

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CHARLES H. AND ISRAEL F., on behalf
of themselves and all others similarly
situated,

Plaintiffs,

v.

THE DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Civil Action No. 1:21-cv-00997 (CJN)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION CONCERNING
EDUCATION FOR STUDENTS WITH DISABILITIES
AT THE DC JAIL COMPLEX**

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April 12, 2021

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LIST OF ACRONYMS

Term Used	Description
APDS	American Prison Data Systems
DCPS	District of Columbia Public Schools
DOC	District of Columbia Department of Corrections
DOE	U.S. Department of Education
FAPE	Free Appropriate Public Education
HOD	Hearing Officer Determination
IDLP	Individualized Distance Learning Plans
IEP	Individualized Education Program
IYP	Inspiring Youth Program
LEA	Local Education Agency
MOA	Memorandum of Agreement
OSSE	Office of State Superintendent of Education
PBIS	Positive Behavior Interventions and Supports
SEA	State Educational Agency
YSC	Youth Services Center

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INTRODUCTION

For the past year, the District of Columbia (“the District”) has abandoned students who are incarcerated by failing to provide even the bare minimum of education required under federal and District law. On March 13, 2020, in response to the COVID-19 pandemic, District of Columbia Public Schools (DCPS) stopped in-person classes for all its students. Among those students are a group of approximately 40 students with disabilities aged 18-22, including plaintiffs Charles H. and Israel F., detained in two adjacent jail facilities, the Correctional Treatment Facility and the Central Detention Facility (collectively the “DC Jail complex”), operated by the District’s Department of Corrections (DOC). These students, all of whom have disabilities, are entitled to receive special education and related services at the DC Jail complex through a DCPS-operated on-site school called the Inspiring Youth Program (IYP). On March 24, 2020, DCPS committed to begin distance learning for all its students and followed through with its commitment to students learning from home by providing them virtual classes through an online platform with two-way videoconference classes. DCPS even began a partial re-opening for part-time in-person instruction for some schools in the community. However, DCPS never resumed classes for IYP students.

DCPS’s commitment to distance learning was a fallacy, at least as it relates to IYP; defendants DCPS, the District of Columbia Office of the State Superintendent of Education (OSSE), and the District chose to eliminate instruction for IYP students and abandoned any efforts to teach them. For the duration of the COVID-19 pandemic, IYP students have been expected to self-teach and complete assignments and assessments in work packets and on electronic tablets without the benefit of any regular direct instruction—that is, without any live, interactive instruction happening in real time either virtually or in-person from a teacher trained to provide special education services or a counselor or other qualified educational professional(s) trained to provide related services.

As soon as the pandemic began, advocates raised the alarm about the deprivation of education to detained students, especially detained students with disabilities who are entitled to education under the Individuals with Disabilities Education Act (IDEA). On several occasions during the spring of 2020, plaintiffs' education attorneys informed IYP staff, the DCPS Central Office, and the DCPS General Counsel's Office that their clients were not receiving any education. In August 2020, advocates for the IYP students, including the undersigned counsel, asked defendants DCPS and OSSE to, among other things, produce a written comprehensive plan to provide a free appropriate public education (FAPE) as required by the IDEA to their detained students by August 25, 2020, and to take immediate steps to ensure that IYP students received FAPE by August 31, 2020, the first day of school. Defendants took none of these actions.

IYP students continue to be detained by the District without meaningful access to FAPE. As explained in detail below, plaintiffs Charles H. and Israel F. and the putative class of IYP students they seek to represent (hereafter collectively "plaintiffs") seek a preliminary injunction to (1) halt the defendants' unlawful policies and practices and to bring them into compliance with the law; (2) provide plaintiffs' special education and related services in conformity with their Individualized Education Programs (IEPs) through the provision of in-person or live videoconference classes; and (3) convene IEP team meetings for plaintiffs to develop a plan to compensate for all special education and related services missed during the COVID-19 pandemic, consistent with OSSE's March 2021 Guidance concerning Recovery Planning and Compensatory Education. Without this court's swift intervention, plaintiffs will suffer further and severe irreparable educational and social-emotional harm.

BACKGROUND

I. Defendants' Obligations to IYP Students Under the IDEA at the DC Jail Complex

The IDEA's primary mandate is the guarantee that all children with disabilities have available to them a "free appropriate public education [FAPE] 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). This is known as the duty to provide FAPE. Under the IDEA, FAPE is defined as (20 U.S.C. § 1401(9)):

[S]pecial education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate . . . secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required[.]

Special education instruction is teacher instruction designed to meet the unique needs of the student. 20 U.S.C. § 1401(29). Related services are those services that assist the student in accessing the instruction, such as speech-language pathology and counseling services. *See* 20 U.S.C. § 1401(26)(A).

The IDEA and its implementing regulations mandate the provision of FAPE for all residents and wards of the District and make clear that States must provide FAPE to individuals held in correctional facilities, including those at the DC Jail complex, aged 18-22. *See* 20 U.S.C. § 1412(a)(10)(A)(ii); 34 C.F.R. §§ 300.125, 300.45; 5 D.C.M.R. § 3002.2. The U.S. Department of Education has made it clear that: "Every agency at any level of government that is involved in the provision of special education and related services to students in correctional facilities must ensure the provision of FAPE, even if other agencies share that responsibility." Dear Colleague Letter, December 5, 2014, Pl. Ex. 1, p. 2; *see also* 34 C.F.R. § 300.2(b)(1) (IDEA mandates apply to "all political subdivisions of a State involved in the education of children with disabilities.").

