "doing push-ups."

VIOLATIONS

The facts outlined above give rise to several violations of the IDEA and corresponding federal regulations and state laws, regulations, and policies.

- 1. VCS failed to provide FAPE and related procedural safeguards to STUDENT 1 while he was incarcerated in a detention center within their district.**

The Individuals with Disabilities Education Act (“IDEA”) requires “that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”¹⁵ A free appropriate public education (“FAPE”) is defined as including “special education and related services that— (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.”¹⁶

While incarceration presents unique challenges for students, this event does not alter the law’s fundamental guarantee of FAPE for students with disabilities. Federal law makes clear that students who are incarcerated retain their right to access special education.¹⁷ The U.S. Department of Education has issued guidance on educating students who are incarcerated.¹⁸ As the Department's Office of Special Education and Rehabilitative Services stated in 2014, “the fact that a student has been charged with or convicted of a crime does not diminish his or her substantive rights or the procedural safeguards and remedies provided under the Individuals with Disabilities Education Act (IDEA) to students with disabilities and their parents.”¹⁹ “Absent a specific exception, all IDEA protections apply to students with disabilities in correctional facilities and their parents.”²⁰

- a) *VCS had an ongoing responsibility to afford FAPE to STUDENT 1 while he remained incarcerated. VCS summarily failed to afford FAPE by failing to provide any of the services included in STUDENT 1's IEP or offering him meaningful access to the general curriculum.*

Incorporating well-settled federal requirements into North Carolina policy, the North Carolina Policies Governing Services for Children with Disabilities (“NC Policy”) make clear that “each LEA must ensure that FAPE is available to students with disabilities incarcerated in local jail who were eligible prior to their incarceration.”²¹ A FAPE must be available to all children with a disability residing in the State between the ages of three through 21, including children with disabilities who have been suspended or expelled from school.²² No exception is made for children who are being educated in local adult correctional facilities.

¹⁵ 20 U.S.C. § 1400(d)(1)(A).

¹⁶ 20 USC § 1401(9).

¹⁷ 20 U.S.C. 1412(a)(I)(A); 34 CFR 300.101; NC. Gen. Stat. § I 15C-107.1; NC Policy 1501-1.1.

¹⁸ U.S. Department of Education Office of Special Education and Rehabilitative Services, Dear Colleague Letter, (December 5, 2014)

¹⁹ *Id.*

²⁰ *Id.*

²¹ NC Policy NC 1501-1.1(d)

²² 20 U.S.C. 1412(a)(I)(A); 34 CFR 300.101; NC. Gen. Stat. § I 15C-107.1; NC Policy 1501-1.1.

STUDENT 1 had an IEP prior to incarceration. Further, at the time of his incarceration - which is ongoing - he has not surpassed the age of twenty-one. Accordingly, during all periods of incarceration, he has been entitled to receive FAPE. Specifically, as outlined in NC Policy 1501-1.1(d), VCS had a responsibility to provide FAPE to STUDENT 1 while he was incarcerated in ABC County Jail.

Despite the clear responsibilities of their LEA, while STUDENT 1 remained incarcerated, he was summarily deprived of the special education services outlined in his IEP and to meaningful access to the general education curriculum.

STUDENT 1 has not received any education services – regular or special education – from VCS during *either* period of incarceration at ABC County Jail. This has been the case even though his IEP indicates that he requires 15 minutes of social/emotional skills instruction 3 times per week while removed from all peers, as well as 30 minutes of content support 5 times per week while in the general education classroom in order to access a FAPE. STUDENT 1 has likewise received no access whatsoever to any form of instruction or even access to educational materials while incarcerated. Accordingly, his denial of FAPE has been and continues to be a summary deprivation.

b) VCS failed to convene IEP meetings and provide prior written notice to STUDENT 1 before dramatically altering his provision of FAPE.

A responsible public agency generally must convene an IEP meeting to develop an IEP at the beginning of the period of detention. While a district can change a student’s placement without conducting an IEP meeting if the same programming is to be provided in the new setting, the likelihood that an IEP designed for another setting can be implemented in a full detention setting is so small that an IEP Team meeting should almost always be held to ensure the IEP is properly reviewed and revised.

