District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Student,[1]	)	
Petitioner,	)	
	)	**Hearing Dates: 10/10/23, 10/19/23**
v.	)	
	)	**Case No. 2023-0031**
District of Columbia Public Schools and	)	
Office of the State Superintendent of	)	**Hearing Officer: Michael Lazan**
Education,	)	
	)	
Respondents.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the "Student") who is currently incarcerated in a federal prison. The District of Columbia does not maintain a local prison for individuals to serve sentences arising from convictions stemming from felony violations of the D.C. Criminal Code. Instead, pursuant to the National Capital Revitalization and Self-Government Improvement Act of 1997 (the "Revitalization Act"), the District of Columbia relies on the United States Bureau of Prisons ("BOP") to satisfy its prison needs. Adults who are sentenced to a term of incarceration for a felony violation of the D.C. Code are transferred to the custody of BOP and placed in a BOP facility outside the District of Columbia. There is no dispute that Petitioner is currently

[1] Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

incarcerated in the BOP as a D.C. Code offender. The Hearing Officer who was originally assigned to this case was Hearing Officer Peter Vaden.

A due process complaint ("Complaint") pursuant to the Individuals with Disabilities Education Act ("IDEA") was received by District of Columbia Public Schools ("DCPS") and Office of the State Superintendent of Education ("OSSE") on February 21, 2023. The Complaint was filed by the Student. A resolution meeting was held on April 14, 2023. The matter was not resolved. DCPS filed a response on March 3, 2023. OSSE filed a corrected response on March 13, 2023. Both Respondents contended, in brief, that they had no authority to provide a student with a Free Appropriate Public Education ("FAPE") when that student resides in a BOP prison.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations ("DCMR"), Title 5-A, Chapter 30.

III. Procedural History

A prehearing conference took place by telephone on March 16, 2023, before Hearing Officer Vaden. Participating in the prehearing conference were Petitioner's representatives, Attorney A, Esq., Attorney B, Esq., Attorney C, Esq., and Attorney E, Esq.; DCPS's representative, Attorney D, Esq.; and OSSE's representatives, Attorney H, Esq., Attorney I, Esq. and Attorney F, Esq. On March 22, 2023, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the

case. In this prehearing order, Hearing Officer Vaden summarily dismissed claims that related to similarly situated students.

The hearing on this matter was originally scheduled for June 2023. The case was assigned to this Hearing Officer on May 18, 2023, for reasons of judicial economy. The parties and this Hearing Officer met in May 2023 to synchronize the hearing dates with the hearing dates for a related case, 2023-0032, involving the same counsel. New hearing dates were set for July 25, 2023, July 26, 2023, and July 27, 2023. The Hearing Officer Determination ("HOD") due date was extended to September 30, 2023.

The parties and this Hearing Officer conducted additional prehearing conferences, including on June 28, 2023, July 7, 2023, July 21, 2023, and September 7, 2023, to address a variety of issues related to: 1) the need for and availability of federal witnesses; 2) the need for Notices to Appear; and 3) the coordination of this case with Case 2023-0032, which was filed by the same counsel on the same issues.

On August 31, 2023, OSSE moved to dismiss the Complaint. On September 14, 2023, Petitioner cross-moved for summary judgment and opposed the motion to dismiss. On October 2, 2023, this Hearing Officer issued an order denying both motions.

The parties then agreed to change the hearing dates due to persistent federal witness availability issues. The hearings were rescheduled for October 10, 2023, and October 19, 2023. The parties selected the date of November 13, 2023, as the new HOD due date for both cases. A corresponding order was issued on September 28, 2023.

The matter proceeded to trial on October 10, 2023, and October 19, 2023. After the hearings in both cases concluded, all three parties requested an opportunity to brief the issues, given the complexity of the legal issues and the possible importance of these

cases for future litigants and students. The parties also wanted an opportunity to file briefs after receiving the written transcripts of the hearings. The parties asked for an extension to December 1, 2023, to file their briefs and moved to extend the HOD deadline to December 15, 2023. This request was memorialized by an order dated November 11, 2023.

The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. After testimony and evidence, the parties presented closing briefs on December 4, 2023. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-22, without objection. DCPS and OSSE submitted evidence jointly as exhibits R-1 through R-35. Objections to exhibits R-1 through R-5, R-9, R-10, R-12, R-14 through R-16, R-21 through R-23, and R-25 through R-27 were overruled. Exhibits R-1 through R-35 were admitted. Petitioner presented as witnesses, in the following order: Petitioner; Witness A, deputy chief of specialized instruction for DCPS; Witness B, an educational consultant (expert in the harm suffered by students for denials and deprivations of FAPE); Witness C, director of special education at OSSE, Witness D, a professor, and Witness E, a resolution specialist.