The three entities involved in the education of IYP students in the District are OSSE (the State Educational Agency or SEA), DCPS (the Local Education Agency or LEA) and the DC Department of Corrections (DOC). As the SEA, OSSE is “primarily responsible for the State supervision of public elementary schools and secondary schools,” 20 U.S.C. § 1401(32), and is responsible for ensuring that FAPE is made available to all eligible District residents with disabilities and that all programs administered by District agencies meet District educational standards, 20 U.S.C. § 1412(a)(11). DCPS is the LEA, D.C. Code § 38-171, responsible for providing FAPE to IYP students at the DC Jail complex. Furthermore, the DOC, a subordinate executive agency of the District, runs the DC Jail complex, the adult correctional facility in which IYP students are detained, and is party to a Memorandum of Agreement between the DOC, DCPS, and OSSE to ensure that general and special education services are provided for eligible students housed in the DC Jail complex. *See Memorandum of Agreement Between DOC, DSPC, and OSSE (MOA)*, March 5, 2019, Pl. Ex. 2.

To provide FAPE, the District must ensure the provision of special education and related services in conformity with a student’s IEP. 20 U.S.C. § 1401(9)(D). “The primary tool for ensuring that the student is provided a FAPE is the child’s IEP.” *Lofton v. D.C.*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013) (citing *Honig v. Doe*, 484 U.S. 305, 311 (1988)). A student’s IEP is developed by the student’s IEP team, a multidisciplinary group consisting of the student’s parents, teachers, and other qualified educational professionals. *See* 20 U.S.C. § 1414(d)(1)(B). An IEP must include a written statement of evaluation and a plan of action that sets forth the student’s present functional/educational performance, measurable annual goals, how the goals will be measured, and the special education and related services and supplementary aids and services to

be provided, including modifications or supports for school personnel that will be provided for the child. 20 U.S.C. § 1414(d)(1)(A)(i).

Defendant DCPS, as the LEA, must create an IEP for each student with a disability that is:

Appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives . . . When all is said and done, a student offered an educational program providing merely more than de minimis progress from year to year can hardly be said to have been offered an education at all . . . receiving instruction that aims so low would be tantamount to sitting idly. . . awaiting the time when they were old enough to drop out. The IDEA demands more.

Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1000-1001, (2017) (cleaned up). The IEPs must be implemented “as soon as possible” after they are developed. 34 C.F.R. § 300.323(c)(2).

The implementation of IYP students’ IEPs relies on coordination among the DOC, DCPS, and OSSE. The District, DCPS and OSSE are solely responsible under the IDEA for the provision of FAPE. Under their MOA, OSSE, DCPS, and the DOC agree to ensure that special education and related services are provided to IYP students pursuant to the IDEA. *See* MOA, Pl. Ex. 2, p. 1. The DOC agrees to “implement operational procedures so that youth and adults up to the age of twenty-two (22) years of age receive general and special education pursuant with [District of Columbia special education laws and regulations].” DOC Policy 4110.7F, Pl. Ex. 3, p. 2, para 1(a); *see also* MOA, Pl. Ex. 2, pp. 6-9. The DOC also provides “designated classrooms for special education instruction” and “space for DPCS staff to conduct re-evaluations, assessment testing, and related services [set forth in the students’ IEP]” such as counseling and speech therapy services to ensure that disabled students at the DC Jail complex have access to FAPE. DOC Policy 4110.7F, Pl. Ex. 3, p. 6, paras. 9(b), 9(c)); MOA, Pl. Ex. 2, p. 7.

The MOA provides a process to resolve issues in the event of a dispute: the parties alert each other to disputes, work cooperatively to resolve them, and, in the event that no resolution can be reached, bring the dispute before the City Administrator. MOA, Pl. Ex. 2, pp. 9-10. OSSE, as the SEA, is ultimately responsible for ensuring that FAPE is made available to IYP students and that all programs administered by District agencies meet OSSE’s educational standards. *See* 20 U.S.C. § 1412(a)(11); 34 C.F.R. § 300.101(c)(1); 34 C.F.R. § 300.149(a). The primary actions OSSE must take to ensure accountability are monitoring and supervising DCPS, by, among other things, “ensuring that public agencies meet the program requirements under Part B of the Act, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.” 34 C.F.R. § 300.600(b)(2). If OSSE determines that DCPS “is unable to establish and maintain programs of free appropriate public education that meet the requirements of [IDEA]” at the DC Jail complex, then OSSE must provide “special education and related services directly to children with disabilities residing in the area served by that local educational agency, or for whom that State agency is responsible.” 20 U.S.C. § 1413(g)(1)(B).

II. Defendants’ Continuing Obligations Under the IDEA During the Public Health Emergency

The U.S. Department of Education issued guidance to States and OSSE issued guidance to all LEAs in the District concerning the provision of FAPE for students with disabilities during the COVID-19 pandemic. In March 2020, the Department of Education informed States that:

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA...

[When school resumes] an IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE to a student for the

purposes of Section 504, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.

Questions and Answers on Providing Services to Children with Disabilities During a COVID-19 Outbreak, (“DOE March 2020 COVID-19 Guidance”), Pl. Ex. 4, p. 2. In July 2020, OSSE issued its IDEA guidance, informing DCPS that:

An LEA continues to have the obligation to provide FAPE to a student with a disability during extended closures resulting in distance or blended-learning models arising from a local or national emergency. LEAs should continue to provide, to the greatest extent possible, the special education and related services identified in students’ individualized education programs (IEPs) and any needed modifications or alternatives to make the curriculum and services accessible to students with disabilities [emphasis added].