A properly constituted IEP Team must in turn include, at a minimum, the parent, the student’s regular education teacher, the student’s special education teacher, and an LEA representative.²³

As is the case for any student, an incarcerated students’ IEP Team must provide written notice of all decisions made pertaining to the student’s IEP and the provision of special education services.²⁴ If services under the students’ IEPs are changed or modified, federal and state law require that an IEP meeting be held. Federal regulations and North Carolina policies further require that parents receive formal written notice prior to changing “the provision of FAPE to the child.”²⁵ This written notice must include key components that enable a parent to understand why changes were made to their students’ special education services and to

²³ NC Policy 1503-4.2(a). When necessary, an IEP Team must also include a member who is qualified to interpret testing results. When appropriate, a student should also be invited to participate on the team.

²⁴ NC Policy 1504-1.4

²⁵ 34 CFR § 300.503

understand how and by when they can challenge any changes made to their student's special education services.²⁶

Even though VCS had a duty to provide STUDENT 1 with the specially designed instruction that was included in his IEP, he did not receive instruction of any kind, much less the specially designed instruction included in his IEP. This failure to provide services of any kind amounted to a significant revision of the services required under his IEP. However, IEP meetings were not held to discuss these changes nor was his mother provided written notice of these changes.

Even though STUDENT 1's provision of FAPE was fundamentally altered, VCS did not convene an IEP Team meeting at any point before ceasing the provision of services. Further, VCS did not provide written notice to STUDENT 1's mother, informing her of the fact that STUDENT 1's provision of FAPE would be ceased and her right to challenge the fact that he was not receiving services. As a result, she had no notice that STUDENT 1 would not be receiving services and that she had the right to challenge that denial of services.

Overall, STUDENT 1 was not provided with FAPE during any of his periods of incarceration. He did not receive the services or accommodations required by his IEP. Consequently, he was deprived of his substantive rights and remedies under the IDEA as a result of his charges. Incarceration was instituted to rehabilitate individuals, not put them in a worse position when they are released. As the U.S. Department of Education stated, "[p]roviding the students with disabilities in these facilities the free and appropriate public education (FAPE) to which they are entitled under the IDEA should facilitate their successful reentry into the school, community, and home and enable them to ultimately lead successful adult lives."²⁷ VCS' failure to provide FAPE has caused, and is continuing to cause, significant harm to STUDENT 1 and will have lasting effects on his education.

2. The violations above are systemic in nature, both within the named districts and across the state

The North Carolina Department of Public Instruction (NCDPI), Exceptional Children Division's Complaint Investigation Procedures defines a systemic complaint as "a complaint that alleges that a public agency has a policy, practice, or procedure that is applicable to a particular group or category, or similarly situated, children." As evidenced by STUDENT 1's experiences, VCS as a matter of pattern and practice fails to provide FAPE and convene IEP meetings for students with disabilities who are incarcerated in correctional facilities across North Carolina.

STUDENT 1's experience is not an isolated incident, but proof of a pattern and practice throughout VCS. VCS deprived STUDENT 1 of a FAPE and IEP meetings during multiple, discrete periods of incarceration. In each period of incarceration, the practice of the district was

²⁶ *Id.*

²⁷ *See supra* note 18.

the same, establishing a pattern of failing to serve incarcerated students and failing to document those decisions via properly constituted IEP meetings. Further, these unlawful practices persist with involvement of senior special education staff. Even though the EC director has been informed that STUDENT 1 was not receiving education services, VCS continued to deprive STUDENT 1 of education services. Most notably, STUDENT 1 is currently incarcerated and continues to sit in jail with no educational services of any kind.

VCS has had multiple opportunities to provide STUDENT 1 with education services yet has deliberately chosen not to. STUDENT 1's experience of not receiving education services or an IEP meeting during multiple periods of incarceration and his continued deprivation of education services while he currently sits in jail demonstrates a pattern or practice exercised by VCS in depriving students with disabilities of their rights to a FAPE and IEP meetings while they are incarcerated.

As outlined in another complaint filed with DPI documenting virtually identical patterns of violations, VCS' actions not only show a district wide pattern and practice, but also a statewide pattern and practice of violating the rights of incarcerated students with disabilities. The violations described above are not isolated incidents. Multiple students' rights were violated in the exact same way in multiple districts during multiple points of incarceration. The complainants' experiences demonstrate a statewide pattern and practice of depriving similarly situated students of their right to FAPE while incarcerated and failing to convene IEP meetings to ensure students with disabilities continue to make reasonable progress towards their goals while incarcerated. These violations are not only egregious, but also systemic in nature and require immediate attention.

