

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER, an Adult Student,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

and

D.C. OFFICE OF THE STATE
SUPERINTENDENT OF EDUCATION,

Respondents.

Date Issued: December 1, 2016

Hearing Officer: Peter B. Vaden

Case No: 2016-0211

Hearing Dates: November 10 and 14, 2016

Office of Dispute Resolution
Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or STUDENT), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In his due process complaint, Petitioner alleges that he was denied a free appropriate public education (FAPE) by the failures of the D.C. Office of the State Superintendent of Education (OSSE) and District of Columbia Public Schools (DCPS) to ensure that he

¹ Personal identification information is provided in Appendix A.

continued to be provided a free appropriate public education during the period of his confinement in a Federal Bureau of Prisons (BOP) correctional facility from July 2015 to November 2016.

Student, an AGE adult, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on September 2, 2016, named DCPS, OSSE and BOP as respondents. The undersigned Hearing Officer was appointed on September 6, 2016. The Petitioner's original due process complaint included expedited discipline claims, which the Petitioner was allowed to withdraw without prejudice by order entered September 22, 2016. On September 30, 2016, I issued an order denying DCPS' and OSSE's motions to dismiss the Petitioner's complaint, except to grant OSSE's motion to dismiss claims asserted by Petitioner on behalf of similarly situated individuals. On October 4, 2016, I granted BOP's motion to be dismissed as a party respondent. On October 7, 2016, I granted DCPS' motion to dismiss claims asserted by Petitioner on behalf of similarly situated individuals.

On September 30, 2016, the Chief Hearing Officer granted OSSE's unopposed motion to continue the final decision due date as to OSSE to align with the final decision due date for DCPS. On November 14, 2016, the Chief Hearing Officer granted Petitioner's unopposed motion to extend the final decision due date in this case from November 16, 2016 to December 4, 2016.

Counsel for Petitioner and DCPS met for a resolution session on September 13, 2016 and were unable to reach an agreement. Subsequently, Petitioner and DCPS settled Student's separate claims against DCPS relating to the 2014-2015 school year before his incarceration at the BOP facility (Count I of the due process complaint). Based upon the settlement, at the beginning of the due process hearing on November

10, 2016, Petitioner withdrew, with prejudice, his claims against DCPS asserted in Count I of the complaint.

On September 23, 2016, I convened an on the record prehearing conference, from Room 2008 of the Office of Dispute Resolution, to discuss the hearing date, issues to be determined and other procedural matters. The prehearing conference was recorded and counsel participated by telephone. On October 6, 2016, I convened a second prehearing conference, by telephone, with counsel for the Petitioner, DCPS and OSSE. This prehearing conference was not on the record.

The due process hearing was held before the undersigned Impartial Hearing Officer on November 10 and 14, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner participated in person, and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL and by COMPLIANCE CASE MANAGER. Respondent OSSE was represented by OSSE' Counsel.

The Petitioner testified and called SPECIAL EDUCATION ADVOCATE as his only witness. DCPS called STUDENT PLACEMENT OFFICER as its only witness. OSSE called OSSE MANAGEMENT ANALYST as its only witness. Petitioner's Exhibits P-1, P-16 through P-22, P-36 through P-38, and P-43 through P-48 were admitted without objection. Exhibits P-2 through P-15, P-25, P-27 and P-39 were admitted over DCPS and OSSE's objections. The Respondents' objections to Exhibits P-23, P-26, P-28, P-32, P-34 and P-40 were sustained. Exhibits P-24, P-30, P-31, P-35, P-41 and P-42 were withdrawn by the Petitioner. Exhibit P-29 was withdrawn by Petitioner, but was later received, without objection, as a DCPS/OSSE exhibit. (There was no Exhibit P-33

offered.) DCPS' Exhibits DCPS R-1 through DCPS R-16 were admitted without objection. OSSE's Exhibits OSSE R-1 through OSSE R-9 were admitted without objection. Counsel for each party made an opening statement.