IV. Issues

As identified in the Prehearing Order and in the Complaint, the issues to be determined in this case are as follows:

1. Whether DCPS has denied the Student a FAPE by not ensuring implementation of special education or related services in accordance with his/her Individualized Education Program ("IEP") during the entirety of the time s/he was incarcerated within the Bureau of Prisons (BOP) from on or about September 23, 2021, through the present;

2. Whether DCPS has denied the Student a FAPE by failing to provide prior written notice and hold annual IEP meetings to enable the Student's IEP team

to develop an IEP reasonably calculated to enable the Student to make appropriate progress;

3. Whether OSSE has denied the Student a FAPE by failing to ensure that a local educational agency ("LEA") provided special education and related services to the Student during his/her period of incarceration at BOP, in compliance with OSSE's supervisory and monitoring obligations under the IDEA, and by failing to take any other necessary steps such as intervening to provide FAPE in light of an absent and unwilling LEA to ensure that the Student receives a FAPE during his/her incarceration.

As relief, in the prehearing order, Petitioner requested that the hearing officer: 1) declare that Respondents denied the Student a FAPE and failed to comply with the IDEA's substantive requirements in violation of federal and local law; 2) extend the Student's IDEA eligibility until the end of the semester in which the Student turns twenty-five years of age, to allow him/her the opportunity to complete a secondary education; 3) order Respondents to provide special education and related services in conformity with the Student's IEP; 4) order Respondents to authorize comprehensive independent education evaluations of the Student, including but not limited to vocational evaluations, psychoeducational evaluations, speech-language evaluations, assistive technology evaluations, occupational therapy evaluations, and neuropsychological evaluations; 5) order Respondents to convene an IEP meeting to review evaluations and update the Student's IEP; 6) order that the Student be returned to the District of Columbia to allow him/her to enroll in the high school diploma program at the District of Columbia Department of Corrections; 7) order that Respondents enter into an agreement with the BOP to place the Student at the District of Columbia Department of Corrections through the period of IDEA eligibility, including any extended eligibility that this Hearing Officer or a court may order, and allow him/her to enroll in the high school diploma program at the District of Columbia Department of Corrections through the period of IDEA

eligibility; 8) award an educational placement, including transportation; 9) award compensatory education services including, but not limited to, tuition and transportation for an educational program of Petitioner's choice and tutoring, counseling, and transition/vocational support services from a provider of Petitioner's choice; 10) funding for college preparation remediation courses and tuition; 11) funding to cover the cost of additional special education programming geared to meet the Student's transition needs, such as vocational and workforce development opportunities; 12) funding to pay for associated educational costs such as, but not limited to, applications, test preparation, career exploration, and internship and apprenticeship opportunities; and 13) a laptop computer with a wireless hub that will allow the Student to complete homework and online courses and search for employment opportunities.

V. Findings of Fact

1. At the time the Complaint in this matter was filed, the Student was eligible for special education and related services under the IDEA as a student with an "Other Health Impairment," according to his/her most recent evaluations and IEP. P-2.

2. The Student tends to engage in poor decision-making, including leaving the home. As many as fifteen-to-twenty missing persons reports have been filed in regard to the Student, who meets the diagnostic criteria for Persistent Depressive Disorder (Dysthymia), Early Onset, Moderate; Specific Learning Disorder (moderate); and Borderline Intellectual Functioning. The Student has also had issues in such areas as physical aggression, trust, defiance, and substance abuse. P-8-14-15.

3. In or about the 2017-2018 school year, the Student resided in the District of Columbia. Testimony of Petitioner. The Student attended Public Charter School A

during this time. The Student enrolled in School B on August 24, 2020. R-1. During the 2020-2021 school year, the Student attended School B. The Student's grades during this school year included four "F" grades in term one and one "F" grade in term two. The change in grades had to do with the Student not engaging and completing work in term one, but beginning to engage and complete some work in term two. P-6.

4. The Student was evaluated through a DCPS report issued on March 25, 2021. The evaluation was a review of an independent education evaluation conducted in 2017, when the Student's Full Scale IQ was scored in the very low range. However, the evaluator reported that the Student's academic skills, academic applications, and brief achievement scores were all in the average range. The evaluator stated that the Student had elevated attentional issues that seemed to make him/her unable to produce work. There were also issues because the Student had been placed in foster or group homes due to being a chronic runaway. The evaluator noted that the Student had been exposed to violence and struggled to have the motivation or energy to participate in school and turn in assignments. P-6.

