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Office of the State Superintendent of Education
Office of Review and Compliance
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Confidential

Adult Student, Petitioner, v. District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”), and District of Columbia Office of the State Superintendent of Education (“OSSE”) State Education Agency (“SEA”) Respondents. Case # 2019-0217 Date Issued: March 26, 2020	CORRECTED HEARING OFFICER’S DETERMINATION ¹ Hearing Date: February 20, 2020 Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, March 26, 2020, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on February 20, 2020, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20002, in Hearing Room 423.

BACKGROUND AND PROCEDURAL HISTORY:

The student or “Student” is age ____² and is a lifelong District of Columbia (“D.C.”) resident. Student is eligible for special education and related services under IDEA as a student with an Emotional Disability (“ED”). Currently, Student is serving a sentence of incarceration, as a D.C. Code offender, at a federal correctional institution (“FCI”) in a state outside D.C. The FCI at which Student is incarcerated (“FCI-A”) is a Federal Bureau of Prisons (“BOP”) facility. Upon Student’s anticipated release from BOP custody in 2026, Student will return to the D.C.

Student has not obtained a high school diploma. Student has not attended a high school program since entering BOP custody in February 2019. Petitioner alleges that BOP does not offer a high school curriculum and does not provide special education and related services pursuant to the IDEA. Student has not received any special education or related services and Student’s individualized educational program (“IEP”) has not been implemented since Student entered FCI-A. While incarcerated in FCI-A Student will likely not have the opportunity to work toward a high school diploma or receive special education and related services.

Student remains a D.C. resident throughout Student’s incarceration and remains eligible for special education until spring 2022. Student may spend nearly three years of eligibility without accessing any services. By the time Student is scheduled to return to D.C., Student will no longer be eligible for special education, having aged out of eligibility.

Student or (“Petitioner”) has filed this due process complaint against both DCPS as Student’s location education agency (“LEA”) and OSSE as the state education agency (“SEA”) alleging a denial of a free appropriate public education (“FAPE”) because Student is unable to access special education services while incarcerated. Student seeks the following relief:

- Extended eligibility until the semester in which Student turns age 29 to allow Student the opportunity to complete secondary education and compensate for the current and future years of denials;
- Placement, including transportation, in an education program upon Student’s return to the D.C. where Student can complete a high school diploma with Student’s IEP being

² The student’s current age is in Appendix B.

implemented. This placement must provide Student with the opportunity to benefit from vocational education, integrated employment (including supported employment), work readiness opportunities and programs, internship and apprenticeship opportunities, and workforce development training, including the ability to earn a certificate in a trade of Student's choice; and

- Compensatory education services including, but not limited to, the following:
 - A laptop with a wireless hub that will allow Student to complete homework and online courses and to search for employment opportunities;
 - Tuition and transportation for an educational program of Student's choice that may include online credit earning options year-round so that Student can earn a diploma as quickly as possible where Student will also have the opportunity to receive updated transition assessments;
 - 800 hours of tutoring and transition and vocational support services from a provider of Student's choice;
 - A compensatory education transition services fund to cover the cost of additional special education programming geared to meet Student's critical transition needs, such as vocational and workforce development opportunities. Student will be able to use this fund to pay for applications, test preparation, career exploration, and internship and apprenticeship opportunities.

LEA Response to the Complaint:

The LEA filed a response to the complaint on September 12, 2019. The LEA denies that there has been any failure to provide Student with a FAPE and states the following:

Student was enrolled in a DCPS school ("School A") from May 2018 through March 2019. Student's February 25, 2019, amended IEP requires 26 hours per week of specialized outside general education and 120 minutes per month of behavior support services ("BSS") outside general education. In October 2018, Student plead guilty to several counts in the Superior Court of the District of Columbia. In February 2019, Student was sentenced to nine years in prison. In May 2019, Student was transferred to a BOP facility. DCPS has no authority to remove or place students in BOP facilities. DCPS is not the LEA responsible for providing students FAPE in BOP facilities. DCPS is unaware of any request from BOP for Student's education records subsequent to Student's transfer in May 2019. DCPS did not fail to develop or implement an IEP for Student since BOP transferred Student from D.C.