At the conclusion of Petitioner's case-in-chief on November 10, 2016, counsel for OSSE made an oral motion for a directed verdict that Petitioner had not shown that he was entitled to a FAPE from OSSE or DCPS from the time he was placed in custody of the BOP beginning in July 2015. After receiving argument from counsel, I took the motion under advisement. On the second day of the hearing, November 14, 2016, DCPS and OSSE put on their respective cases-in-chief. Counsel for each party made closing argument. At the request of counsel for Petitioner, the parties were granted permission to file written closing memoranda by November 17, 2016. Counsel for Petitioner and counsel for OSSE filed post-hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues remaining for determination were certified in the October 6, 2016 First Revised and Supplemental Prehearing Order:

Count II: Whether DCPS and OSSE Denied Student a FAPE (2015-2016 and 2016-2017 School Years)

A. Whether DCPS and OSSE denied Student a FAPE by failing to make available and provide special education and related services to Student during these school years while student was at the BOP facility;

B. Whether DCPS and OSSE denied Student a FAPE by failing to provide an appropriate placement in the Least Restrictive Environment that could implement Student's IEP during these school years while Student was at the BOP facility;

C. Whether DCPS and OSSE Denied Student a FAPE by failing to have an IEP in effect for the 2015-2016 and 2016-2017 school years during these school years while Student was at the BOP facility;

D. Whether DCPS and OSSE failed to implement Student's IEP since the 2015-2016 school year during these school years while Student was at the BOP facility;

E. Whether DCPS and OSSE denied Student a FAPE by failing to collect, provide, and maintain Student's education records.

Count III: Whether OSSE denied Student a FAPE during the 2015-2016 and 2016-2017 school years when Student was at the BOP facility

A. Whether OSSE denied Student a FAPE by failing to adhere to its supervisory obligations in violation of 34 C.F.R. § 300.149;

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

2. Whether OSSE denied Student a FAPE by failing to develop an interagency agreement to ensure services to Student in violation of 34 C.F.R. § 300.154;

3. 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.

B. 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.

For Relief, Petitioner requests that he be awarded extended special education eligibility until the semester in which he turns twenty-three to allow him the opportunity to complete his secondary education and compensate for the year of denial; that the hearing officer order OSSE and DCPS to provide Student a suitable educational placement, including transportation, in an education program upon his return to the District of Columbia where he can complete his high school diploma with his IEP being implemented at a placement which would provide him 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 his choice; and that the hearing officer award Student compensatory education services including, but not limited to, the following individual relief:

A laptop with a wireless hub that will allow him 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 he can earn his diploma as quickly as possible where he will also have the opportunity to receive updated transition assessments; 400 hours of tutoring and transition and vocational support services from a provider of his choice; A compensatory education transition services fund to cover the cost of additional special education programming geared to meet his critical transition needs such as vocational and workforce development opportunities. With this fund, Student would be able to use this fund to pay for applications, test prep, career exploration, and internship and apprenticeship opportunities.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE young adult, is a resident of the District of Columbia.

Testimony of Student. Student is eligible for special education and related services as a student with a Specific Learning Disability (SLD). Exhibit P-14.

2. Student recently returned to the District of Columbia after being incarcerated for some 15 months at FEDERAL CORRECTIONAL INSTITUTION (FCI) in another state. Testimony of Student.

3. Until his release from FCI in November 2016, Student had been jailed since December 15, 2014. Student was convicted in a District of Columbia court for a criminal felony violation in 2015. He was initially held at the Correctional Detention Facility at the D.C. Jail. In July 2016, following a short stay at the Northern Neck

(Virginia) Regional Jail, Student was sent to FCI to serve his D.C. court sentence.

Testimony of Student.

4. Prior to his arrest, Student was enrolled in the GRADE at CITY HIGH SCHOOL. Student's last public school Individualized Education Program (IEP) was developed at City High School on October 22, 2013. The IEP included Mathematics, Reading and Written Expression as areas of concern and provided for Student to receive 10 hours per week of Specialized Instruction in the general education setting. Exhibit P-15.

5. After being jailed in January 2015, Student was placed in the Incarcerated Youth Program (IYP) at D.C. Jail where he was provided special education services.

