

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

Middlesex, ss.

Civil Action No. _____

JOHN DOE 1, JOHN DOE 2, and JOHN DOE
3, on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

RUSSELL JOHNSTON, Acting
Commissioner, Massachusetts Department of
Elementary and Secondary Education, in His
Official Capacity,

AND

THE MASSACHUSETTS BOARD OF
ELEMENTARY AND SECONDARY
EDUCATION,

Defendants.

**VERIFIED CLASS ACTION COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. The Massachusetts Department of Elementary and Secondary Education (“DESE”) fails to fulfill its statutory duty to “provide special education to school aged children with a disability who are incarcerated in county houses of correction.”

2. Plaintiffs are school-aged, incarcerated youth who ask the Court to remedy this systemic failure on their own behalf and for similarly situated students confined in houses of correction (“HOCs” or “jails”) throughout the Commonwealth.

3. Individualized Education Programs (IEPs) were devised for Plaintiffs and class members that describe the special services they need to benefit from a public education. State statute requires DESE to “provide” these services to eligible students confined in HOCs. DESE, notwithstanding this clear command, has no system capable of doing this.

4. The legislative history and statutory scheme governing the delivery of special education to jailed students suggests that DESE is obliged to *directly* provide services sufficient to implement IEPs. Instead, DESE delegates to HOC staff the responsibility for identifying young adults with established IEPs and directly provides only minimal services to those identified. DESE leaves it to local school districts to provide everything else set out in IEPs and does little or nothing to ensure that HOC staff and local schools actually discharge the assigned duty.

5. As a result, except for some very few who obtain legal representation, Defendants’ system for providing special education to youth incarcerated in HOCs denies them the services that special education teams determined they need in order to benefit from public education.

6. This Court’s intervention is necessary because, by virtue of Defendants’ policies and practices:

- a. Students with disabilities who require special education are not routinely identified, even when they already have IEPs, and are subject to unreasonable delays in the identification process;
- b. Students who *are* identified receive very little; typically nothing more than limited hours of tutoring in math and English by a grossly understaffed and inadequately monitored contract provider;
- c. Students are denied “related” or ancillary services that local district staff members deemed necessary for them to learn, such as speech and language therapy;
- d. Students are also denied access to the full high school curriculum to which all students are entitled, which requires a minimum of 27.5 hours per week of instruction; and,
- e. Students do not receive instruction in all of the subjects they must successfully complete, and in which they must demonstrate mastery in standardized testing, as a condition of graduation (*e.g.*, science & technology).

7. DESE’s policies and practices toward students confined in HOCs violates G. L. c. 71B, § 3 and § 11A (“Section 11A”), as well as G. L. c. 69, §§ 1A, 1B, and 1I. These statutes mandate the provision to jailed students of special education services to the same extent as non-institutionalized students.

8. The proposed plaintiff class consists of persons 18 to 22, who as of April 16, 2024 or at any time thereafter, (1) are or will be incarcerated in county houses of correction, (2) have

been issued an IEP, (3) and are being denied the full spectrum of instruction and services to which they are entitled under their IEP and/or state law.

9. Plaintiffs filed administrative complaints in the Bureau of Special Education Appeals (“BSEA”), the state agency that resolves disputes between students and their districts or the state. Plaintiffs intend to exhaust their individual administrative remedies.

10. Regardless of the outcome in the BSEA, however, Plaintiffs will continue to seek relief for the putative class. That is, declaratory and injunctive relief on behalf of a class of similarly situated students residing in HOCs throughout the Commonwealth.

11. The BSEA has repeatedly declined to decide class claims.

PARTIES

12. Plaintiff John Doe 1, is a 21 year-old special education student currently incarcerated at the Norfolk County jail. He attended Boston Public Schools (BPS) prior to his incarceration, where he received special education and related services for more than 300 minutes per day each week in conformity with an IEP. He was originally identified as a special-needs student in the second grade and suffers from emotional disabilities. He has been in HOC custody since February 2022.

13. Plaintiff John Doe 2, is a 20 year-old special education student currently incarcerated at the Plymouth County HOC. He attended the Quincy Public Schools prior to the time of his incarceration. He currently has an IEP for a learning disability in math and suffers from depression and anxiety. He has been in HOC custody since February 2022.