SEA Response to the Complaint:

The SEA filed a response to the complaint on August 30, 2019. The SEA asserts that it did not deny Student a FAPE in violation of the IDEA. In its response the SEA stated, inter alia, that

Petitioner's claims against OSSE pertain to an alleged failure by OSSE to monitor/supervise or directly provide FAPE to Student while Student has been in the custody of the BOP.

Guidance from the US Department of Education ("DOE") confirmed that "[i]ndividuals in the Federal correctional system fall under the jurisdiction of the Federal Bureau of Prisons within the Department of Justice....[and therefore] the District of Columbia does not have an obligation under the IDEA to provide FAPE to students with disabilities convicted as adults under District of Columbia law and incarcerated in Federal prison."

Since DOE is the federal agency responsible for administering the IDEA and is well suited to interpret and/or clarify the provisions of the IDEA, OSSE defers to DOE's guidance. Based on this very clear guidance by DOE, the lack of legal authority that would enable OSSE to compel BOP to comply with local or federal requirements, and the mandate in the National Capital Revitalization and Self-Government Improvement Act of 1997 that BOP retain responsibility for the education of persons in its custody, OSSE asserts that it has no liability under the IDEA to Petitioner for time at BOP.

Resolution Meeting, Pre-Hearing Conference and Continuances:

Petitioner and the LEA did not waive resolution session. The 45-day period began on September 28, 2019, and was to end [and the Hearing Officer's Determination ("HOD") was originally due] on November 11, 2019. With regard to the case against OSSE, Petitioner's counsel filed a unopposed motion to align the timelines for the case against OSSE and DCPS. That motion was granted.

Because the hearing was originally scheduled to be convened after the original HOD due date, DCPS submitted an unopposed motion, that was granted, to extend the HOD due date from November 11, 2019, to December 20, 2019.

A pre-hearing conference ("PHC") in this matter was held on September 26, 2019. The undersigned hearing officer ("Hearing Officer") issued a pre-hearing order ("PHO") on October 8, 2019, setting December 20, 2019, as a hearing date and outlining, inter alia, the issues to be adjudicated.

On December 20, 2019, Petitioner's counsel filed a motion to continue and extend the HOD due date further due to Petitioner's unavailability for the scheduled hearing date. The motion was granted extending the HOD due date to February 21, 2020. The parties then filed an additional motion to continue and extend the HOD due date. The motion was also granted. The hearing was convened on February 20, 2020, and the HOD is now due on March 26, 2020.

ISSUES: ³

The issues adjudicated are:

³ The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

Claims Against Respondent DCPS

1. Whether DCPS denied Student a FAPE by failing to provide an appropriate placement, since February 2019, in the least restrictive environment (“LRE”) that could implement Student’s IEP, in violation of 34 C.F.R. §§ 300.114 through 300.116.
2. Whether DCPS failed to implement Student’s IEP since February 2019.
3. Whether DCPS denied Student a FAPE by failing to transmit records from School A to BOP within a month of Student having left School A, in violation of 34 C.F.R. § 300.323.

Claims Against Respondent OSSE

4. Whether OSSE denied Student a FAPE by failing to adhere to its supervisory obligations in violation of 34 C.F.R. § 300.149, from February 2019.
5. Whether OSSE denied Student a FAPE by failing to identify a responsible LEA, in violation of 34 C.F.R. § 300.101.
6. Whether OSSE denied Student a FAPE by failing to monitor and enforce the requirements of LEAs, in violation of 34 C.F.R. § 300.120.
7. Whether OSSE denied Student a FAPE by failing to intervene and provide special education and related services, in violation of 34 C.F.R. § 300.227.
8. Whether OSSE denied Student a FAPE by failing to transmit records from School A to BOP within a month of Student having left School A, in violation of 34 C.F.R. § 300.323.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 25, DCPS Exhibits 1 through 10 and OSSE Exhibits 1 through 10) that were admitted into the record and are listed in Appendix 2. The witnesses testifying on behalf of each party are listed in Appendix B.⁴

SUMMARY OF DECISION:

In this case, Petitioner held the burden of production on all issues to be adjudicated. Respondent DCPS held the burden of persuasion on issue # 1 after Petitioner established a prima facie case on that issue. Petitioner held the burden of persuasion on the other issues as to DCPS and on all issues as to OSSE.