OSSE, Part B Provision of FAPE: Guidance Related to Remote and Blended Learning (“OSSE 2020 Guidance”), Pl. Ex. 5, p. 4. During the ongoing COVID-19 pandemic, defendants, by their own requirements, have a clear obligation to provide FAPE to students with disabilities at the DC Jail complex. That includes “special education and related services identified in students’ individualized education programs (IEPs) and any needed modifications or alternatives to make the curriculum and services accessible[.]” *Id.*

III. Defendants’ Failure to Provide Special Education and Related Services at IYP During the Public Health Emergency

In response to the COVID-19 pandemic, DCPS stopped in-person teacher instruction for all its students on March 13, 2020 and committed to a distance learning model to begin shortly thereafter. *See* Letter from Chancellor Ferebee, Pl. Ex. 6, p. 1. For students in the community learning at home, the District took several actions to make this a reality. In the spring and summer of 2020, the District provided more than 29,000 devices to DCPS students, invested \$3.3 million to provide internet access to 25,000 low-income students, set up an office to provide 24/7 technical support to families to troubleshoot access to virtual learning, and offered a virtual workshop series

for families. *See* Ferebee DC Council Testimony, Pl. Ex. 7, pp. 2-3. For students with disabilities, DCPS sent parents a guide, informing them that students would continue to receive supports and services in conformity with their IEPs, including appropriate technology for live instruction, and that each student would receive an Individualized Distance Learning Plan (IDL). *See* Special Education Program and Resources Guide for Families, School Year 2020-2021 (“DCPS Special Education Resources Guide”), Pl. Ex. 8, p. 4.

By the fall of 2020, DCPS students learning at home were receiving virtual, interactive instruction, Ferebee DC Council Testimony, Pl. Ex. 7, p. 2, and, by early February 2021, DCPS opened some of its classrooms for in-person instruction while continuing to offer live virtual instruction to its students. *See* Email from Chancellor to DCPS Community, Pl. Ex. 9. Students detained at the District’s Youth Services Center (YSC), DCPS’s counterpart to IYP for high school students under 18 years old, also began receiving in-person and virtual instruction. Testimony of Tarisai Lumumba-Umoja, DCPS Special Coordinator (“Umoja Testimony”), *Charles H. v. DCPS and OSSE*, Case No. 2020-0184 (“*Charles H. v DCPS*”), Pl. Ex. 10, Tr. 53:18-54:7; Declaration of Rachel Russo (“Russo Decl.”), Pl. Ex. 11, para. 17. However, for IYP students, the provision of education has been vastly inferior, and, in fact, almost non-existent.

Education at IYP During the Spring and Summer 2020

DCPS did not provide virtual or in-person instruction or related services in the spring and summer of 2020 for IYP students. DCPS exchanged emails with the DOC in March 2020 concerning virtual and in-person instruction, but DCPS never followed through with its implementation. Testimony of Tanya Roane, IYP’s principal¹ (“Roane Testimony”), *Charles H. v. DCPS*, Pl. Ex. 10, Tr. 82:1-82:17; 84:9-85-9. The agencies’ versions of what happened next

¹ As of March 2020, Dr. Roane left her position as IYP’s principal.

differ: According to the DOC, on March 13, 2020, the DOC offered DCPS the use of Android tablets “designed for educational content delivery” with a cellular connection but no internet connectivity. Testimony of Amy Lopez, Deputy Director at DOC (“Lopez Testimony”), *Charles H. v. DCPS*, Pl. Ex. 10, Tr. 16:4-16:9. DCPS rejected the DOC’s offer and instead provided work packets to IYP students throughout the summer. *Id.*, 16:10-16:11. The DOC claims that they would have allowed DCPS to provide its own tablets “as long as their [DCPS’s] tablets passed our [DOC’s] security.” Lopez Testimony, Pl. Ex 10, Tr. 37:21-38:1.

Although DCPS staff were not precluded by the DOC from entering the DC Jail complex during the lockdown, IYP staff and teachers stopped going to the DC Jail complex to provide instruction. *Id.*, Tr. 15:17-16:1;17:14-17:26.

Then, on or about April 4, 2020, in response to an order from a health official, the DOC confined every resident at the DC Jail complex to their cells for 23 hours per day. Lopez Testimony, Pl. Ex. 10, Tr. 9:9-9:18.² For the remainder of the 2019-2020 school year, IYP students were confined to their cells for 23 hours per day and were only receiving paper-based work packets, which were dropped off by correctional staff. Declaration of Charles H. (“Charles H. Decl.”), Pl. Ex. 15, paras. 9-10; Declaration of Israel F. (“Israel F. Decl.”), Pl. Ex. 12, para. 15. After many months of providing only paper-based work packets, DCPS agreed to use DOC-issued electronic tablets, made by American Prison Data Systems (ADPS). *See* Lopez Testimony, Pl. Ex.

² According to Amy Lopez, Deputy Director of College and Career Readiness at the DOC, the order was issued upon the recommendation of an unnamed District health official in response to a temporary injunction issued on April 19, 2020 by this court in *Banks v. Booth*, Civil Action No. 20-849 (CKK). Lopez Testimony, Pl. Ex. 10, Tr. 9:11-9:18; 11:12-11:21. The Order required the District, among other things, to “ensure appropriate and consistent implementation of social distancing policies[.]” *Banks* Temporary Injunction Order, Pl. Ex. 13. A subsequent preliminary injunction issued on June 18, 2020 in the same case orders the District to comply with CDC regulations on social distancing. *Banks* Preliminary Injunction Order, Pl. Ex. 14. The district court did not order the DOC to confine inmates to their cells for 23 out of 24 hours.