5. School B developed an IEP for the Student on April 20, 2021, and amended it on June 3, 2021. The IEP of June 3, 2021, required that the Student receive fifteen hours per week of specialized instruction in a general education setting and 120 minutes per week of behavioral support services. Both IEPs indicated that the Student's English teacher felt that s/he was very sad and totally unmotivated. The Student was inconsistent in performance and easily distracted. P-2; P-3.

6. The Student has been incarcerated as a D.C. Code offender since September 2021, serving a sentence in BOP facilities "FCI #1" and "FCI #2." The

Student was first placed at FCI #1 for approximately eleven months. The Student is currently incarcerated at FCI #2 and has been there for approximately fourteen months. Testimony of Petitioner.

7. The Student has not been offered, provided, or enrolled in any high school program since s/he entered the BOP in September 2021. The Student has not received any special education and related services in accordance with the IDEA since s/he entered the BOP in or about September 2021. Testimony of Petitioner.

8. On July 19, 2019, after the ruling of the court in Brown v. District of Columbia, No. 1:17-CV-00348 (RDM) (GMH), 2019 WL 3423208 (D.D.C. July 8, 2019), the District of Columbia reached out to the BOP to engage in conversations about providing IDEA services to offenders in its custody. R-6. On July 25, 2019, the BOP responded, inviting the District of Columbia to participate in a teleconference with BOP representatives. R-7. On behalf of DCPS and OSSE, staff from the District of Columbia's Office of the Attorney General ("OAG") engaged in a conversation with the BOP about the provision of FAPE to District of Columbia offenders who were housed in the BOP. Testimony of Witness C. In an email dated September 13, 2019, the BOP stated that it would not relocate offenders in its custody to allow them to receive IDEA services, as that would be "contrary to federal law," which requires consideration of many factors in inmate placement. BOP also stated that it would not permit outside contractors to access its facilities. R-8.

9. On February 20, 2020, Respondents were parties to a due process hearing for a D.C. Code offender in BOP custody. In that case, the BOP's education

administrator refused to answer any specific questions about the offender's access to diploma programs and special education services. R-10.

10. FCI #2, where the Student was transferred in July 2022, and where s/he is currently incarcerated, has no high school education or special education programs. Testimony of Petitioner.

11. On April 6, 2023, Respondents sent a so-called "Touhy Request" to the BOP, seeking testimony from its then-current education administrator. R-14. On May 19, 2023, the BOP responded, denying Respondents' request on grounds including 1) sovereign immunity; 2) the witness would be improperly asked for legal opinions; 3) the witness would be improperly asked for confidential information about inmates; and 4) the witness would be improperly asked to testify as an expert. The BOP referred Respondents to the BOP website. R-28; R-29; R-30; R-31; R-32; R-33; Testimony of Witness C.

12. On May 23, 2023, Respondents sent a Touhy Request and a Notice to Appear to the Office of Special Education and Rehabilitative Services ("OSERS") of the U.S. Department of Education ("Department of Education"), seeking testimony about its position regarding the District's obligation to provide a FAPE to offenders in BOP custody. OSERS declined to make a witness available, responding that its position that offenders in BOP custody are not entitled to a FAPE under the IDEA had not changed. OSERS referred the District to its previous two letters addressing the issue. R-21.

13. On June 27, 2023, Respondents sent a letter to the BOP, inquiring about the District of Columbia's ability to provide a FAPE to individuals in BOP custody who were entitled to IDEA services. R-17. On August 21, 2023, the BOP responded to the

District's inquiry in a letter, stating that the BOP alone is responsible for educating offenders in its custody and that the BOP has its own programs to provide education services, including to students with disabilities. The BOP stated that its policies require each institution to maintain an "education department" responsible for providing adults in custody with literacy classes and other educational programs, as well as a special learning needs ("SLN") teacher who ensures that SLN students receive appropriate support and assistance in the classroom. R-24.

14. A DCPS dispute resolution specialist reached out to a BOP facility via email and phone on six separate occasions between March 23, 2023, and July 5, 2023, to inquire about services available to the Student and opportunities to provide him/her with supports, as well as to request any updated data or testing on the Student that was completed while s/he was in BOP custody. The dispute resolution specialist received no response. R-17; Testimony of Witness E. This same dispute resolution specialist then searched the internet, including the BOP website, but could not find any contact information for the Student's case manager or the staff responsible for education programs in the BOP facility. R-17; Testimony of Witness E.

15. The Student has completed approximately 19.5 credits toward the required 24.0 Carnegie Unit credits needed to earn his/her DCPS high school diploma. R-11.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: "Where there is a dispute about the appropriateness of the child's individual educational program or

placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement," provided that "the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency." D.C. Code Sect. 38-2571.03 (6)(A)(i). Accordingly, on all three issues, the burden of persuasion is on Petitioner.