⁴ Petitioner presented two witnesses: (1) Student ("Petitioner") and (2) an Educational Consultant designated as an expert witness on compensatory education. DCPS and OSSE presented the same two witnesses: (1) a DCPS Deputy Chief of Policy, (2) an Educational Administrator from the Federal Bureau of Prisons.

Based on the evidence adduced, the Hearing Officer concluded that DCPS did not sustain the burden of persuasion by a preponderance of the evidence on issue #1. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #2. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issue #3 and did not sustain the burden of persuasion by a preponderance of the evidence on any of the issues as to OSSE.

Based upon the finding of denial of FAPE to Student by DCPS, the Hearing Officer granted Student an additional three years of special education eligibility. The additional years of eligibility will begin when Student is released from incarceration, which is currently targeted to be in 2026.

In addition, the Hearing Officer directed in the order below that DCPS provide Petitioner written authorization to obtain, with LEA funding, a comprehensive psychological or neuropsychological evaluation with educational and vocational components at the prevailing market rate when Student is released from incarceration, for the purpose of determining appropriate compensatory education due Student for the denials of FAPE determined in this HOD. Petitioner shall have the right to pursue, in due process hearing if need be, a compensatory education award based on that evaluation, as the full and complete remedy for the denials of FAPE determined in this HOD.

FINDINGS OF FACT:⁵

1. Student is a lifelong D.C. resident. Student is eligible for special education and related services under the IDEA as a student with the disability classification of ED. Currently, Student is serving a sentence of incarceration, as a D.C. Code offender, at a FCI-A, in a state outside D.C. FCI-A is a BOP facility. Upon Student's anticipated release from BOP custody in 2026, Student will return to the D.C. Student remains a D.C. resident throughout Student's incarceration and remains eligible for special education until spring 2022. When Student returns to D.C. from incarceration Student will no longer be eligible for special education, having aged out of eligibility. (Student's testimony, Witness 3's testimony, Petitioner's Exhibit 2)
2. Student has a history of significant special education needs and has the following diagnoses: Attention-Deficit/Hyperactivity Disorder, Combined Type ("ADHD"); Posttraumatic Stress Disorder; Unspecified Depressive Disorder; Mood Disorder; Specific Learning Disorder ("SLD") with impairments in math, reading and written expression. (Petitioner's Exhibit 17)
3. Student's last school of attendance was a DCPS school ("School A"). DCPS is the LEA for School A. On January 29, 2018, Student entered School A with an IEP that prescribed 29.5 hours per week of specialized instruction outside general education, 60 minutes per week of BSS, and 4 hours per year of Parent Counseling and Training. (Petitioner's Exhibit 3)