10, Tr. 21:3-22:11; 43:5-43:10. These tablets have the same content as the paper-based work packets but provide this content preloaded in a digital format. Charles H. Decl., Pl. Ex. 15, para. 19. Therefore, even after the introduction of the tablets, students continued to receive no direct instruction. Students also continued to be deprived of the related services required in their IEPs. *Id.*, Roane Testimony, Tr. 102:18-103:13; DCPS Service Tracker for Charles H., Pl. Ex. 16.

DCPS Representations Regarding the 2020-2021 School Year

On August 20, 2020, special education advocates sent a letter to the District expressing their concerns that IYP students in the DC Jail complex were being denied special education and related services. Letter from Advocates to District, Pl. Ex 17. On August 31, 2020, the first day of school, DCPS Chancellor Lewis Ferebee responded that DCPS would be providing virtual instruction to IYP for the 2020-2021 school year; that he could confirm that IYP was fully equipped to serve students; and that DCPS was “supporting students with IEPs during this time through the development of individual distance learning plans [IDLDP].” Email from Chancellor to DCPS Community, Pl. Ex. 9, p. 1. He further stated that IYP students “will have the same supports articulated through these plans as all other students with IEPs in DCPS.” *Id.*

On that same day, IYP sent a letter and a handbook to its students at the DC Jail complex, stating that “[a]ll Students will have access to a DOC-provided tablet . . . [and] will use these tablets to participate in virtual instruction with their teachers via the Microsoft Teams platform. Students will attend class according to their provided schedules.” 2020-2021 IYP Student Handbook, Pl. Ex. 18, p. 5.

That never happened. Charles H. Decl., Pl. Ex. 15, para. 8; Israel F. Decl., Pl. Ex. 12, para. 24. IYP’s principal admitted that she knew by July or early August 2020 that IYP would not use the Microsoft Teams virtual platform that was cited in the IYP Student Handbook, but she “just didn’t go back and revise[] the handbook.” Roane Testimony, Pl. Ex. 10, Tr. 85:3-85:9; 96:1-

96:17. To date, neither DCPS nor OSSE have provided IYP students with any information to correct Dr. Roane's error.

The 2020-2021 School Year: Fall and Winter 2020

Despite promises by Chancellor Ferebee and Principal Roane, the 2020-2021 school year has been a continuation of defendants' failure to provide or ensure the provision of FAPE for IYP students. Months after the beginning of the 2020-2021 school year, some IYP students began receiving DOC-issued tablets, which they keep throughout the day. Lopez Testimony, Pl. Ex. 10, Tr. 21:3-22:8; Roane Testimony, Tr. 97:4-97:12. Not all students have access to the DOC-issued tablets; students who are in restrictive housing are not given access to tablets for "safety and security reasons." Lopez Testimony, Pl. Ex. 10, Tr. 22:20-22:25. Other students, like Charles and Israel, do not use the tablets because of their poor functionality. Charles H. Decl., Pl. Ex. 15, para. 20; Israel F. Decl., Pl. Ex. 12, para. 21. The tablets include pre-loaded DCPS content and assignments, which students are expected to complete on their own. *Id.*, 97:12-97:17. The tablets are difficult to use. Charles H. Decl., Pl. Ex. 15, para. 20; Israel F. Decl., Pl. Ex. 12, para. 21. They require students to provide responses to multiple questions in a single text box, which requires repeated scrolling back and forth in order to read the question and write an answer. Charles H. Decl., Pl. Ex. 15, para. 20. The tablets have a message feature, which is supposed to allow students—many of whom have diagnosed learning disabilities and/or severe deficits in reading and writing—to send a message requesting assistance to a teacher. Lopez Testimony, Pl. Ex. 10, Tr. 23:16-24:7; Roane Testimony, Tr. 109:13-109:20; Russo Decl., Pl. Ex. 11, para. 13. However, students are unable to receive the help they need by sending messages to their teachers. Charles H. Decl., Pl. Ex. 15, para. 21; Israel F. Decl., Pl. Ex. 12, para. 22; Russo Decl., Pl. Ex. 11, para. 13.

The DOC-issued tablets are often not a viable option for students during their 23-hour per day cell confinement, because in their cells, students do not always have access to their login credentials or a reliable connection to the DC Jail complex's intranet which is either out of range or spotty with extremely slow loading times. *See* APDS Instructions, Pl. Ex. 19, p. 9; Russo Decl., Pl. Ex. 11, para. 13; Israel F. Decl., Pl. Ex. 12, para. 21; Charles H. Decl., Pl. Ex. 15, para. 20. In the instructions about the use of the tablets, the DOC tells students:

Be patient with content loading times. Some content may take a few seconds to load. If you can't get something to work and all else fails, try restarting your tablet by holding down the power button until you see the Restart option. You can also power down the tablet here as well.

APDS Instructions, Pl. Ex. 19, p. 9. The lack of a reliable connection to access the work packets on the tablet frustrates students and makes it difficult for them to complete their coursework. Russo Decl., Pl. Ex. 11, para. 13. For example, Charles becomes frustrated with the amount of time it takes to load material on the tablet—about 30 minutes in total. Charles H. Decl., Pl. Ex. 15, para. 20. Both Charles and Israel had to hold the tablets outside their cell doors through the slot that they use for food to get any connection to the intranet. *Id.*, para. 20; Israel F. Decl., Pl. Ex. 12, para. 21. These problems caused Charles and Israel to give up working on the tablet and to use only paper-based work packets. Charles H. Decl., Pl. Ex. 15, para. 20; Israel F. Decl., Pl. Ex. 12, para. 21. These experiences cause an undue cognitive burden on students with disabilities. Declaration of Joseph Brojomohun-Gagnon (“Gagnon Decl.”), Pl. Ex. 20, para. 37.