Testimony of Student. On April 9, 2015, the IYP IEP team met to review Student's IEP. The IYP April 9, 2015 IEP provided that Student would continue to receive 10 hours per week of Specialized Instruction in the general education setting. Exhibit P-20.

6. DCPS is the local education agency (LEA) for IYP. Exhibit P-39.

7. After Student was taken to FCI in July 2015, he was assigned to a General Education Development (GED) high school equivalency program at FCI. The GED program was led by other inmates and there was no certified teacher. Student told his intake coordinator at FCI that he had an IEP in the District. FCI did not provide Student any special education programming. Toward the end of his FCI confinement, Student was expelled from the GED program due to a disciplinary incident which resulted in his confinement in the Special Housing Unit (the Hold) for 35-45 days. After his release from the Hold, Student did not return to the GED class because his confinement was close to ending. Testimony of Student.

8. On June 13, 2016 in response to a request from BOP, OSSE forwarded Student's April 9, 2015 IYP IEP to BOP. Exhibit OSSE R-9, Testimony of OSSE Management Analyst.

9. In a November 8, 2016 settlement agreement with Student, DCPS agreed, *inter alia*, that upon Student's re-enrollment in DCPS, DCPS would conduct an educational assessment, convene an IEP team to develop an IEP and identify an appropriate placement for Student. Exhibit DCPS R-16.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case (except for exceptions not applicable to this case), shall bear the burden of production and the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence. *See D.C. Code § 38-2571.03(6).*

Analysis

Duty to Provide a FAPE at FCI

Except for Petitioner's claim that OSSE and DCPS failed to maintain and provide his education records, all of Student's claims concern alleged failures by OSSE and DCPS to ensure he received a FAPE during the period of his incarceration at FCI. At the close of Petitioner's case-in-chief, counsel for OSSE made an oral motion for a "directed verdict" against Petitioner on the grounds that Petitioner had not shown that either

OSSE or DCPS was responsible for providing Student a FAPE from the time he was placed in the custody of BOP. In federal court, a motion for a directed verdict in a trial by judge, as opposed to a trial by jury, is treated as a motion for judgment on partial findings under Federal Rule of Civil Procedure 52(c).² See *Northeast Drilling, Inc. v. Inner Space Servs., Inc.*, 243 F.3d 25, 37 (1st Cir. 2001). In its discretion, the court may wait until the close of all the evidence before ruling on a Rule 52(c) motion. See *Smith v. Haden*, 872 F. Supp. 1040, 1044 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995).

In this case, I took OSSE's motion for a directed verdict under advisement in order to defer ruling until the close of all the evidence. Following the hearing, I have had the opportunity to consider the Petitioner's and OSSE's post-hearing briefs and have conducted my own legal research. For the reasons explained herein, the testimony, documentary evidence, briefs, and oral arguments persuade me that OSSE and DCPS are entitled to judgment as a matter of law with respect to all claims asserted by Petitioner for the period of his incarceration at FCI.

Most of the relevant facts in this case are not disputed. Student is a "child with a disability" as defined by the IDEA. See 34 CFR § 300.8. At all times concerned, Student was a resident of the District of Columbia. In the first half of 2015, Student was convicted of a felony, as an adult, by a District of Columbia court and sentenced to imprisonment in FCI, a BOP facility in another state. At the time BOP took custody of Student in July 2015, Student had a current IEP, developed at the D.C. Jail Incarcerated Youth Program (IYP). The IYP IEP provided, *inter alia*, for Student to receive 10 hours per week of special education services. It is axiomatic that under these facts, if Student

² The Federal Rules of Civil Procedure do not apply to special education due process hearings. I cite Fed.R.Civ.P. Rule 52(c) by analogy.

had been incarcerated in a state or local correctional facility, under the IDEA, OSSE would have been ultimately responsible for ensuring that he was offered a FAPE. *See Dear Colleague Letter*, 64 IDELR 249 (OSEP/OSERS Dec. 5, 2014) (State, as the IDEA, Part B grantee, has ultimate responsibility for ensuring FAPE is made available to all eligible students with disabilities residing in State and local juvenile and adult correctional facilities.) I further find that Petitioner established by the preponderance of the evidence that during the entire period he was in the custody of the BOP, from July 2015 to November 2016, he received no IDEA special education or related services. Notwithstanding, I find that OSSE and DCPS are entitled to judgment as a matter of law because the IDEA does not place responsibility on state or local education agencies to provide a FAPE for individuals with disabilities incarcerated in federal correctional facilities.