⁵ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

4. School A updated Student's IEP on December 3, 2018, by reducing the hours of specialized instruction from 29.5 hours per week to 26 hours per week. Student's BSS were increased to 120 minutes per week. (Petitioner's Exhibit 2)
5. Student has not obtained a high school diploma. Student has thus far earned a total of 3 credits of the 24 credits needed to earn a DCPS high school diploma. (Petitioner's testimony, Petitioner's Exhibit 1)
6. Student attended several DCPS schools prior to being incarcerated. Student has been in special education due to behavior and mental health issues. Student has not attended a high school program since entering BOP custody in February 2019, and has not met with a special education teacher or received in any special education services during that time. Student wants to obtain a high school diploma and attend college. There is no high school program at FCI-A that is run by DCPS or OSSE. Student has asked BOP personnel to request Student's DCPS educational records, but it is unclear whether BOP has made any such request. Student has not personally requested any records from DCPS. (Petitioner's testimony)
7. Student believes there is a general educational development credential ("GED") program at FCI-A, but it is not available to Student yet. It is Student's understanding that Student will not even be able to get on the wait list for that program for years. Student is due to be at FCI-A at least three more years and plans to return to D.C. upon release. Student fears that without an education, upon returning to D.C., Student's chances for success are limited and reincarceration is a great risk. Student is not aware of what services may be available in the D.C. community for a "Returning Citizen." Student believes that tutoring will be helpful and the ability to work at Student's own pace, along behavior support services, will increase Student's chances for success upon release. (Student's testimony)
8. Petitioner engaged an educational consultant to testify regarding compensatory education. The consultant assumed that if Student has not received services since being in a BOP facility until the date Student's special education eligibility is due to end, Student would have missed 1000 hours of specialized instruction and 80 hours of BSS. The consultant believes that it would take 3 to 4 years for Student to complete a high school diploma. In making his determination and recommendations regarding compensatory education, the consultant did not read the BOP educational standards and was not aware of what educational programs are available at BOP facilities. However, the consultant was aware that there are free community-based programs available in D.C. for persons returning from incarceration. (Witness 1's testimony)
9. Petitioner requested as compensatory education that Student be provided a high school diploma program with special education and related services while in a BOP facility or extended eligibility for a period of four years after Student's release from a BOP facility and subsequent placement in a high school diploma program in the community. (Petitioner's Exhibit 24)

10. In addition, Petitioner requested that Student be provided the following as compensatory education: a laptop computer with Wi-Fi and Software, funding up to \$6000.00 for a comprehensive psychological or neuropsychological evaluation with educational and vocational components by the private evaluator of Petitioner's choosing; 480 hours of individualized tutoring/specialized instruction from a provider of Student's choice; and a compensatory education fund in the amount of \$40,000, which Petitioner can use to pay for post-secondary education, vocational training programs or apprenticeship programs of Petitioner's choice; transportation to and from each compensatory education service. (Witness 1's testimony, Petitioner's Exhibit 24)
11. DCPS as a policy matter, maintains that it does not have responsibility for providing FAPE to individuals in BOP custody. DCPS sought guidance from the U.S. Department of Education regarding this matter. The only response DCPS has received from DOE indicates that IDEA makes no provision for states, including D.C., to provide FAPE to students incarcerated in BOP facilities. Neither DCPS, nor OSSE, provide funding specifically for special education students who are incarcerated with BOP. In the past, there was a pilot project being explored with BOP to provide these additional services; however that program was never established. There is also no official mechanism to transfer educational records to BOP for D.C. students and neither DCPS, nor OSSE, have access to BOP student records. (Witness 2's testimony, OSSE Exhibits 1, 2, 3)
12. BOP is headquartered in D.C. and has six regions throughout the country that manage facilities. Each region has an education administrator and each BOP facility has an education supervisor. The BOP facilities can develop their own programs at the local level and there are some national educational programs that are in the majority of BOP facilities. However, all programs are implemented at the local level. There are special education teachers, vocational instructors, education technicians and education specialists employed by BOP who work in the facilities. The BOP facilities have a high school equivalency program and provide testing to lead to the GED. The special education teachers provide accommodations, modifications and interventions to individuals who have learning disabilities who are in the GED and vocational programs. Most BOP trade vocational programs require a GED. Contractors, as well as volunteers, do come in to facilities occasionally to provide limited services. Contractor oversight is done by BOP. Psychology services are provided in the facilities separate from educational services. (Witness 3's testimony)
13. At the direction of the U.S. Attorney for the District of Columbia, the BOP witness who testified at the hearing was directed by counsel to not testify as to whether or what educational programs are available at FCI-A, or what the requirements are for an inmate to participate in these programs. He was not allowed to answer whether BOP provides services under IDEA. He was not allowed by his counsel to answer whether BOP maintains and requests educational records or allows LEA personnel to enter facilities to provide services. He was also not allowed to answer whether there have been discussions with D.C. regarding providing special education services to D.C. residents in BOP facilities who qualify under IDEA. (Witness 3's testimony)

CONCLUSIONS OF LAW:

The overall purpose of the IDEA is to ensure 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.” 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA “aims to ensure that every child has a meaningful opportunity to benefit from public education.