1. Whether DCPS has denied the Student a FAPE by not ensuring implementation of special education or related services in accordance with his/her IEP during the entirety of the time s/he was incarcerated within the Bureau of Prisons (BOP) from on or about September 23, 2021, through the present;

2. Whether DCPS has denied the Student a FAPE by failing to provide prior written notice and hold annual IEP meetings to enable the Student's IEP team to develop an IEP reasonably calculated to enable the Student to make appropriate progress;

3. Whether OSSE has denied the Student a FAPE by failing to ensure that an LEA provided special education and related services to the Student during his/her period of incarceration at BOP, in compliance with OSSE's supervisory and monitoring obligations under the IDEA, and by failing to take any other necessary steps such as intervening to provide FAPE in light of an absent and unwilling LEA to ensure that the Student receives a FAPE during his/her incarceration.

Hearing Officer Vaden's prehearing order identified three separate FAPE issues in this case. But as in Case 2023-0032, all three issues involve the same basic question: Does the Student have a legal right to special education services while s/he is housed in federal prison? As a result, all three issues are addressed in this section.

The answer to the question involves whether this Hearing Officer should adopt the legal view of the Department of Education, as expressed in its opinion letters that state, effectively, that the state educational agency ("SEA") and the LEA have no obligation to provide special education services pursuant to the IDEA if a student is housed in a federal prison. Narrowed further, the issue is whether this Hearing Officer

should be persuaded by a pair of administrative determinations and related rulings by the Department of Education's Office of Special Education Programs ("OSEP") and OSERS, or by a series of federal court decisions that call into question the wisdom of deferring to such administrative determinations, and indeed finds that those rulings were wrongly decided.

In Brown v. District of Columbia, a federal court judge and federal magistrate judge issued four separate opinions, all of which underscored the defects in the OSEP letters and explained why students in federal prisons should have access to special education in the District of Columbia. The four opinions are: "Brown I," the initial report and recommendations of U.S. Magistrate G. Michael Harvey [Brown v. District of Columbia, Civil Action No. 1:17-cv-00348, 2018 WL 774902 (D.D.C. Jan. 24, 2018)]; "Brown II," U.S. Judge Randolph Moss's opinion adopting, in part, and modifying, in part, Magistrate Harvey's report and recommendations [Brown v. District of Columbia, 324 F. Supp. 3d 154 (D.D.C. 2018)]; "Brown III," Judge Moss's opinion denying the District of Columbia's motion for reconsideration [Brown v. District of Columbia, Civil Action No. 17-348, 2018 WL 774902, (D.D.C. Apr. 30, 2019)]; and "Brown IV," the magistrate judge's report and recommendation to deny the District's motion for summary judgment and grant Brown's cross-motion for summary judgment on the liability of the District for failure to provide a FAPE [Brown v. District of Columbia, No. 1:17-CV-00348 (RDM) (GMH), 2019 WL 3423208, at *1 (D.D.C. July 8, 2019)].[2]

[2] OSSE argued that the findings in Brown are dicta, but did not explain more. This Hearing Officer fails to see how Brown can be considered dicta on the issue of the availability of special education services for students with disabilities who are in federal prisons. While there may be more than one reason for the court's rulings, where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*. Woods v. Interstate Realty Co., 337 U.S. 535, 537, 69 S. Ct. 1235, 1237, 93 L. Ed. 1524

The first ruling, Magistrate Harvey's extensive report and recommendation, based its analysis on the principles of deference described in Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), Skidmore v. Swift, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984). Deference to administrative determinations, whether characterized as "Skidmore deference" or "Chevron deference," examine the thoroughness of the rulings, the validity of the reasoning, and the consistency of the reasoning with earlier and later pronouncements." Skidmore, 323 U.S. at 140, 65 S.Ct. 161. If an interpretation contradicts the plain text of the statute, it is afforded no deference. Chevron, 467 U.S. 837, 842–43 (if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress). Brown II, 324 F. Supp. 3d at 161–62.

The policies of the Department of Education are at issue here. They are best explained in two "OSEP letters:" Letter to Yudien, 39 IDELR 270 (2003), and Letter to Mahaley 58 IDELR 20 (OSEP 2011). In Letter to Yudien, the Vermont Department of Education noted that the State of Vermont's correctional system housed prisoners from other states and from the BOP. Vermont asked OSEP what its obligations were to those inmates. OSEP recognized that, "when a youth with disabilities is referred or placed by the State into an out-of-State facility, the referring State is generally responsible for ensuring that FAPE is available to the youth during the course of the youth's placement

(1949). Judge Moss's ruling in regard to the availability of IDEA services to incarcerated students is at the heart of this case and is the basis for the finding that Brown was denied a FAPE.

in that facility." Regarding BOP prisoners housed in Vermont facilities, OSEP stated that, "Individuals in the federal correctional system fall under the jurisdiction of [BOP] within the Department of Justice … The IDEA makes no specific provision for funding educational services for individuals with disabilities through [BOP]." OSEP directed further inquiries to the BOP.