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *See, e.g., Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005). “The IDEA’s basic rule is that the state must ensure that ‘[a] free appropriate public education is available to *all* children with disabilit[ies] residing in the State between the ages of 3 and 21.” *District of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 93 (D.D.C. 2014) (quoting 20 U.S.C. § 1412(a)(1)(A) (emphasis added by court.)) This requirement to provide a FAPE extends to students with disabilities incarcerated in State and local correctional facilities. *See Dear Colleague Letter, supra*.

However the “basic” rule cited in the *Wolfire* decision does not apply here. A student with a disability, convicted of a felony as an adult by a District of Columbia court and confined to a BOP facility, is outside of the gamut of IDEA rights and safeguards. In

1997, the U.S. Congress enacted the National Capital Revitalization and Self-Government Improvement Act of 1997 (the Revitalization Act) as part of the Balanced Budget Act of 1997, Public Law 105-33. That act provided, *inter alia*, that not later than October 1, 2001, any felon sentenced to incarceration under D.C. law would be “designated” by the BOP to a BOP correctional facility and would be subject to laws and regulations applicable to persons committed for violations of federal law. Section 11201(a) of the Revitalization Act provides,

Not later than October 1, 2001, any person who has been sentenced to incarceration pursuant to the District of Columbia Code . . . shall be designated by the [Federal] Bureau of Prisons to a penal or correctional facility operated or contracted for by the Bureau of Prisons, for such term of imprisonment as the court may direct. Such persons shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed.

Id. (codified at D.C. Code § 24-101(a)).

As concerns students with disabilities in federal prisons, federal law vests the control and management of federal penal and correctional institutions in the United States Attorney General. *See* 18 U.S.C. § 4001(b). The Bureau of Prisons, under the direction of the Attorney General, is charged with providing for “the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.” 18 U.S.C. § 4042(a)(3). In *Letter to Yudien*, the U.S. Department of Education’s Office of Special Education and Rehabilitative Services (OSERS) responding to a query about State of Vermont’s obligation to provide FAPE for, *inter alia*, students, placed by the BOP in Vermont’s correctional system, advised,

Individuals in the federal correctional system fall under the jurisdiction of the Federal Bureau of Prisons (BOP) within the Department of Justice. The IDEA makes no specific provision for funding educational services for individuals with disabilities through the BOP.

Letter to Yudien, supra. (August 19, 2003).

In a 2010 due process proceeding in the District of Columbia, another adult student claimed that DCPS and OSSE had denied him a FAPE when he was in the legal custody of BOP. In his November 1, 2010 Hearing Officer Determination (published at 111 LRP 19379), Independent Hearing Officer Bruce Ryan ordered, *inter alia*, that OSSE write officials at the U.S. Department of Education to request additional guidance regarding OSSE's responsibilities for services to disabled students who are convicted as adults under D.C. law and incarcerated in adult federal correctional facilities. In response to OSSE's subsequent inquiry, the Department of Education's Office of Special Education Programs (OSEP) issued *Letter to Mahaley*, 58 IDELR 20 (OSEP 2011). In that guidance, OSEP wrote,

The provisions of the IDEA apply to each State that receives Federal funds under Part B of the IDEA and all political subdivisions of the State that are involved in the education of children with disabilities, including State and local juvenile and adult correctional facilities. *See* 34 CFR §300.2. As noted in OSEP's *Letter to Yudien* dated August 19, 2003, the IDEA makes no specific provision for funding educational services for individuals with disabilities incarcerated in Federal prison. Individuals in the Federal correctional system fall under the jurisdiction of the Federal Bureau of Prisons within the Department of Justice. Therefore, absent any other applicable law, 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.