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (“FAPE”).

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS] procedural violations affected the student’s substantive rights.” *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioner held the burden of production on all issues to be adjudicated. Respondent DCPS held the burden of persuasion on issue # 1 after Petitioner established a prima facie case on that issue. Petitioner held the burden of persuasion on the other issues as to DCPS and on all issues as to OSSE. The burden of persuasion shall be met by a preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

Claims Against DCPS

ISSUE 1: Whether DCPS denied Student a FAPE by failing to provide an appropriate placement, since February 2019, in the LRE that could implement Student’s IEP, in violation of 34 C.F.R. §§ 300.114 through 300.116.

Conclusion: Petitioner established a prima facie case and Respondent DCPS did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

IDEA requires that DCPS as the LEA of right in the District of Columbia, to provide a FAPE to all residents of the ages 3 to 21 who are eligible for special education and related services including those who are incarcerated.

The evidence in this case demonstrates that Student is eligible for special education and related services under the IDEA as a student with the disability classification of ED. Currently, Student is serving a sentence of incarceration, as a D.C. Code offender, at a FCI-A, in a state outside D.C. FCI-A is a BOP facility. Student remains a D.C. resident throughout Student's incarceration and remains eligible for special education until spring 2022.⁶

There is no prison within the District of Columbia. Through the National Capital Revitalization and Self-Government Improvement Act of 1997 (hereinafter the "Revitalization Act"), the District relies on BOP to satisfy its prison needs. *See* DC Code § 24-101(a).

Prior to Student being placed at FCI-A, Student attended a DCPS school, School A, had an IEP, and was being provided special education services. Since Student's transfer to FCI-A, based on Petitioner's credible testimony, Student has not received any special education services since arriving at FCI-A in February 2019.

IDEA and its implementing regulations require that in providing a FAPE, the LEA must provide an educational placement in the least restrictive environment along the continuum of placements.⁷

⁶ In the District of Columbia, eligible residents or wards are entitled to a FAPE, including appropriate transition services, until the end of the semester in which they reach the age of 22. DC MUN. REG. tit. 5-E, § 3002.1.

⁷ **Least Restrictive Environment (LRE) § 300.114 LRE requirements.** (a) *General.* (1) Except as provided in § 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 through 300.120. (2) Each public agency must ensure that— (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (b) *Additional requirement—State funding mechanism—*(1) *General.* (i) A State funding mechanism must not result in placements that violate the requirements of paragraph (a) of this section; and (ii) A State must not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability FAPE according to the unique needs of the child, as described in the child's IEP. (2) *Assurance.* If the State does not have policies and procedures to ensure compliance with paragraph (b)(1) of this section, the State must provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that the mechanism does not result in placements that violate that paragraph.

§ 300.115 Continuum of alternative placements. (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must— (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

§ 300.116 Placements. In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) The placement decision— (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118; b) The child's placement—(1) Is determined at least annually;(2) Is based on the child's IEP; and(3) Is as close as possible to the child's home;(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or

The legal standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student’s IEP requirements).

Although DCPS maintains that it has no authority or ability to provide services and an educational placement to D.C. eligible residents who are incarcerated in a BOP facility, that assertion has effectively been debunked.

The Court in *Brown v. District of Columbia*, 324 F. Supp. 3d 154, 159-60, 162 (D.D.C. 2018) clearly held that under the plain language of the IDEA, the District of Columbia, and not the BOP, was obligated to provide the eligible special education student (Brown) a FAPE while he was in BOP custody.