In Letter to Mahaley, the District of Columbia itself asked OSEP if it had an obligation to provide a FAPE to students with disabilities convicted as adults under District of Columbia law and incarcerated in federal prison. OSEP again answered that, as stated in Letter to Yudien, the statute does not provide funds for the BOP to provide a FAPE to children with disabilities. 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."

To Magistrate Harvey, these two letters were incorrectly decided. He found that OSEP's interpretation of the statutes was "simply untenable." Brown I, 2018 WL 774902 at *7. Magistrate Harvey found that Letter to Yudien's logic was faulty because the fact that the BOP does not receive IDEA funds to educate children with disabilities in its custody says nothing about the responsibilities of a state that receives funds to provide FAPE for its residents who require them, even if they are in BOP custody. Magistrate Harvey noted that states are regularly required to provide FAPE to students being educated in schools under the jurisdiction of a different sovereign, and he found that it would be inappropriate to defer to the Department of Education's interpretation.

It is noted that Letter to Yudien and Letter to Mahaley are not completely consistent with other Department of Education correspondence that suggests it is

important to expand the rights of incarcerated youth. The Department of Education has stated that, "incarcerated youth, many of whom are students with disabilities, are among those in greatest need of academic, emotional, and behavioral supports, [and] they often lack access to high-quality educational services." It has also stated that educational and juvenile justice agencies must ensure that youth who are already confined receive the services they need to meet their educational goals, obtain employment, and avoid recidivism. The Department of Education has further stated that, to strengthen educational services for youth in confinement, it has engaged with communities and practitioners to develop a set of overarching characteristics for providing high-quality educational services for youth in long-term secure care facilities. Letter to Chief State School Officers and State Attorneys General, 114 LRP 26961 (U.S. Department of Education, Department of Justice, June 9, 2014).

After Magistrate Harvey issued his report and recommendation and objections were filed, Judge Moss agreed with Magistrate Harvey, pointing out that it would be inappropriate to defer to the OSEP opinion letters because IDEA's mandate applies whether an eligible student with a disability is incarcerated or not, as is stated in the text of the statute. Addressing the same arguments as those made here by DCPS and OSSE, Judge Moss wrote that:

> (T)he District has failed to explain why Plaintiff's placement in the BOP extinguishes its obligations under the IDEA when the statute expressly applies to individuals in "adult or juvenile *Federal*, State, or local correctional institutions." 20 U.S.C. § 1415(m)(1)(D) [emphasis in original]. The fact that the DOE has, in a notice of proposed rulemaking, stated that it "would not include the reference, from the statute, to Federal correctional institutions" because, in its view, "[s]tates do not have an obligation to provide special education and related services under the Act to individuals in Federal facilities," 70 Fed. Reg. 35,782, 35,810 (June 21, 2005), carries little force.

Brown II, 324 F. Supp. 3d 154, 161–62 (D.D.C. 2018); see also Brown III, 2019 WL 1924245 at *4. No appeal was filed and, indeed, the court's decisions were apparently convincing enough to have, at least initially, convinced both OSSE and DCPS of their worth. DCPS and OSSE have since made best efforts to try to convince the BOP to open its doors to District of Columbia students who are incarcerated there.

In this case, however, DCPS and OSSE argued that they have no duty to otherwise eligible students with disabilities in the BOP, because it is impossible for the BOP to provide special education services to students. Respondents argued that no state or local government agency, including Respondents, can force the federal government to open the BOP prison doors to the Student. OSSE contended that the IDEA is a "financial assistance grant program to support state and local government agencies providing public education," not a statute to force state and local government agencies to monitor the federal government's provision of education and fund relief for any alleged deficiencies of their education programs for BOP inmates. Respondents argued that BOP education programs are governed by federal laws, underscoring that, in 1997, Congress enacted the Revitalization Act, which, among other things, closed the District's adult correctional facility and transferred responsibility for the custody, care, subsistence, education, treatment, and training of felons sentenced pursuant to the D.C. Official Code from the District of Columbia to the BOP. D.C. Code § 24-101(b).