3. DPI has failed in its supervisory duties to ensure VCS provides FAPE to incarcerated students.

Pursuant to 20 U.S.C. § 1412(11)(A), State Education Agencies ("SEA") are responsible for supervising all educational programs for children with disabilities in the State, including all programs administered by any other state agency and ensuring these programs meet the educational standards established by the SEA. NC Policy 1501-9.1 states that SEAs must exercise general supervision over all educational programs for students with disabilities administered within the State, including programs administered in State and local agencies unless covered by an exception. NC Policy 1501-9.1 makes clear that it is the SEAs duty to ensure their educational programs meet State education standards and IDEA, Part B requirements. This responsibility includes monitoring public agencies that are responsible for providing FAPE to students with disabilities in correctional facilities.

In addition, the U.S. Department of Education detailed the responsibilities of SEAs in its 2014 Dear Colleague Letter. The Department of Education stated that SEAs "must exercise general supervision over all educational programs for students with disabilities in correctional

facilities (unless covered by an exception) to ensure that their educational programs meet State education standards and IDEA, Part B requirements.” According to the Department of Education, “[t]his responsibility includes monitoring public agencies that are responsible for providing FAPE to students with disabilities in correctional facilities.”²⁸

The North Carolina Department of Public Instruction (“DPI”) is the SEA responsible for monitoring all educational programs across the State. As the SEA, DPI has a duty under federal and state law to supervise the educational programs administered by VCS at ABC County Jail. STUDENT 1 has disabilities; therefore, he has the right to receive FAPE, even while incarcerated. As outlined above, VCS deprived STUDENT 1 of his right to FAPE when they failed to provide educational services while he has been incarcerated. It is clear from the facts outlined above that because STUDENT 1 received NO instruction or even work packets, VCS in no way could be deemed to have met state educational standards and IDEA, Part B requirements. These violations have been longstanding and as of the date of this filing is still ongoing. Due to VCS’ failure to provide educational services, STUDENT 1 has been deprived of the opportunity to make meaningful progress towards his educational goals. If DPI had exercised general supervision over the education programs from incarcerated students from VCS, it would have noticed that no program met state education standards or requirements under Part B of the IDEA. DPI’s neglect of their supervisory duties resulted in significant past and ongoing harm to STUDENT 1.

4. Additional violations pertaining to STUDENT 1

The individual legal violations pertaining to STUDENT 1 are remarkable. Given the fact that they were so egregious, persistent, and numerous, they clearly constitute extraordinary circumstances. The rare inclusion of prior written notices in his records further worsened STUDENT 1’s situation, leaving his mother with no notice of the ill-informed decisions made regarding her son. Together, all the violations regarding STUDENT 1 became missed opportunities to provide the services that he not only needed but was also entitled to. With every violation of his rights, STUDENT 1 was pushed further and further into the school-to-prison pipeline.

a. Failure to conduct manifestation determination review (“MDR”) meetings according to North Carolina Policies’ Procedural Safeguards.

NC Policies Governing Services for Children with Disabilities (“NC Policies”) 1504-2.1(e) requires an MDR to be completed “within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.” A school’s inquiry in a manifestation determination review should be rooted in whether “the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability.” Under section 1504-2.1(f) of the NC Policies, “[i]f the LEA, the parent, and relevant

²⁸ U.S. Department of Education Office of Special Education and Rehabilitative Services, Dear Colleague Letter, (December 5, 2014)

members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must – (1) Either- (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (ii) If a behavioral intervention plan has already been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior...”

On a staggering number of occasions, STUDENT 1's school suspended him while completely forgoing the critical procedural protection of a manifestation determination review. He was entitled to an MDR for the following suspensions during his eighth grade year:

- In the Fall of 2017, he received three days of out-of-school suspension (“OSS”) for skipping school.
- In the Fall of 2017, he received ten days of OSS for aggressive behavior.
- In the Fall of 2017, he received five days of OSS for disrespect of faculty/staff.
- In the Winter of 2017, he received ten days of OSS for insubordination, disorderly conduct, and inappropriate language/disrespect.
- In the early Winter of 2018, he received five days of OSS for disorderly conduct.
- In the early Winter of 2018, he received ten days of OSS for assault on a non-student without a weapon.
- In the Spring of 2018, he received two days of OSS for “other.”
- In the Spring of 2018, he received six days of OSS for “repeat offender.”