There are no significantly distinguishing facts in the case at hand that cause the Hearing Officer to not to conclude, as in *Brown*, that the District of Columbia remains responsible to providing Student a FAPE while Student remains eligible pursuant to IDEA and remains incarcerated at FCI-A. DCPS, as the LEA of right, in the District of Columbia, thus remains Student’s LEA.

The evidence demonstrates that Student is likely to remain at FCI-A for at least the next three years and may remain incarcerated for the next six years. However, it is unclear at this juncture whether Student will receive any educational services at all while at FCI-A. Based upon Petitioner’s credible testimony, that is questionable. Petitioner testified that Petitioner is not yet even on the wait list for FCI-A’s GED program.

Based upon the evidence adduced, and the legal precedent set by *Brown*, the Hearing Officer must conclude that DCPS has failed to ensure Student a FAPE through an educational placement in Student’s LRE since Student has been at FCI-A. Consequently, the Hearing Officer concludes Student has been denied a FAPE by DCPS and is entitled to relief.

ISSUE 2: Whether DCPS failed to implement Student’s IEP since February 2019.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

In reviewing a failure-to-implement claim, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant" or, in other words, whether the deviations from the IEP's stated requirements were "material." *See Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir.). Sept. 11, 2007). Where an LEA's failure to implement is material (not merely de minimus), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. *See Wilson v.*

she would attend if nondisabled; (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (e) A child with a disability is not removed from education in age- appropriate regular classrooms solely because of needed modifications in the general education curriculum.

District of Columbia, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

As noted in the discussion of the issue above, the evidence demonstrates that Student has not received any special education services in over a year since Student left School A and was placed at FCI-A in February 2019. The fact that Student has been provided no special education services in such a significant period is clearly a material failure to implement Student's IEP and denial of a FAPE, for which Petitioner is due relief.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to transmit records from School A to BOP within a month of Student having left School A, in violation of 34 C.F.R. § 300.323.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

IDEA and its implementing regulations require that when a student with a disability who transfers from one LEA to another in the same state, the LEA must ensure the new LEA is provided the student's IEP, and if a student transfers to an LEA in another state, that state may either adopt the IEP from the previous LEA, or develop its own.⁸

⁸ 34 CFR § 300.323 When IEPs must be in effect.

(a) *General*. At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320.

(b) *IEP or IFSP for children aged three through five*. (1) In the case of a child with a disability aged three through five (or, at the discretion of the SEA, a two- year-old child with a disability who will turn age three during the school year), the IEP Team must consider an IFSP that contains the IFSP content (including the natural environments statement) described in section 636(d) of the Act and its implementing regulations (including an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children with IFSPs under this section who are at least three years of age), and that is developed in accordance with the IEP procedures under this part. The IFSP may serve as the IEP of the child, if using the IFSP as the IEP is—(i) Consistent with State policy; and (ii) Agreed to by the agency and the child's parents. (2) In implementing the requirements of paragraph (b)(1) of this section, the public agency must— (i) Provide to the child's parents a detailed explanation of the differences between an IFSP and an IEP; and (ii) If the parents choose an IFSP, obtain written informed consent from the parents.

(c) *Initial IEPs; provision of services*. Each public agency must ensure that— (1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and (2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. (d) *Accessibility of child's IEP to teachers and others*. Each public agency must ensure that— (1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and (2) Each teacher and provider described in paragraph

(d)(1) of this section is informed of— (i) His or her specific responsibilities related to implementing the child's IEP; and (ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

(e) *IEPs for children who transfer public agencies in the same State*. If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child

The evidence in this case demonstrates that DCPS remains Student's LEA. Therefore, pursuant to 34 C.F.R. § 300.323, there is no specific requirement that DCPS provide BOP or FCI-A Student's IEP or other educational records. In addition, there was insufficient evidence that the IEP or records were ever actually requested by BOP to be sent or requested by Petitioner. Based on the evidence adduced, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Claims Against Respondent OSSE

ISSUE 4. Whether OSSE denied Student a FAPE by failing to adhere to its supervisory obligations, in violation of 34 C.F.R. § 300.149, from February 2019.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

IDEA and its implementing regulations require that the SEA in a state to ensure that local education agencies in its state are providing FAPE including the provision of FAPE to students incarcerated as adults in prisons.⁹

There was no documentary or testimonial evidence presented by Petitioner to support Petitioner's

(including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either— (1) Adopts the child's IEP from the previous public agency; or (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.

