



UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202- ____

NOV 20 1998

Honorable Lisa Graham Keegan
Superintendent of Public Instruction
Arizona Department of Education
1535 West Jefferson
Phoenix, Arizona 85007-3280

Mr. Terry Stewart
Director
Arizona Department of Corrections
1601 West Jefferson
Phoenix, Arizona 85007

Dear Superintendent Keegan and Director Stewart.,

On January 9, 1997, the Office for Civil Rights (OCR) of the United States Department of Education (the Department) received a complaint alleging that the Arizona Department of Corrections (ADC) discriminates against persons on the basis of disability by not providing a free and appropriate public education (FAPE) to incarcerated persons under the age of 22 years who qualify for special education and related aids and services in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§12101 *et seq.*, and its implementing regulations at 28 C.P.R. Part 35; and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its regulations, 34 C.F.R. Part 104.

The ADA and Section 504, which prohibit discrimination against disabled individuals by public entities and by recipients of Federal financial assistance, apply to State correctional facilities and their programs and services, including educational programs and services. See Pennsylvania Department of Corrections v. Yeskey, 118 S.Ct. 1952 (1998); Armstrong v. Wilson, 124 F.3d 1019, 1023-1025 (9th Cir. 1997); Duffy v. Riveland, 98 F.3d 447, 453-456 (9th Cir. 1996); Bonner v. Lewis, 857 P.2d 559, 562 (9th Cir. 1988); and Donnell C. v. Illinois State Board of Education, 829 F. Supp. 1016 (N.D. Ill. 1993).

Section 504 and its implementing regulations require recipients of Federal financial assistance who operate a public elementary or secondary education program, to provide FAPE to each qualified disabled¹ person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. 34 C.F.R. §104.33. Under 34 C.F.R. §104.3, a "qualified handicapped person" is defined as any person who has a physical or mental impairment that substantially limits one or more major life activities and is of an age during which it is mandatory

¹ The terms "disability" and "handicap" are used synonymously in this letter.

under state law to provide such services to disabled persons; is of an age during which nondisabled persons are provided such services; or is entitled to FAPE under federal law. Under Section 504, FAPE is defined as the provision of special education and related aids and services that are designed to meet the disabled child's educational needs as adequately as the needs of non-disabled children. 34 C.F.R. §104.33. Therefore, the basic right of individuals with disabilities to receive an education comparable to that offered to non-disabled individuals is not obviated by their incarcerated status. Within the Department, OCR enforces the requirements of both the ADA and Section 504.

Under the Individuals with Disabilities Education Act (IDEA), which is administered by the Department's Office of Special Education Programs (OSEP), States must make FAPE, consisting of special education and related services provided pursuant to an individualized education program (IEP), available to all eligible children and youth with disabilities, including eligible youth with disabilities who are incarcerated in correctional facilities.² This requirement that States make FAPE available to all eligible children and youth with disabilities has been part of the IDEA, and its predecessor, the Education of the Handicapped Act, since 1975.

The IDEA also requires that the Arizona Department of Education (AZDE) exercise its general supervisory responsibility to ensure that FAPE is made available to all eligible children and youth with disabilities. 20 U.S.C. §1412(a)(11). The IDEA Amendments of 1997 revised IDEA's general supervision requirements to permit a State's governor (or other individual pursuant to State law) to transfer to any public agency in the State the responsibility of ensuring that the Part B requirements are met with respect to youth with disabilities who are convicted as adults under State law and are incarcerated in adult prisons. The State of Arizona has not advised the Department of a transfer of the general supervisory responsibility. It is OSEP's understanding that AZDE retains general supervisory responsibility under the IDEA, for educational programs for eligible youth with disabilities who are incarcerated in adult prisons.

The State of Arizona also has recognized its obligation under its statutory provisions. Arizona Revised Statutes, §15-1372(A) provides in part that:

The State Department of Corrections shall provide educational services for ...pupils with disabilities who are age twenty two or younger who are committed to the State Department of Corrections The Department of Education and the State Department of Corrections shall enter into an intergovernmental agreement ...The agreement shall: ...