14. Plaintiff John Doe 3, is an 18 year-old student currently confined in the Essex County jail. John Doe 3 was educated in day school special education programs since he was in second grade. His most recent IEP was developed by the Haverhill School District and calls for

342 minutes of special education instruction daily, as well as speech language therapy and counseling on a weekly basis. He has been in HOC custody since April 11, 2023.

15. Defendant Russell Johnston is the Acting Commissioner of DESE, which is mandated by Section 11A, to “provide special education to school aged children with a disability” who are confined in HOCs and to “take any and all steps necessary to monitor and enforce compliance” with Massachusetts’ special education laws, per G. L. c. 71B, § 3. DESE is under Johnston’s “supervision and management,” pursuant to G. L. c. 15, § 1. Under G. L. c. 69, § 1A, it is his charge, among other things, to “supervise and monitor on an on-going basis” the compliance of school districts in “fully implementing the educational program recommendations required by individual educational plans of students with disabilities[.]” Additionally, Johnston serves, as per G. L. c. 15, § 1F, as the Secretary to the Board of Education and its chief executive officer. He is sued in his official capacity.

16. The Massachusetts Board of Elementary and Secondary Education is the governing administrative body for DESE, established pursuant to G. L. c. 15, § 1E. The Board is required, under G. L. c. 69, § 1B, to “see to it that all school committees comply with all laws relating to the operation of the public schools” and to take enforcement action when necessary.

17. Offices for both DESE and BESE are located in Everett, Massachusetts.

JURISDICTION

18. This Court has jurisdiction over this matter, pursuant to G. L. c. 231A, § 1, which governs the adjudication of actions for declaratory relief.

FACTS

Statutory and Regulatory History and Background

19. In 1972, the Massachusetts legislature enacted what has come to be known as Chapter 766 (Massachusetts Public Education Law, G. L. c. 71B, §§ 1–16) (“Chapter 766”). A forerunner of concomitant federal law, Chapter 766 was designed to address discrimination in the education of students with disabilities.

20. Chapter 766 requires that students who need special assistance due to a disability be identified; that suspected disabilities be evaluated by educational experts; that an IEP based on the evaluation describing services necessary to overcome educational barriers be developed by school staff and parents/guardians; and that the IEP be faithfully implemented.

21. Chapter 766 also affords procedural rights to dispute asserted failures to enact or implement adequate IEPs in individual cases through the aforementioned BSEA.

22. Chapter 766 is intended to result in the provision to *all* students of a “free and appropriate public education” or “FAPE.” State law incorporates the federal FAPE definition as set forth in statute and regulation, which requires, in relevant part, that “special education and related services” be provided at public expense, afforded “under public supervision and direction,” and conform, not only with the student’s IEP, but with federal law and the Commonwealth’s standards for elementary and secondary education.

23. Massachusetts state standards require the provision of a core curriculum, mandated minimum hours of annual instruction, and standardized testing that measures students’ acquisition of the curriculum (the “MCAS”).

24. The legislature specifically addresses the special educational needs of incarcerated students differently than it does those of other institutionalized children and young adults.

25. Under G. L. c. 71B, § 12, school-aged students with disabilities confined in institutions under the control of the Departments of Mental Health, Children and Families, and Youth Services (DYS), are served by “school department[(s)]” managed “jointly” by DESE and these agencies, which share responsibility for administration, staffing, and the issuance of governing regulation.

26. The legislature’s provision for meeting the special educational needs of students confined in HOCs, however, has taken a different and relatively peculiar course.

27. In 1981, the federal district court, in *Green v. Johnson*, 513 F. Supp. 965 (D. Mass. 1981), heard a challenge from a student confined in the Franklin County HOC who alleged that his special educational needs were not addressed. The plaintiff asserted that the state defendants’ policies and practices in the delivery of special education services to students incarcerated in the Franklin, Hampshire, Hampden, and Berkshire County Houses of Correction denied students the education to which they were entitled under state and federal law. *Id.*

28. In concluding that the manner of apportioning duties between DESE, local school districts, and HOCs did not result in the provision of special education services to plaintiff and other confined students, the Court issued a preliminary injunction requiring Defendants to deliver services to the plaintiff and other similarly situated students. *Id.* at 977–78.

29. In response to the federal court order, in each of the next 10 years, the legislature ensured compliance with the Court’s injunction by appropriating specifically earmarked funding. The appropriations stated that DESE “shall provide” special education services to eligible students in HOCs “in accordance with” the Court’s injunction.

30. During this period, DESE directly provided special education services to students confined in HOCs, employing DESE staff.