Letter to Mahaley, p.1. Although OSEP policy letters do not have the binding effect of the IDEA, they provide a nationally applicable interpretation that courts tend to find persuasive. Zirkel, Perry A., *Do OSEP Policy Letters Have Legal Weight?* 171 Educ. L. Rep. 391 (2003).

In the present case, Student was convicted of a felony in the first half of 2015 when he was an adult, sentenced to imprisonment by the District of Columbia court and

was designated by the BOP to FCS, a facility outside of the District of Columbia. As such, under the Revitalization Act, Student became subject to all laws and regulations applicable to persons committed to BOP for violations of laws of the United States. As noted above, federal law makes the Bureau of Prisons responsible for “the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.” 18 U.S.C. § 4042(a)(3). Accordingly, pursuant to the Revitalization Act and 18 U.S.C. § 4042(a)(3), BOP – not OSSE or DCPS -- was responsible for Student’s education for the period of his incarceration at FCS.

Counsel for Petitioner argues in her closing brief that when Student was in the custody of BOP, OSSE denied him a FAPE by failing to ensure that BOP provided Student with special education and related services, or failing to intervene and provide such services directly. This argument fails because under well established law, BOP is not subject to OSSE’s jurisdiction. OSSE is a District of Columbia agency. Under the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2) , the activities of federal installations, such as FCI, are shielded from direct state regulation unless Congress provides “clear and unambiguous” authorization for such regulation. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180, 108 S. Ct. 1704, 1709, 100 L. Ed. 2d 158 (1988). The Fourth Circuit Court of Appeals’ decision in *G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295 (4th Cir. 2003), is instructive on this point. In *Fort Bragg*, the parents claimed that North Carolina state FAPE standards governed the services that must be provided to their son, who attended a Department of Defense school in the state. The 4th Circuit rejected the parents’ contention, noting that “[f]or a federal installation to be subject to state laws, there must be a clear, unequivocal, federal statutory requirement that the entity be so subject.” *Fort Bragg* at 304. The Court

found that the federal statutes relating to rights of children in Department of Defense schools provided no clear indication that Congress intended a federal institution such as the Fort Bragg school to be subject to FAPE standards established by state regulators. *Id.* at 304-05.

As explained in OSEP's guidance in *Letter to Mahaley, supra*, individuals in the federal correctional system, including some students with disabilities from the District of Columbia, fall under the jurisdiction of the Federal BOP. Under federal law, the BOP is responsible for their instruction. As noted in *Letter to Yudien, supra*, the IDEA makes no specific provision for funding educational services for individuals with disabilities through the BOP. I have not found, nor has Petitioner identified, any other federal law or regulation which indicates that the Congress intended BOP facilities to be subject to D.C. special education law or the jurisdiction of OSSE. Therefore, under the Supremacy Clause, neither OSSE nor any other agency of the D.C. government was empowered to ensure that BOP provided Student with a FAPE or to intervene and provide such services directly to Student while he was incarcerated at FCS.

In summary, I conclude that neither OSSE nor DCPS had an obligation under the IDEA or District of Columbia law to provide a FAPE to Student when he was in the custody of BOP, including during the period he was incarcerated at FCS. Therefore OSSE and DCPS are entitled to judgment as a matter of law.

Education Records

As a subpart of Count II, Petitioner alleges that DCPS and OSSE denied him a FAPE by failing to collect, provide, and maintain his education records. The IDEA regulations afford parents and adult students an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational

placement of the student and the provision of a FAPE to the student. See 34 CFR § 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C.2006). There was no evidence at the due process hearing that OSSE or DCPS failed to maintain Petitioner's education records, that Petitioner sought to inspect his education records or that OSSE or DCPS failed to afford him that opportunity. At the hearing, the only evidence of a request for Student's education records concerned a request for records by BOP, submitted to OSSE on June 2, 2016. OSSE sent Student's IEP to BOP on June 13, 2016. I find that Petitioner has not met his burden of proof on this issue.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. Petitioner's claims herein against OSSE and DCPS are dismissed with prejudice;
2. OSSE's motion for a directed finding is denied as moot and
3. All relief requested by the Petitioner herein is denied.

Date: December 1, 2016

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: **Counsel of Record**
Office of Dispute Resolution
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team