(f) *IEPs for children who transfer from another State.* If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency— (1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324. (g) *Transmittal of records.* To facilitate the transition for a child described in paragraphs (e) and (f) of this section— (1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 CFR 99.31(a)(2); and (2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

⁹ 34 CFR § 300.149 SEA responsibility for general supervision.

(a) The SEA is responsible for ensuring— (1) That the requirements of this part are carried out; and (2) That each educational program for children with disabilities administered within the State, including each program administered by any other State or local agency (but not including elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior)— (i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and (ii) Meets the educational standards of the SEA (including the requirements of this part). (3) In carrying out this part with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 *et seq.*) are met. (b) The State must have in effect policies and procedures to ensure that it complies with the monitoring and enforcement requirements in §§ 300.600 through 300.602 and §§ 300.606 through 300.608. (c) Part B of the Act does not limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State. (d) Notwithstanding paragraph (a) of this section, the Governor (or another individual pursuant to State law) may assign to any public agency in the State the responsibility of ensuring that the requirements of Part B of the Act are met with respect to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

claim that OSSE, as the SEA, failed to adhere to its supervisory responsibilities to ensure that DCPS provided a FAPE to Student. The testimony and documentary evidence sufficiently supported two of Petitioner's claims against DCPS, but none as to OSSE.

ISSUE 5. Whether OSSE denied Student a FAPE by failing to identify a responsible LEA, in violation of 34 C.F.R. § 300.101.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Although IDEA and its implementing regulations require that the SEA in a state ensure that local education agencies in its state are providing FAPE including the provision of FAPE to students incarcerated as adults in prisons,¹⁰ there was no documentary or testimonial evidence presented by Petitioner to support Petitioner's claim that OSSE failed to identify an LEA for Student. As discussed in the issues above, DCPS remains Student's LEA while Student is incarcerated at FCI-A.

ISSUE 6. Whether OSSE denied Student a FAPE by failing to monitor and enforce the requirements of LEAs, in violation of 34 C.F.R. § 300.120.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

IDEA and its implementing regulations require that the SEA in a state ensure that local education agencies in its state are providing FAPE including the provision of FAPE to students incarcerated as adults in prisons.¹¹ There was no documentary or testimonial evidence presented by Petitioner to support Petitioner's claim that OSSE failed to monitor and enforce LEA requirements.

ISSUE 7. Whether OSSE denied Student a FAPE by failing to intervene and provide special education and related services, in violation of 34 C.F.R. § 300.227.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the

¹⁰ **34 CFR § 300.101 Free appropriate public education (FAPE).** (a) *General.* A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d). (b) *FAPE for children beginning at age 3.* (1) Each State must ensure that— (i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and (ii) An IEP or an IFSP is in effect for the child by that date, in accordance with § 300.323(b). (2) If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP or IFSP will begin. (c) *Children advancing from grade to grade.* (1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade. (2) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making eligibility determinations.

¹¹ **34 CFR § 300.120 Monitoring activities.** (a) The SEA must carry out activities to ensure that § 300.114 is implemented by each public agency. (b) If there is evidence that a public agency makes placements that are inconsistent with § 300.114, the SEA must— (1) Review the public agency's justification for its actions; and (2) Assist in planning and implementing any necessary corrective action.

evidence on this issue.