31. In 1992, the legislature enacted Section 11A. This provision, in practically the same language as the prior earmarks, states that DESE “shall provide special education to school aged children with a disability who are incarcerated in county houses of correction.”

32. Section 11A does not include the explicit mandate of inter-agency cooperation stated in the statutes governing the provision of education to youth confined in locked facilities run by other agencies of the Commonwealth.

33. The language, “shall provide” in Section 11A, given this history, contemplates the regimen that the Legislature first established to ensure compliance with the order in *Green*. It is specifically directed at DESE and it is intentional. Delegating the lion’s share of responsibility for educating incarcerated youth to local school districts runs afoul of this intent.

34. Defendants’ grant to themselves of permission to depart from prior practice and legislative intent is evinced by DESE regulation, which limits DESE’s obligation to the provision of “*certain* special education services to eligible students in . . . County Houses of Corrections[.]” 603 Mass. Code Regs. 28.06(9) (emphasis added). DESE explicitly reserves “discretion to determine, based upon resources, the type and amount of special education and related services that it provides in such facilities.” *Id.*

35. To the extent that DESE employs the discretion it has awarded itself to deliver services to incarcerated students, it does so through its division entitled Special Education in Institutional Settings (“SEIS”). SEIS contracts with the Collaborative for Education services (“CES”), a nonprofit educational service agency, to deliver special education services in HOCs.

Deficient Provision of Education to Students in HOCs

DESE's policies block students with IEPs from being identified and receiving services promptly or at all.

36. Though providing services starts with identifying those who need them, DESE does not require CES to identify students who were determined by local school districts to need special education services set out in IEPs. DESE instead relies on HOC staffers to do this. HOCs in turn rely on students with IEPs speaking up. For example, in one jail, students are asked to overcome the shame typically experienced by students with learning disabilities and raise their hand in the presence of other imprisoned youth when the group is asked if anyone has an IEP.

37. The inadequate system for identifying students with IEPs and special educational needs results in non-identification or lengthy periods of no services.

38. John Doe 1 was identified as a student with a prior IEP, almost two years after his incarceration.

39. At his attorney's request, John Doe 2 was identified as a student with a disability by the Quincy Public Schools, nearly one year after he was incarcerated.

40. John Doe 3 received special education services under an IEP since his enrollment as a kindergarten student. His most recent IEP calls for 5.7 hours of instruction daily. However, he has yet to receive services in the Essex HOC, though he was first jailed in April 2023.

41. Even when students' prior receipt of special education becomes known to DESE, they will not actually receive services until DESE seeks out and receives the student's IEP from the local school district.

42. Further significant delays may ensue if a local district has already moved to cut ties by "unenrolling" the student or if the district insists on conducting a reevaluation of the student's educational needs, which could take months.

43. Both Plaintiffs John Doe 1 and 2 were disenrolled by their home school districts. In both cases, they needed to “re-enroll,” which resulted in significant delays in securing special education services.

44. If the identification system over which Defendants preside was purposely intended to limit the provision of services, it could hardly be more successful.

45. DESE reports that 20% of all students enrolled in Massachusetts public schools have been identified as students with disabilities who have IEPs.

46. Individuals with disabilities are typically overrepresented among incarcerated populations. Approximately 50% of the students in the custody of the Department of Youth Services are receiving special education services.

47. But, at most, only 2% of the 18-to-22-year-olds in Massachusetts’ HOCs are currently receiving any special education services. As of February 2024, only 12 students across all 15 HOCs were receiving services from DESE.

48. In February 2024, according to DESE data, students did not receive any special education services in 6 out of 15 HOCs or jails, including the Barnstable, Bristol, Hampshire, Middlesex, and Plymouth HOCs and the Nashua Street Jail in Suffolk County.

DESE provides only minimal services to eligible students and fails to ensure that school districts provide the rest.

49. Jail-confined students who *are* identified as needing special education do not receive education services that even approximate what is set out in IEPs.

50. The curriculum offered to incarcerated students is depleted. As noted, DESE provides nothing more than limited math and English tutoring to eligible students.

51. Further, Defendants fail to devote adequate resources toward the provision of even the very limited education services for which it accepts direct responsibility. In February 2024, only 2.4 full-time equivalent teachers provided special education across all 15 HOCs.

52. Students therefore receive, at most, two hours of tutoring per week in reading and/or math instead of the full services contemplated in their IEPs. At a recent IEP meeting attended by undersigned counsel, a CES employee, Kate Firling, who is a School District Coordinator, confirmed that services are capped at two hours weekly as a matter of policy.