Students who do not use the tablets continue to receive paper-based work packets and the system for delivery, completion, and feedback on the packets is riddled with problems. As Charles's IEP acknowledges: “His current setting and the pandemic has made it difficult for him to get the support he needs to successfully complete distance learning packets.” Charles H. IEP, October 20, 2020, Pl. Ex. 21, p. 4. Charles' experience is not unique. Since DCPS began to

provide the packets, students report that they do not know when the packets will be delivered. Charles H. Decl., Pl. Ex. 15, para. 10; Israel F. Decl., Pl. Ex. 12, para. 15; Russo Decl., Pl. Ex. 11, para. 10. When students do randomly receive them, they cannot complete them because of their inaccessibility and lack of support. Lopez Testimony, Pl. Ex. 10, Tr. 17:6-17:11; Umoja Testimony, Tr. 64:17-64:23, 71:7-72:25; Russo Decl., Pl. Ex. 11, paras. 10-14; Charles H. Decl., Pl. Ex. 15, para. 11. Without any teacher guidance, students do not understand how to do the assignments in the work packets and cannot stay focused and motivated to complete them. Charles H. Decl., Pl. Ex. 15, para. 11; Israel F. Decl., Pl. Ex. 12, para. 17. In a letter from Tabitha Burnett, the DOC's Education Administrator, students were told: "[i]f you have any specific questions about your work, I want you to make a star next to it. This will let your teacher know you need assistance." DOC Letter to Students, August 24, 2020, Pl. Ex. 22. However, according to Amy Lopez at DOC, "when students did ask for help, they didn't receive responses." Lopez Testimony, Pl. Ex. 10, 36:15-36:26; *see also* Charles H. Decl., Pl. Ex. 15, para. 11.

Conditions at the students' cells are noisy, lacking privacy, and lacking access to items such as calculators and basic writing utensils. Umoja Testimony, Pl. Ex. 10, Tr. 68:5-69:2; *see also* Israel F. Decl., Pl. Ex. 12, paras. 17-18. To avoid such noises, Charles usually works on his packets as early as 4:00 am. Charles H. Decl., Pl. Ex. 15, para. 22. Over the fall and winter of 2020, the few volunteer teachers who dropped off the work packets delivered them through the students' cell doors and stayed only a very limited time, since they had to see around 40 students located in different parts or sections of the DC Jail complex. Roane Testimony, Pl. Ex. 10, Tr. 101:7-101:27; Russo Decl., Pl. Ex. 11, para. 11; Charles H. Decl., Pl. Ex. 15, para. 14. Logs from the DOC and DCPS documenting the delivery of work packets to IYP students from March to

October 2020 indicate that many students did not turn in completed packets on time or at all. *See* DOC Work Distribution Log, March through October 2020, Pl. Ex. 23.

IYP students also continued to receive almost no related services. The social worker/school counselor at IYP returned to the DC Jail complex around November 2020 but did not provide therapy sessions because students were not allowed outside of their cells for private sessions. Roane Testimony, Pl. Ex. 10 Tr. 102:18-103:13. It was not until December 2020, that Charles saw his school counselor for two in-person sessions. Charles H. Decl., Pl. Ex. 15, para. 23. Israel saw his school counselor for one counseling session in November 2020, when he was first detained in the DC Jail complex. Israel F. Decl., Pl. Ex. 12, para. 25.

Administrative Due Process Complaints

Named plaintiffs Charles H. and Israel F. brought due process complaints against DCPS and OSSE concerning the failure to provide FAPE during the COVID-19 pandemic. On October 16, 2020, Charles filed an administrative due process complaint on behalf of himself and all others similarly situated. Charles H. Complaint, Pl. Ex. 24. An administrative hearing established that DCPS failed to meet its IDEA obligations with respect to Charles, and OSSE failed to meet its supervisory and monitoring duties, and the hearing officer ordered injunctive and compensatory relief. Hearing Officer Determination (“HOD”), Case No. 2020-0184, Pl. Ex. 25. The hearing officer determined that Charles did not have standing to raise allegations of systemic violations under the IDEA in an administrative hearing and that the hearing officer did not have jurisdiction over those claims and a related claim under Section 504 of the Rehabilitation Act. Prehearing Order, Case No. 2020-0184, Pl. Ex. 26, p. 4.

On February 4, 2021, Israel filed an administrative due process on behalf of himself and all others similarly situated, alleging that DCPS failed to meet its IDEA obligations with respect

to him, and OSSE failed to meet its supervisory and monitoring duties. Israel F. Complaint, Pl. Ex. 27. The case is pending.