² The IDEA Amendments of 1997 revised the statute to provide that:

The obligation to make [FAPE] available does not apply with respect to 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 children with disabilities, who, in the educational placement prior to their incarceration in an adult correctional facility: (I) were not actually identified as being a child with a disability under [20 U.S.C. §1401(3)]; or (II) did not have an [IEP wider Part B].

20 U.S.C. §1412(a)(1)(B)(ii).

Provide for appropriate education to all committed youths as required by state and federal law.

After receiving the complaint, OCR contacted ADC to inform it of the complaint and to request information, that would enable OCR to determine whether ADC was in compliance with the requirements of Section 504 and the ADA. OCR specifically requested that ADC provide documentation for each inmate receiving special education and related services, including the IEP for each such inmate. ADC disputed the applicability of the ADA and Section 504 to the State prison system and OCR's jurisdiction to investigate this matter. Following a protracted period during which the application of the ADA and Section 504 and the jurisdiction of OCR to investigate were clarified, ADC submitted documentation regarding 21 inmates under 22 years of age. It is the understanding of OCR that this response represents the total documentation for all inmates with disabilities to whom special education and related services had been made available throughout the entire Arizona State prison system. Based upon review of those materials, OCR believes that the State has not met the requirements for either a Section 504 educational plan or an IEP pursuant to the IDEA.³ During a meeting on December 17, 1997, the Director of ADC informed OCR that he is unwilling to change, modify or add to any of the educational components being offered in the various prisons under the charge of the ADC.

OCR also consulted with OSEP to determine the status of this issue under monitoring and compliance reviews conducted by OSEP. As set forth in its February 1, 1995 monitoring report, OSEP found as part of its 1994 monitoring review of AZDE, that occasionally an inmate would arrive at a State prison with an existing IEP and ADC would provide services, but that neither ADC nor AZDE had proper procedures in place for monitoring or ensuring the identification, location and evaluation of eligible inmates with disabilities or the provision of FAPE to them. AZDE was required to take corrective action. Based upon documentation submitted by AZDE, OSEP determined that AZDE had implemented the required corrective actions. However, based upon the more recent documentation that OCR requested and reviewed, OCR and OSEP find it necessary to reexamine the availability of FAPE to eligible incarcerated youth with disabilities and the exercise, by AZDE, of its general supervisory responsibility. Therefore, we request the following information and documentation:

A copy of any current intergovernmental or interagency agreements that address the provision of FAPE to eligible inmates with disabilities, and a summary of the status of implementation of the terms of such agreement(s);

A copy of the monitoring procedures, monitoring schedules (including all related

³ Implementation of an IEP, developed in accordance with IDEA, is one means of meeting the FAPE standards established pursuant to Section 504. See 34 C.F.R. §104.33(b)(2).

⁴ Although IDEA '97 allows States to decide whether to make FAPE available to youth with disabilities ages 18 to 21 and whether to restrict eligibility for certain incarcerated youth in that age range, OSEP is not aware of any changes in Arizona's eligibility Statute or policies.

monitoring reviews that AZDE has conducted or plans to conduct in the near future), and other monitoring documents that AZDE is using to ensure that the requirements of Part B are met for all eligible youth with disabilities who are incarcerated in adult correctional facilities; and

A copy of all monitoring reports and corrective action documents that address the provision of FAPE to eligible inmates with disabilities in adult correctional facilities.

Please also feel free to provide any additional documentation to show how the State of Arizona is meeting its responsibilities, under the IDEA, Section 504, and the ADA, to make FAPE available to all eligible children and youth with disabilities who are incarcerated in adult correctional facilities.

We look forward to your response to this letter within thirty days of your receipt of this letter. Please send your response to OCR and OSEP at the following addresses:

Lillian Gutierrez
Director
Office for Civil Rights, Region VIII
United States Department of Education
1244 Speer Boulevard
Denver, Colorado 80294

Thomas Hehir
Director
Office of Special Education Programs
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Sincerely,
Sincerely,



Lillian Gutierrez
Director
Region VIII
Office for Civil Rights



Thomas Hehir
Director
Office of Special Education Programs

cc: Kathryn A. Lund, Ph.D
State Director of Special Education