Had STUDENT 1 been provided with the procedural protections he was entitled to, he would have been suspended less and would certainly have had regular reviews of his FBA and BIP.

By the end of his eighth grade year, STUDENT 1's behaviors became so escalated that he became involved with the juvenile justice system. By the end of his ninth grade year, he was involved in the adult correctional system.

b. Failure to provide continuation of services guaranteeing a FAPE starting on the 11th day of suspension.

NC Policies 1504-2.1(d) requires a District to provide continuing educational services – including, if applicable, related services – that afford the student a FAPE and enable a student to progress in the general education curriculum and to make progress on his/her IEP goals. Furthermore, federal regulations and comments make clear that these services must be provided no later than the 11th cumulative day of suspension in a school year. 71 Fed. Reg. 46717 (2006) (“Beginning on the 11th cumulative day in a school year that a child with a disability is removed from the child's current placement, and for any subsequent removals, educational services must be provided to the extent required in 300.530(d), while the removal continues.”)

STUDENT 1's school failed entirely to provide STUDENT 1 with continuation of a FAPE beginning on his 11th day of suspension. He received no education at all during the days he was suspended. This means that he missed a total of 61 days of school in eighth grade without education.

c. Failure to conduct adequate functional behavior assessments (“FBAs”) and implement adequate behavior intervention plans (“BIPs”), resulting in continued behavior challenges and denial of access to a FAPE

NC Policies 1504-2.1 requires a District to conduct an FBA and/or develop or revise a BIP, as needed, to address behavioral violations in circumstances relevant to STUDENT 1. NC Policies 1503-4.1(a)(4) requires that the IEPs created by a District include “a statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research to the extent practicable*, to be provided to the child, or on behalf of the child, ... that will be provided to enable the child to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum ..., and to be educated ... with nondisabled children.” An FBA without sufficient collected data as to antecedents and consequences of behavior can result in a district's denial of FAPE via development of an ineffective IEP or BIP. *See Cobb County Sch. Dist. v. D.B.*, 66 IDELR 134 (N.D. Ga. 2015). FBAs and BIPs are supports provided in education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate; per NC Policies 1500-2.34, FBAs and BIPs thus qualify as supplementary aids and services, which must be based on peer-reviewed research to the extent practicable, in order to comport with the law. The IDEA sets here a high bar, which the District has failed to meet for STUDENT 1 – instead relying on informal evidence to support a student with intensive behavioral disabilities resulting in the creation of a plan with inadequate behavior interventions.

STUDENT 1's school suspended him constantly, and it was not until he had been suspended nine times over a period of seven months during his eighth grade year that the school bothered to hold a Behavior Intervention Plan review in the Spring of 2018.

The next meeting was scheduled for the Spring of 2018. This meeting was never held, despite STUDENT 1's escalating behaviors.

Several months later, in the Spring of 2018, the school met to draft an IEP addendum. The addendum stated, “He has a current BIP that will be updated every 30 days to fit his behavioral needs.” Not only was the “current” BIP not updated every 30 days, but it was *never* updated after it was drafted in the Spring of 2018. Not surprisingly, without the proper supports in place, STUDENT 1 continued to have behavior issues.

d. Failure to craft and implement timely Individualized Education Programs that were reasonably calculated to afford STUDENT 1 access to a Free Appropriate Public Education

NC 1501-1.1 provides that a Free Appropriate Public Education (FAPE) “must be available to all children residing in the State between the ages of three through 21, including children with disabilities who have been suspended or expelled from school, as provided for in NC 1504-2.1(d).” Furthermore, in *Endrew F. v. Douglas County School District RE-1*, No. 15-827 (U.S. March 22, 2017), the Court held in a unanimous opinion authored by Chief Justice John Roberts that, “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”