Over One Year Later Without FAPE

As of the date of this filing, defendants are still failing to provide students at IYP with a meaningful education. Plaintiffs continue to receive only work packets—either printed or loaded onto poorly functioning tablets. Students remain abandoned by DCPS and are still forced to teach themselves the material, without the benefit of any regular teacher instruction or feedback. Charles H. Decl., Pl. Ex. 15, para. 12; Israel F. Decl., Pl. Ex. 12, para. 16. Although students continue to receive some limited related services, such as counseling, they mainly receive these services via work packets rather than direct services. For example, Charles is receiving counseling work packets. Charles H. Decl., Pl. Ex. 15, para. 23. As of March 2021, he is being offered live virtual counseling sessions, but he is unable to access them because DOC does not ensure that a private room is readily available to him. *Id.* On the single occasion that he participated in a live virtual counseling session with the school’s social worker, Charles found it of little value because the session focused on reviewing a counseling work packet. *Id.* Israel has received one counseling packet. Israel F. Decl., Pl. Ex. 12 para. 25. As a policy and practice, IYP students are not receiving their special education and related services in conformance with their IEPs. Umoja Testimony, Pl. Ex. 10, Tr. 65:14-65:23; Roane Testimony, Tr. 101:7-101:27; 102:25-103:13; *see also* HOD, Pl. Ex. 25, p. 20; Gagnon Decl., Pl. Ex. 20, para. 18.

LEGAL STANDARD

A plaintiff seeking a preliminary injunction must establish:

[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008). The D.C. Circuit appears to continue favoring its long-standing “sliding scale” approach in evaluating motions for preliminary injunction, consistently stating that “the moving party must make a clear showing that [the] four factors, taken together, warrant relief.”³ *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 101 (D.C. Cir. 2021) (citing *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 897 F.3d at 321) (internal quotation marks omitted and emphasis added). As set forth below, plaintiffs here satisfy all four factors whether they are analyzed together or independently.

ARGUMENT

THE COURT SHOULD ISSUE EFFECTIVE PRELIMINARY INJUNCTIVE RELIEF

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF EACH OF THEIR CLAIMS

Since the beginning of the COVID-19 pandemic, defendants have systematically failed to provide the plaintiffs with the special education and related services to which they are entitled under the IDEA, and otherwise discriminated against them in violation of Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (ADA), their respective implementing

³ Before *Winter*, the D.C. Circuit “allowed that a strong showing on one factor could make up for a weaker showing on another,” referred to as a “sliding scale approach.” *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). Post-*Winter*, the D.C. Circuit has questioned, but declined to decide, whether *Winter* should be read to abandon the sliding scale approach. See, e.g., *Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018) (noting that “this [C]ourt has not yet decided whether [*Winter*] is properly read to suggest a ‘sliding scale’ approach to weighing the four factors be abandoned” (citation omitted)); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016) (declining to address “whether the ‘sliding scale’ approach remains valid after *Winter*”).

regulations, and District of Columbia law, including the District of Columbia Human Rights Act (DCHRA). *See* 20 U.S.C. § 1400, *et seq.*; 34 C.F.R. § 300, *et seq.*; 29 U.S.C. § 794(a); 34 C.F.R. § 104, *et seq.* 5 D.C.M.R. § 3000, *et seq.*; 42 U.S.C. § 12132; D.C. Code § 2-1401 *et seq.* Plaintiffs are likely to prevail on each of these claims. First, defendants have admitted violations. Second, the administrative hearing officer determined that defendants are in violation of the IDEA. Third, the evidence, including sworn testimony by defendants’ representatives at the administrative hearing, overwhelmingly demonstrates defendants’ violation of the students’ rights under the IDEA, the Rehabilitation Act, the ADA, and DCHRA.

A. DEFENDANTS ARE IN VIOLATION OF THE IDEA BY FAILING TO PROVIDE FAPE TO IYP STUDENTS

1. Defendants Are Systematically Failing to Implement the Specialized Education Required in IYP Students’ IEPs

Defendants have systematically failed to implement the special education and related services required in plaintiffs’ IEPs by, as a policy and practice, foregoing all direct specialized instruction and related services for IYP students and providing them only with assigned work packets, thereby violating the IYP students’ right to FAPE. ECF No. 4, Class Action Complaint for Declaratory, Injunctive, and Other Relief, paras. 55-61. Defendants’ failure to implement the special education and related services in the IEPs of all IYP students must be remedied by an injunction requiring DCPS to change its current system of assigned work packets at IYP to a system of direct instruction either through synchronous/virtual or in-person instruction and related services; it cannot be solved on a “student-by-student basis.” *See Easter v. D.C.*, 128 F.Supp.3d 173 (D.D.C. 2015) (systemic claims are “precisely the type of issue that cannot be addressed on a student-by-student basis during Due Process Hearings, but is better addressed by seeking injunctive relief in federal court . . . [.]”); *see also* Prehearing Order, Pl. Ex. 26, p. 4 (hearing officer in Charles’s due process case dismissing systemic claims for lack of jurisdiction).

In a similar circumstance, a federal court granted a preliminary injunction for a subclass of plaintiffs, based in part on its finding that because they were only receiving work packets without any direct instruction, they were likely to succeed on the merits of their claims that they were being systematically deprived special education services under the IDEA. *See V.W. by & through Williams v. Conway*, 236 F. Supp. 3d 554, 587-590 (N.D.N.Y. 2017). In *V.W.*, a putative class of detained juveniles in solitary confinement were denied access to direct educational instruction because, like IYP students, they were confined to their cells (for non-pandemic related reasons) for “approximately 23 hours a day.” *Id.* at 567. Much like IYP students, those students were given work packets, prepared by teachers, with some modifications for students who needed special education services. *Id.* Teachers were unable to directly reach these students. *Id.* And, like IYP students, those students “rarely” returned completed work packets for grading, follow-up, or other meaningful evaluation. *Id.* The court found that the subclass of plaintiffs were substantially likely to prevail on their IDEA claim, noting that “[work] packets . . . are wholly insufficient for both the average juvenile class member as well as the members of the subclass who qualify for additional educational support under the IDEA.” *Id.* at 589 (emphasis added). Likewise, defendants here have systematically failed to implement the IEPs of IYP students, because they too are given work packets in lieu of direct teacher instruction.