An "impossibility defense" does not apply to federal grant programs like the IDEA. Brown IV, No. 17-cv-348, 2019 WL 3423208, at *16; Schiff v. District of Columbia, No. 18-CV-1382 (KBJ), 2019 WL 5683903, at *7 (D.D.C. Nov. 1, 2019). There is no dispute that the Revitalization Act eliminated the District of Columbia's

access to D.C. Code offenders in federal custody, including the District's ability to monitor, control, and provide education programming for students, including those entitled to IDEA services. But there also should be no dispute that the Revitalization Act does not override the District's obligations under the IDEA. Brown II, 324 F. Supp. 3d at 161. A review of the text of the Revitalization Act reveals that it does not mention the IDEA at all, and there is nothing in its legislative history, or anywhere else, to suggest that Congress intended anything in the Revitalization Act to limit a school district's obligations under the IDEA in the Revitalization Act. Id.

Judge Moss characterized this "impossibility" defense as hollow, in part because there was no evidence that the District tried to cooperate with the BOP to provide a FAPE to D.C. Code felons incarcerated in federal prison. Brown III, 2019 WL 1924245, at *4. That is not quite the case here, where there is evidence that the BOP has simply refused to allow OSSE or DCPS to access its jails. However, the BOP's at-best disinterest in the rights of children with special needs in the District of Columbia should not and does not provide any legal basis for limiting the rights that Congress established for these children with disabilities. Even after the passage of the Revitalization Act, under the IDEA and District of Columbia law, DCPS and OSSE have a duty to ensure that all students with disabilities who are residents of the District of Columbia, including adult students, have access to a FAPE, however difficult or inconvenient that may be, and whether or not the agencies can access a prison. U.S.C. Sect. 1412(a)(1) (2023); 34 C.F.R. Sect. 300.101; 5-A D.C.M.R. Sect. 3001.1. As pointed out by Magistrate Harvey, the legal duty to provide students with a FAPE does not require the District to literally send personnel and supplies to federal prisons to fulfill its obligations. Brown I, 2018 WL 774902 at *14.

DCPS called the court's decision in Brown an "absurd interpretation of the statute," and OSSE argued that Brown is entirely flawed, logically, and rests on an errant reference to "federal" prisons in a provision of 20 U.S.C. Section 1415(m) regarding the permissive action states may take concerning transfer of parental rights. That provision reads as follows:

> **Transfer of parental rights at age of majority**
>
> (1) In general
>
> A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)
>
> (A) the agency shall provide any notice required by this section to both the individual and the parents;
>
> (B) all other rights accorded to parents under this subchapter transfer to the child;
>
> (C) the agency shall notify the individual and the parents of the transfer of rights; and
>
> (D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

Since this section contains a clear reference to the IDEA rights of children who are incarcerated in federal prisons, it can be read to suggest that Congress intended children in federal prisons to benefit from IDEA rights. OSSE argued that this is the only time the word "federal" is used when the IDEA refers to correctional institutions, and that the word "federal" is "misplaced." But OSSE was unable to point to any language in the IDEA that specifically contradicts the court's hypothesis in Brown, and OSSE failed to explain what the subject language could possibly mean other than what it says, which is

that, when a student in federal prison turns eighteen years of age, parents can transfer their IDEA rights to the student, even if he or she is in federal prison.

As the court put it in Brown I, with the IDEA, Congress established a national framework for the provision of special education to eligible students for the purpose of assuring that "all" handicapped children have available to them a FAPE. The law's wording continually refers to the need to provide for all children, assure all handicapped children the right to a FAPE, and ensure that "all" children residing in the state who are handicapped have access to it. Brown I, 2018 WL 774902 at *7; 20 U.S.C. Sect. 1412(1), (2)(C); 5-A D.C.M.R. Sect. 3002.1(a).

DCPS argued that it cannot be liable because it was not the LEA responsible for providing services to the Student under the IDEA. But the Student was enrolled in a DCPS school just prior being transferred to the D.C. jail and then to BOP custody. DCPS also argued that it was not notified when the Student was transferred to BOP custody, nor has it been notified about Petitioner's whereabouts during the period that s/he has been in custody. DCPS pointed out that Petitioner did not seek to enroll in DCPS or request an IEP from the agency, and that if DCPS had been notified, Petitioner would have been referred to the agency's Private and Religious Office ("PRO") and required to complete the enrollment and residency verification process before DCPS could develop an IEP.

However, under the IDEA and District of Columbia law, DCPS is the LEA responsible for making FAPE available to all eligible District residents if they are not enrolled in another LEA. 5-A D.C.M.R. Sect. 3001.2. Accordingly, in A.D. v. Creative Minds Int'l PCS, Civil Action No. 18-2430 CRC/DAR at *22-23, 2020 WL 12654618 (D.D.C. August 14, 2020), the court found that DCPS was in fact the default LEA for a

student who was not enrolled in DCPS but had withdrawn from a public charter school, which is also the reasoning of this Hearing Officer.