53. Many students identified as eligible do not receive even that.

54. John Doe 1 and 3 have yet to receive any special education services despite prolonged periods of incarceration.

55. Between January and September of 2023, John Doe 2 received less than 10 hours of special education services.

56. Local school districts do not pick up the slack left by DESE. They fail to provide either the named Plaintiffs or other class members with those additional services required by their IEPs and/or state law.

57. The Quincy Public Schools provided John Doe 2 with nothing more than interrupted access to an online credit recovery course for a few hours a week. Since enrolling in the program in November 2022, John Doe 2 was only able to complete one course. Since his transfer to Plymouth HOC on or about February 19, 2024, he has been unable to access the online credit recovery program and has instead received less than 6 hours of tutoring total.

58. Difficulties making academic progress are exacerbated, if not foreclosed by, local school districts' failure to deliver the related services that are prescribed in incarcerated students' IEPs.

59. John Doe 1's last accepted IEP requires him to receive services from a counselor who provides guidance and therapeutic support to address his emotional disability. No such services have been provided since he was first locked up in February 2022.

60. John Doe 2's IEP was amended in September 2024 to require 10 weekly counseling sessions to assist him in coping with his anxiety and depression. But he only had two such sessions by his December IEP meeting.

61. DESE makes little effort to enforce the duties it has delegated to local districts.

62. The recourse that DESE sets out in policy for overcoming local districts' recalcitrance is to file a complaint with DESE's Problem Resolution System Office ("PRS"), which is charged with fielding complaints about school districts that do not comply with requests for incarcerated students' educational records or required services.

63. DESE/SEIS reported in response to a public records request, however, that no complaint regarding a local district's failure to provide an incarcerated student's educational services has *ever* been filed with PRS.

64. Even when DESE is involved in deliberations over individual cases, DESE staff refuses to enforce the duties that are delegated to local districts.

65. In fact, local districts are only moved to provide any education services if confronted by a student's attorney. Even this does not necessarily work, however. Counsel was present at the meeting mentioned just above.

66. Defendants have not always fallen so significantly short of discharging the legislative mandate to "provide" special education in jails.

67. Before DESE delegated the bulk of responsibility for educating students with disabilities in jails to local school districts, students in the HOCs received significant daily instruction from state employees who worked full-time and were certified in special education.

68. As these teachers left their positions, they were replaced by CES employees who were not assigned to particular jails and would instead divide their efforts between HOCs, with the apportionment depending on the number of students identified as eligible in the jails.

69. This change in practice had the effect of limiting teachers' ability to build relationships and work cooperatively with jail staff to identify students and encourage them to participate in instruction.

70. Before this switch, the practice was to check incarcerated students against a master list of students identified as special education eligible in local school districts.

71. This practice ceased, however, when state employees were replaced by CES staff. Administrators instructed teachers to de-emphasize the identification of students and instead solely focus on educating those identified by jail staff without support or assistance from teachers.

72. DESE administrators also dramatically cut down on education services. Teachers were limited to teaching English Language Arts (ELA) and Math.

73. Administrators also ceased the practice of providing incarcerated students with report cards, which served as verification of the completion of course work. Very few incarcerated students thereafter earned credit for their work or received high school diplomas.

Consequences of DESE's Failure for Youth

74. The entitlement of students with disabilities to an individualized public education that meets specific learning needs ceases on their 22nd birthday. The potential that an incarcerated

student will not graduate high school significantly increases when they are denied education services during their confinement.

75. The life prospects of youth who fail to graduate are greatly diminished, economically and otherwise. A high school diploma is necessary to have any reasonable chance to compete in today's job market. Without meaningful employment opportunities, youth are substantially more likely to live in poverty and depend on public benefits as adults. This poverty can exacerbate mental health issues, as well as perpetuate cycles of homelessness and unemployment.

76. Conversely, schooling while incarcerated can improve outcomes. Research shows that youth who experience higher academic achievement while incarcerated are less likely to be rearrested and more likely to return to school upon release.

CLASS ACTION ALLEGATIONS

77. The plaintiff class consists of all persons aged 18 to 22 who as of April 16, 2024, or at any time thereafter, (1) are or will be incarcerated in HOCs, (2) have been issued an IEP, and (3) are being denied the full spectrum of instruction and services to which they are entitled under their IEP and/or state law while incarcerated.