IDEA and its implementing regulations require that the SEA in a state ensure that local education agencies in its state are providing FAPE including the provision of FAPE to students incarcerated as adults in prisons.¹² There was no documentary or testimonial evidence presented by Petitioner to support Petitioner's claim that OSSE failed to intervene and provide services to Student since Student has been at FCI-A.

ISSUE 8. Whether OSSE denied Student a FAPE by failing to transmit records from School A to BOP within a month of Student having left School A, in violation of 34 C.F.R. § 300.323.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

IDEA and its implementing regulations require that when a student with a disability who transfers from one LEA to another in the same state, the LEA must ensure the new LEA is provided the student's IEP, and if a student transfers to an LEA in another state, that state may either adopt the IEP from the previous LEA, or develop its own.

There was no documentary or testimonial evidence presented by Petitioner to support Petitioner's claim against OSSE in this regard. And, as previously noted, the evidence in this case demonstrates that DCPS remains Student's LEA. Therefore, pursuant to 34 C.F.R. § 300.323, there is no specific requirement that the LEA provide BOP or FCI-A Student's IEP or other educational records. In addition, there was insufficient evidence that the IEP or records were ever actually requested by BOP to be sent or requested by Petitioner.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that Student was denied a FAPE by DCPS and has directed that DCPS, in the order below, remedy that denial.

¹² **34 CFR § 300.227 Direct services by the SEA.** (a) *General.* (1) An SEA must use the payments that would otherwise have been available to an LEA or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that LEA, or for whom that State agency is responsible, if the SEA determines that the LEA or State agency— (i) Has not provided the information needed to establish the eligibility of the LEA or State agency, or elected not to apply for its Part B allotment, under Part B of the Act; (ii) Is unable to establish and maintain programs of FAPE that meet the requirements of this part; (iii) Is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain the programs; or (iv) Has one or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of these children. (2) *SEA administrative procedures.* (i) In meeting the requirements in paragraph (a)(1) of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements. (ii) The excess cost requirements of § 300.202(b) do not apply to the SEA. (b) *Manner and location of education and services.* The SEA may provide special education and related services under paragraph (a) of this section in the manner and at the locations (including regional or State centers) as the SEA considers appropriate. The education and services must be provided in accordance with this part.

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

In the current complaint Petitioner seeks that the Hearing Officer extend Student's special education eligibility and provide a litany of items as compensatory education. Although Petitioner presented an expert witness regarding compensatory education, that witness did not draft or recommend the specific items that Petitioner requested. The Hearing Officer finds that the list of the items that Petitioner has requested as compensatory education are highly speculative as to what Student will actually need when Student is released from incarceration. Although Student's projected date of release is years from now, it is uncertain that what Petitioner is requesting now will have the same relevance to Petitioner upon release. In addition, there is no certainty that Student will remain without special education services while incarcerated, although that has been the case up until now.

Consequently, rather than grant the additional items requested other than extended eligibility, the Hearing Officer concludes that it is more appropriate to award Student funding for an evaluation in the future, coupled with the stated right herein to pursue additional compensatory education for the denials of FAPE determined in this HOD and any future denials.

ORDER: ¹³

1. Student is hereby awarded an additional three years of special education eligibility that will begin when Student is released from incarceration, which is currently targeted to be in 2026. In addition to this award being documented in this HOD, DCPS shall within ten (10) business days of the issuance of this order, provide Petitioner DCPS' own written documentation of this award of additional eligibility.
2. DCPS shall, within ten (10) business days of the issuance of this order, provide Petitioner written authorization to obtain with LEA funding a comprehensive psychological or neuropsychological evaluation with educational and vocational components at the prevailing market rate when Student is released from incarceration, for the purpose of determining appropriate compensatory education due Student for the denials of FAPE determined in this HOD.

¹³ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

3. Petitioner shall have the right to pursue, in a due process hearing, if need be, a compensatory education award based on the evaluation(s) awarded in the provision above, as the full and complete remedy for the denials of FAPE determined in this HOD.
4. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.

Hearing Officer

Date: March 26, 2020

Copies to: Counsel for Petitioner
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