DCPS also argued that it is only required to have policies and procedures to ensure a FAPE "to all children with disabilities residing" in the District. 20 U.S.C. Sect. 1412(a). Since the Student does not literally reside in the District of Columbia because of his/her prison sentence, DCPS argued that the Student is not a resident of the District of Columbia for IDEA purposes. DCPS argued that there must be a physical presence in the District of Columbia pursuant to 5-A D.C.M.R. Sect. 5001.5(a) and the OSSE Enrollment and Residency Handbook.

However, in Brown, the court made it clear that Respondents' obligation to make FAPE available to an incarcerated student under the IDEA does not hinge on the physical presence of the student. The court flatly stated that "a person's residency does not change by virtue of being incarcerated in another state." Brown I, 2018 WL 774902 at *12. Nor does the obligation to provide FAPE hinge on whether a student is enrolled in a District public school. D.S. v. District of Columbia, 699 F. Supp. 2d 229, 235 (D.D.C. 2010); District of Columbia v. Vinyard, 971 F. Supp. 2d 103, 113 (D.D.C. 2013) (residency is the basis for the obligation to provide FAPE). When students are placed in private schools located in other states, outside the District of Columbia, their enrollment does not relieve DCPS from having to fulfill its responsibilities to make FAPE available. District of Columbia v. Oliver, No. CV 13-00215 BAH/DAR, 2014 WL 686860, at *4 (D.D.C. Feb. 21, 2014); see also T.H. as next friend T.B. v. DeKalb Cnty. Sch. Dist., 564 F. Supp. 3d 1349, 1353 (N.D. Ga. 2021) (the school district's inability to access detainees made a sheriff liable for IDEA violations, even though the sheriff did not have access to

incarcerated students with disabilities). It is noted that the IEP team of a child with a disability who is convicted as an adult under state law and incarcerated in an adult prison may modify the child's IEP or placement, without respect to the least restrictive environment, if the state has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated. 34 C.F.R. Sect. 300.324(d)(2).

OSSE also suggested throughout its presentation that it should have no liability in this case since it does not provide direct educational services to students in the District of Columbia. However, in Brown, both DCPS and OSSE were named as respondents, and indeed the court referred to both respondents collectively as "the District." Moreover, when an LEA that is responsible for the provision of FAPE, is unable or unwilling to establish and maintain FAPE programs, the provision of FAPE to a student becomes the duty of the SEA. 20 U.S.C. Sect. 1413(g)(1); 34 C.F.R. Sect. 300.227(a). Letter to Kane, 65 IDELR 303 (OSEP April 13, 2015) (once determined that the LEA could not establish or maintain programs of FAPE for the children identified in the regulation, the SEA would be required to take the necessary actions to ensure compliance); Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B*)*, 61 IDELR 232 (OSEP 2013) (hearing officers have authority to determine the sufficiency of all due process complaints filed and to determine the jurisdiction of issues raised in due process complaints); Letter to Anonymous, 69 IDELR 189 (OSEP 2017) (hearing officers have discretion to allow a parent to allege claims against the SEA as a respondent.).

Petitioner has shown that s/he is entitled to special education services despite being located in the BOP. S/he therefore prevails on all three issues because both DCPS

and OSSE denied the Student a FAPE by failing to provide the Student with any special education services during the two years prior to the filing of the Complaint.

RELIEF

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate."

Petitioner characterized his/her claims for relief as follows in his/her brief: 1) extended eligibility for one year after the date upon which the Student is able to enroll in a high school diploma program that will allow him/her sufficient time to complete the 4.5 credits outstanding to earn his/her high school diploma, and 2) compensatory education services for the Student to include 100-125 hours of services to target reading, math, and written expression; 25-30 hours of transition services for post-secondary education and training, employment, and independent living, to be used for anything from completing an employment assessment, receiving training around developing a resume, attending a training program in an area of interest, or research and applying for positions; and 12-15 hours of services focused on emotional, social, and behavioral development.

Additionally, as reframed in Petitioner's brief, Petitioner seeks as relief: 1) a declaration that Respondents denied the Student a FAPE and failed to comply with the IDEA's substantive requirements in violation of federal and local law; 2) an order

directing Respondents to authorize comprehensive independent education evaluations for the Student by evaluators of the Student's choice, to include a comprehensive psychological evaluation with educational testing and a comprehensive vocational evaluation; 3) an order directing Respondents to convene an IEP meeting to review the evaluations and update the Student's IEP; 4) an order directing Respondents to provide special education and related services in conformity with the Student's IEP; 5) an order directing that the Student be returned to the District of Columbia to allow him/her to enroll in the high school diploma program at the District of Columbia Department of Corrections; 6) an order extending the Student's IDEA eligibility for two years after the day that s/he can enroll in a special education program that allows him/her an opportunity to complete his/her secondary education; and 7) an order directing Respondents to enter into an agreement with the BOP to place the Student at the District of Columbia Department of Corrections through the period of IDEA eligibility, including any extended eligibility that this Hearing Officer may order, and allow him/her to enroll in the high school diploma program at the District of Columbia Department of Corrections through the period of IDEA eligibility.