With a myriad of diagnoses and behaviors including Oppositional Defiant Disorder, Disruptive Mood Dysregulation Disorder, and Attention Deficit Hyperactivity Disorder, STUDENT 1 has been faced with considerable disability-related challenges that have consistently impeded his success in school. His schools’ failures to adequately address longstanding challenges have further exacerbated them. As described below, STUDENT 1’s IEP was not reasonably calculated to enable him to make progress appropriate in light of his circumstances, therefore amounting to a denial of FAPE.

i) The services that were in STUDENT 1’s IEP were not based on reliable, updated evaluation and assessment data regarding his individualized needs

The last time STUDENT 1 was meaningfully evaluated was in 2015. A myriad of factors indicated that there was a desperate need for more information about STUDENT 1’s behaviors. Nevertheless, the school failed to assess STUDENT 1 and persisted only in using outdated information and punitive measures to address his behavioral issues.

At the early Winter of 2019 IEP Addendum meeting, the school arrived entirely unprepared to assess STUDENT 1 in any way. The team had only the grossly outdated data from the year 2015 to assess STUDENT 1’s present levels:

Using data from 2015, STUDENT 1’s FSIQ is 78. Additional testing revealed that his Verbal Comprehension skills is 71; Perceptual reasoning is 92, Working Memory is 97, and Processing Speed is 75. Overall, his broad reading is equivalent to late 3rd grade, broad math is equivalent to mid-year 4th grade, and broad written language is late 3rd grade also.

While STUDENT 1’s mother insisted on putting the reevaluation process into motion and obtaining a consent for a comprehensive reevaluation, the school never followed up by performing a reevaluation. To date, the school has still not performed a reevaluation since 2015.

ii.) STUDENT 1’s IEPs often lacked appropriate goals and specialized instruction, and his IEP Team did not consider or implement related services or accommodations necessary to afford him access to FAPE

NC Policies 1503-4.1(a)(4) requires that the IEPs created by a District include “a statement of the special education *and related services* and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, ... that will be provided to enable the child to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum ..., and to be educated ... with nondisabled children.” Related services may include, among others, counseling services, psychological services, and social work services in schools (NC Policies 1500-2.27). These related services may involve: psychological or other group and individual counseling, consultation on effective learning/teaching strategies, referring children and families to community agencies, and “assisting in developing positive behavioral strategies” (NC Policies 1500-2.27). Related services are required, as needed, *in addition to* special education services.

As his school records consistently describe, STUDENT 1 has had a long-documented history of difficulty managing his emotions, resulting in severe behavioral issues. Furthermore, his academic abilities were compromised, as demonstrated by the fact that in 2015 (when he was in the sixth or seventh grade), his broad reading scores and written language scores were equivalent to late 3rd grade and his math scores were equivalent to mid-year 4th grade. The fact that STUDENT 1 failed nearly all of his classes throughout the grades discussed in this complaint also demonstrated his academic challenges.

Despite STUDENT 1’s consistent issues, the IEP team was inconsistent in making efforts to help STUDENT 1 to improve his behavior and academics. His IEPs often lacked appropriate goals and specialized instruction. For instance, around Spring of 2018, the school met to draft an IEP addendum. Although numerous severe behavior concerns were cited throughout and the IEP includes a behavior goal, the only specialized instruction provided was reading instruction. No social-emotional instruction was included. On November 20, 2018, an Annual Review IEP was drafted. Perhaps the most problematic part of this IEP was that in the overall strengths portion, the team appeared to be talking about another female student, stating, “STUDENT 1 has the ability to be a very good student in the academic setting. There are times when she can be a very hard working student and other times when she just does nothing.” Aside from the fact that the IEP team had a lapse in its understanding of whose IEP they were drafting, the team’s chosen goals and specialized instruction were inappropriate. While the team acknowledged that “STUDENT 1 has had behavior issues in the classroom and need(sic) additional assistance with social skills”, the team listed no behavior goal for STUDENT 1 to work towards, and also neglected to provide him with social-emotional instruction.

Moreover, without the intervention of his attorney, his IEP team never considered any form of counseling or social work services. It was not until the IEP meeting which his attorney attended in the early Winter of 2019, during which his attorney advocated for him to obtain counseling as a related service, that the school finally agreed to provide him with it.

iii.) On more than one occasion, STUDENT 1’s IEP team completely neglected to hold required IEP meetings

Around Winter of 2017, the school was required to conduct an annual review of STUDENT 1's IEP. No such meeting was held.