78. The class is so numerous that joinder of all members is impractical.

79. Claims regarding the adequacy of special education provided to an incarcerated student would not warrant class relief if services were delivered in the context of a system that had the capacity to fulfill DESE's statutory mandate.

80. Plaintiffs here, however, assert that Defendants have not implemented a statewide system that has the capacity to offer special education students access to a full curriculum as well as the services called for in incarcerated students' IEPs, regardless of what service plans specify.

81. Questions of law and facts relevant to Plaintiffs' claims, therefore, are common to the members of the class and predominate over questions affecting only individual class members. They are: (1) Does DESE's failure to directly "provide" education services called for in class members' IEPs and/or state law violate Section 11A?; and (2) If DESE has discretion to delegate its duty to provide services to HOC staff and local school districts, has it implemented procedures ensuring that services are "provided" to class members consistent with G.L. c. 71B, § 3?

82. Further, Plaintiffs' claims on behalf of the class are susceptible to a common remedy. Plaintiffs ask the Court to require Defendants to assume responsibility for the identification of students and provision of special education services in HOCs and implement a system that has the capacity to deliver services required by IEPs and/or state law, including a full slate of typical high school courses and a program that complies with Defendant's own structured learning time standards.

83. Plaintiffs' claims are typical of the claims of the class, who are equally entitled to receive special education services and are consistently denied these services by virtue of Defendants' statewide system.

84. Plaintiffs will adequately protect the interests of all class members as he is represented by competent counsel with experience in both prisoner and special education litigation and class actions generally.

85. A class action is superior to other available methods for a fair and efficient adjudication of this action. Separate actions could result in inconsistent and varying decisions as well as in conflicting and incompatible standards of conduct for the Defendants.

86. Plaintiffs and the class they represent have no other adequate remedy at law. Monetary relief cannot compensate for a denial of education services.

87. There is also no adequate administrative remedy. The BSEA has repeatedly held that it has no authority to order class-wide, systemic relief and has never done so.

CLAIMS

88. Based on the foregoing allegations, Plaintiffs, on their own behalf and on behalf of similarly situated students, assert the following causes of action.

First Cause of Action

89. By failing to directly identify students confined in HOCs who were deemed eligible for special education services by local school districts and failing to provide services consistent with their IEPs and/or state law, Defendants violate G. L. c. 71B, § 11A.

90. By failing to provide students who have an IEP and are confined in HOCs with services consistent with their IEPs and/or state law, including access to 27.5 hours a week of general curriculum instruction, Defendants violate G. L. c. 71B, § 11A.

Second Cause of Action

91. By failing to ensure that students confined in HOCs deemed eligible for special education services by local school districts are provided with services consistent with their IEPs and state law, including access to 27.5 hours a week of general curriculum instruction, Defendants violate G. L. 71B, §§ 3 and 11A, and G. L. c. 69, §§1A and 1B.

PRAYER FOR RELIEF

92. Plaintiffs, on behalf of themselves and other class members, request that this Court:
- a. Order such individual relief as hereinafter requested, if any, for Plaintiffs, following the completion of BSEA proceedings.

- b. Declare, pursuant to G. L. c. 231A, that Defendants' conduct, as set forth above, violates each of the legal authorities set forth in Plaintiffs' statement of claims.
- c. Issue injunctive relief permanently enjoining Defendants from failing to:
 - i. Devise and implement an effective system for identifying persons confined in HOCs who are younger than 22 and were deemed eligible for special education services in local school districts.
 - ii. Directly implement IEPs of persons who are younger than 22 and were deemed eligible for special education services in local school districts, or, alternatively, take adequate steps to assure that IEPs are otherwise faithfully implemented.
 - iii. Provide all special education students in HOCs with at least 27.5 hours of general curriculum instruction a week in accordance with state law.
 - iv. Regularly collect, maintain, and review data on the number of students potentially eligible for special education services in HOCs, the number of students receiving such services, and the extent and type of services, disaggregated by race and disability in the like manner of other local reporting to DESE, in order to permit adequate monitoring of compliance with this Court's order.
- d. Maintain jurisdiction over this action for a sufficient period of time to ensure continued compliance with this Court's Order.

- e. Order Defendants to pay Plaintiff reasonable attorneys' fees and costs.
- f. Provide such other relief as this Court deems appropriate.

Dated: April 16, 2024

Respectfully submitted,

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on behalf of themselves and all others similarly
situated,

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