

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202-2600

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

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

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

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

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

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

Sincerely,

/s/

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Director  
Office of Special Education Programs

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