Around Winter of 2019, the school was required to conduct an annual review of STUDENT 1's IEP. During the time that time, STUDENT 1 was incarcerated at ABC County Jail. He was released in the Winter of 2019. Even after his release, no annual review occurred.

REMEDIES

Audit of special education services provided to incarcerated students

1. Complainant requests that DPI conduct audits of VCS and all districts across the state to assess whether special education services and related safeguards are being properly afforded to students with disabilities who are incarcerated in adult detention facilities.

Training

2. Complainant requests that district and school-level special education staff within VCS be required to receive training from an independent expert related to the proper provision of special education services in a correctional facility.
3. Complainant requests that district and school-level special education staff within VCS be required to receive training from an independent expert related to:
 - a. Required disciplinary safeguards, including timely, appropriate MDRs and continuation of FAPE services beginning on the 11th cumulative day of suspension.
 - b. Creation and review of IEPs and BIPs that are reasonably calculated to afford FAPE

District-wide Policy Revision

4. Complainant requests revision and/or creation of VCS Special Education Services policies in order to ensure that the rights of incarcerated students with disabilities are protected. Revised policies should include, at a minimum:
 - a. a requirement that the base schools of incarcerated students hold an IEP meeting for any juvenile entering the custody of the Sheriff's Office within two weeks of entry into an adult facility.
 - b. A requirement that the base schools of incarcerated students hold an IEP meeting for any juvenile reentering their base school from an adult facility within two weeks of reentry.
 - c. Guidance related to how FAPE may be appropriately provided to incarcerated students within adult detention settings.
 - d. A requirement that the district designate a staff person to serve as transition coordinator, whom shall be responsible for ensuring legally compliant educational services for incarcerated students during the students' entry into correctional facilities as well as the students' exit from correctional facilities. The designated

staff person will also conduct site visits at each jail at least once per quarter to audit students' Individualized Education Plans.

Statewide Guidance by DPI

5. Complainant requests that DPI issue statewide guidance to all EC Directors related to the proper provision of FAPE to incarcerated students with disabilities within adult detention facilities.

Compensatory services

6. Complainant seeks retrospective relief in the form of compensatory special education for the student named in this complaint and for similarly situated students. Each compensatory service plan should be developed after a comprehensive independent expert evaluation of each student. The type and amount of compensatory services for the student named in this complaint should address all areas of need and be based on the recommendations of the independent expert in consultation with the petitioner, petitioner's attorney, and DPI consultants. It should be provided at a mutually convenient time with transportation.
7. Specific compensatory education relief for STUDENT 1
 - a. Require VCS to provide a minimum of 116 hours of compensatory education to remedy harm caused by him not receiving any of the special education services required under his IEP while incarcerated, and a minimum of 65 hours of compensatory education to remedy harm caused by numerous extraordinary violations that occurred while he was attending VCS schools, including being suspended for significant periods of time without MDRs, BIP reviews, or educational services of any kind.

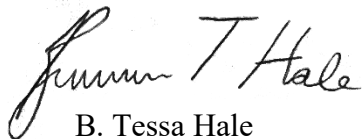
Additional Individual relief

8. To ensure that STUDENT 1's special education services are appropriate and that violations and associated harm do not recur, Complainants request the following additional remedies:
 - a. Require VCS to contract with a private behavior specialist to conduct an FBA for STUDENT 1 that includes a review of his records and an assessment of his behaviors and needs in his current setting.
 - b. Continued collaboration with the contracted behavior expert throughout the school year as any behavioral issues may arise.
 - c. Require VCS to pay for independent educational evaluations in the areas of: psychoeducational, communication (speech/language), adaptive behavior, and vocational.
 - d. Require VCS to conduct a review and revision of STUDENT 1's Individualized Education Plan and Behavior Intervention Plan, based on the independent evaluations obtained.

Other

9. Other remedies deemed appropriate by DPI in order to address the systemic violations found in investigating this complaint.

Sincerely,

A handwritten signature in black ink that reads "B. Tessa Hale". The signature is written in a cursive style with a large initial "B" and a stylized "T".

B. Tessa Hale
TessaH@legalaidnc.org
Attorney for Student 1 (VCS)