Much of the requested relief is appropriate, given the finding that DCPS and OSSE have a legal obligation to provide special education services to students in the BOP. This Hearing Officer was not persuaded by Respondents' objection to Petitioner's reasonable request for evaluations. This Hearing Officer agrees with Petitioner that comprehensive evaluations are necessary for this Student to be able to better benefit from compensatory education, and such evaluations will be so ordered. However, of course, if the BOP flatly refuses to give OSSE or DCPS access to the Student, then all the LEA or

SEA can do is document the refusal and wait until the Student is available for the process to proceed.

In regard to the request for compensatory education services, hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The 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. Id., 401 F.3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative, fact-intensive" inquiry used to craft an award "tailored to the unique needs of the disabled student"). A petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). The Brown court, in Brown I, specifically suggested considering this sort of approach in a case involving an incarcerated student in federal prison. Brown I, 2018 WL 774902 @ *14.

DCPS objected to the proposed compensatory education award, contending that Petitioner's expert failed to identify the specific harm, that the plan was not based on sufficiently contemporary data or evidence, that the plan failed to explain exactly how the proposed number of hours of counseling, tutoring, and transition services related to the alleged denial of FAPE, and that the plan's author was not qualified to offer it. But as DCPS itself argued throughout the hearing on other points, there is little data available to assess the Student, who remains in the BOP, inaccessible to evaluation. Witness B, who has years of experience in proposing compensatory education awards

in this forum, presented a reasonable compensatory education plan in support of his findings, which, while not perfect, provides for a relatively modest amount of relief for a two-year deprivation of FAPE. Witness B, who came across as professional, reviewed the Student's records, interviewed him/her, and calculated the specific duration of the deprivation and total services missed. Witness B reasonably focused his plan on preparing the Student for a General Equivalency Diploma ("GED"), suggesting that the Student would need a lot of help to obtain the GED that s/he seeks.

The main question in regard to relief relates to whether or not the Student should be granted extended eligibility after s/he is released from prison. However, the record is not sufficiently clear on when the Student might be released, and Respondents expressed legitimate concerns about the appropriateness of placing much older students in high school classrooms. This Hearing Officer has found no authority where a court or a hearing officer has ordered anything close to this kind of extended eligibility for a student after a finding of FAPE denial, much less in a case involving an incarcerated student. This Hearing Officer must therefore decline the request for extended eligibility, underscoring that extended eligibility is not discussed as a potential form of relief in any of the Brown decisions, though the court appeared to go out of its way to think of a solution for this kind of student.

Nor was this Hearing Officer persuaded by Petitioner's suggestion to issue an order that the Student be released from federal prison, or issue an order directing Respondents to enter into an agreement with the BOP to place the Student at the District of Columbia Department of Corrections through the period of IDEA eligibility.

Petitioner provided no authority to suggest that it is prudent for a special education hearing officer to address public safety or municipal contractual concerns in such a way.

VII. Order

As a result of the foregoing:

1. After the Student is released from prison, or if the BOP allows Respondents access to its facilities, Respondents shall arrange for a comprehensive evaluation of the Student, by a provider or providers of the Student's choice, at a usual and customary rate in the community, to include a comprehensive psychological evaluation with educational testing and a comprehensive vocational evaluation;

2. Respondents shall pay for 125 hours of compensatory tutoring for the Student in reading, math, and writing, to be provided by a certified special education teacher at a usual and customary rate in the community;

3. Respondents shall pay for thirty hours of transition services for the Student, to be provided by a qualified professional at a usual and customary rate in the community;

4. Respondents shall pay for twenty hours of behavioral support services for the Student, to be provided by a qualified professional at a usual and customary rate in the community;

5. Petitioner's other requests for relief are denied.

Dated: December 15, 2023

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.

Attorney B, Esq.
Attorney C, Esq.
Attorney D, Esq.
Attorney E, Esq.
Attorney F, Esq.
Attorney G, Esq.
Attorney H, Esq.
Attorney I, Esq.

VIII. Notice of Appeal Rights

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 days from the date of the Hearing Officer Determination in accordance with 20 USC Sect. 1415(i).

Dated: December 15, 2023

Michael Lazan
Impartial Hearing Officer