To prevail on a denial of FAPE claim, this Court has consistently held that plaintiffs can demonstrate a material failure to implement a substantial or significant provision of the students’ IEPs. *See Holman v. D.C.*, 153 F. Supp. 3d 386, 390 (D.D.C. 2016); *Savoy v. D.C.*, 844 F. Supp. 2d 23, 31 (D.D.C. 2012).⁴ The IDEA requires that every student with a disability who is eligible

⁴ Although the D.C. Circuit has not adopted a standard for determining a material failure to implement an IEP, “the consensus among federal courts has been . . . more than a *de minimis*

for special education and related services receive an IEP to ensure meaningful access to the curriculum. 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(bb). Courts have established that the minimum requirement of FAPE is an IEP that “provid[es] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 519 (D.C. Cir. 2005) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 203 (1982)). See also *Andrew F. ex rel. Joseph F.*, 137 S. Ct. at 1001 (“When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.”). Accordingly, special education and related services that ensure meaningful access to the curriculum are those that provide, at minimum, personalized instruction with sufficient support to permit the student to benefit from that instruction and make progress. A failure to implement such significant and essential provisions of an IEP, as defendants have systemically done here, is thus a material failure to implement the students’ IEPs.

(a) Students Cannot Meaningfully Access Special Education Services Mandated in Their IEPs With Only Work Packets and No Direct Instruction

Special education services under the IDEA help students with disabilities access the general education curriculum by adapting instruction and providing accommodations and supports that allow a student to access the general education curriculum. Gagnon Decl., Pl. Ex. 20, para. 56. The evidence overwhelmingly shows that since March 24, 2020, defendants have failed to implement the special education services in the IEPs of IYP students which are needed for the students to access the general education curriculum.

failure to implement all elements of that IEP, and, instead, [a plaintiff] must demonstrate that the . . . authorities failed to implement substantial or significant provisions of the IEP.” *Savoy*, 844 F. Supp. 2d at 31 (quotation omitted).

Defendant DCPS concedes that neither the work packets nor the tablets given to IYP students provide the direct instruction needed for plaintiffs to receive the special education needed to access FAPE. In filings in Charles’s administrative hearing, DCPS admitted that “[u]nder the current circumstances in the facility[,] the staff members are not able to provide the supports and services outlined in student IEPs.” DCPS Closing Statement, Pl. Ex. 28, p. 23. In sworn testimony, Tarisa Lumumba-Umoja, the DCPS Special Coordinator at IYP during the 2019-2020 school year, acknowledged that work packets were difficult for students to complete because they “are working independently, and there’s very little access to staff to be able to provide any instruction or clarification.” Pl. Ex. 10, Tr. 65:14-65:23. And, the hearing officer found that, “[w]ork packets, delivered every other week, with no scheduled interaction with any teacher, do not constitute specialized instruction or virtual instruction.”⁵ HOD, Pl. Ex. 25, p. 20.⁶

DCPS’ admissions and the hearing officer’s finding that the work packets cannot provide FAPE are consistent with the opinion of Dr. Brojomohun-Gagnon, an expert in special education

⁵ The hearing officer’s findings, to the extent relevant, should be accorded appropriate weight in assessing the likelihood of plaintiffs’ success on the merits. When reviewing the decision issued in a due process hearing, a district court must make an independent determination and grant relief as appropriate, based on a preponderance of the evidence. *See B.D. by & through Davis v. D.C.*, No. 13-1223, 2020 WL 5763630, at *4 (D.D.C. Sept. 28, 2020) (citing 20 U.S.C. 1415(i)(2)(C)(iii)). However, that the hearing officer here made specific findings on matters relevant to whether plaintiffs are likely to succeed on the merits of their claim should be accorded appropriate weight by this Court. *See J.B. v. Killingly Bd. of Educ.*, 990 F. Supp. 57, 71–72 (D. Conn. 1997) (in granting an IDEA plaintiff’s motion for a preliminary injunction, the district court “defer[red] to the Hearing Officer’s factual findings on the type of transition services, or lack thereof, provided to” the plaintiff, and thus found a likelihood of success on the merits).

⁶ The situation has remained much the same since December 2020. Although as of March 2021, Charles and two other IYP students in his unit are meeting with two teachers in-person for around three hours a week, this is *de minimis*. The teachers cannot always provide assistance with other subjects outside of their own field and are not providing the students with instruction “like they were before the pandemic.” Charles H. Decl., Pl. Ex. 15, para. 17. Charles does not feel like he is learning and continues to feel frustrated with the work packets he is assigned. *Id.*, para. 18. Charles does not know his other assigned teachers. *Id.*

and correctional education, who has reviewed the material in the work packets and tablets provided to IYP students and interviewed Charles and Israel. Gagnon Decl., Pl. Ex. 20, paras. 16, 18. In addition to his finding that work packets cannot constitute specialized instruction, Dr. Brojomohun-Gagnon identified the following deficiencies in the work packets:

Inaccessible Course Content

The course content in the paper-based or tablet computer-delivered work packets is so lacking that it is almost impossible for Charles, Israel, and other IYP students to successfully complete them. Gagnon Decl., Pl. Ex. 20, paras. 17-38. The packets and tablets lack adequate directions, explanation, context, and are written at a reading level that is far above that of Charles, Israel, and other students with disabilities. *Id.*, paras. 22-32. They also lack the adaptations necessary to guide students with disabilities through the presentation of information and how to respond. *Id.*, paras. 18, 23, 26. Relying on packets, rather than teacher instruction, requires a great deal of reading and writing—areas in which incarcerated students with disabilities, including Charles and Israel, perform at well below expected levels. *Id.*, para. 22. The minor instructional adaptations made by DCPS in the work packets, such as bolding and highlighting words, do not address the key components needed to assist students with disabilities who have problems with reading comprehension. *Id.*, para. 23. Moreover, without more guidance in the writing process, discussions with teachers, and specific feedback throughout, the extended writing assignments in the packets are too difficult for plaintiffs, making access to the general education curriculum almost impossible. *Id.*, para. 26.

The work packets also cannot provide sufficient support for students to learn certain subject matter, such as mathematics. *Id.*, paras. 29-31. For example, Charles's geometry packet completely lacks explanation and includes no adaptations, even though Charles, Israel, and many incarcerated students with disabilities function well below grade level in mathematics. *Id.*, para.

29. They also provide no guidance to assist the student with understanding how their work will be graded and provide only 1-2 days' worth of assignments over a two-week period. *Id.*, paras. 19-20, 27.

Particular Inadequacies of DOC-Issued Tablets to Deliver Work Packets

According to Dr. Brojomohun-Gagnon, there is no research demonstrating that providing a tablet and solely relying on asynchronous information and activities is an effective educational approach for students with disabilities. Gagnon Decl., Pl. Ex. 20, para. 18. The DOC-issued tablets used by IYP students do not provide direct instruction, either through synchronous virtual instruction or in-person instruction, are not consistently updated with content, have poor functionality, and lack reliable connectivity, all of which significantly minimize their educational value to the students. *See id.*, paras. 32-37; Russo Decl., Pl. Ex. 11, para. 13; Charles H. Decl., Pl. Ex. 15, para. 20; Israel F. Decl., Pl. Ex. 12, para. 21; Roane Testimony, Pl. Ex. 10, Tr. 85:7-85:9; APDS Instructions, Pl. Ex. 19, p. 6; Declaration of Eden Nelson ("Nelson Decl."), Pl. Ex. 29, para. 27. The directions given to students for the DOC-issued tablets lack explicit instruction on how to use all the features and are written at a 6th to 10th grade reading level, which is beyond that of Charles, Israel, and most other incarcerated students with disabilities. Gagnon Decl., Pl. Ex. 20, para. 38.

DCPS Failure to Monitor Student Progress

In addition to the deficiencies in the paper-based and tablet-based work packets, DCPS' failure to monitor student progress is inappropriate. The IDEA requires that an IEP be adapted based on the student's progress. 34 C.F.R. § 300.324(b)(ii)(A). To understand whether IYP students are making progress in the general curriculum and their IEP goals, their academic work and behavior must be monitored. Gagnon Decl., Pl. Ex. 20, para. 40. The IYP Student Handbook itself recognizes the importance of such monitoring, stating "[s]chools [will be] expected to utilize

the additional measures beyond attendance as indicators of student engagement in learning . . . includ[ing] participation in live classes [and] access and utilization of other learning platforms” 2020-2021 IYP Student Handbook, Pl. Ex. 18, p. 10. As Dr. Brojomohun-Gagnon notes, such monitoring would necessarily include daily academic and behavioral data. Gagnon Decl, Pl. Ex. 20, para. 41. However, despite the clear statements in their IEPs requiring instructional adaptations and interventions, neither Charles nor Israel receive regular feedback on assignments or any feedback on their behavior. *Id.*, paras. 42-43. Defendants confirm that neither Charles H. (*see* IEP, Pl. Ex. 21, p. 4) nor other IYP students regularly receive such feedback (Umoja Testimony, Pl. Ex. 10, Tr. 64:14-64:23). *See also* Charles H. Decl., Pl. Ex. 15, para. 12; Israel F. Decl., Pl. Ex. 12, para. 16.

* * *

Defendants are materially failing to implement IYP students’ IEPs by denying them sufficiently personalized special education services through direct instruction. Thus, plaintiffs are likely to prevail on the merits of their claim alleging denial of FAPE.

(b) Students Cannot Meaningfully Access the Related Services, Including Crucial Behavioral Supports, Mandated in their IEPs

Related services are “developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education . . . [.]” 20 U.S.C. § 1401(26)(A). For example, “in the case of a student whose behavior impedes his or her learning or that of others,” the IEP “should consider the use of strategies, including positive behavioral interventions and supports and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B)(i). Most IYP students have disability classifications of Emotional Disturbance, Specific Learning Disability, or Other Health Impairment and have IEPs requiring behavioral

support services as their related services. Russo Decl., Pl. Ex. 11, para. 6; *see also* Gagnon Decl., Pl. Ex. 20, para. 70.

In sworn testimony during Charles's December 2020 administrative hearing, DCPS conceded that since March 2020, it has not provided related services to IYP students. *See* Roane Testimony, Pl. Ex. 10, 102:25-103:13. IYP's principal, Dr. Roane, testified that because students were not allowed out of their housing units to meet with the social worker in a private location, there were no opportunities for students to receive related services as written in their IEPs. *Id.* The hearing officer found that (HOD, Pl. Ex. 25, p. 20): "The record is clear that Petitioner has not received specialized instruction or related services since the inception of COVID-19 restrictions."

The situation has not materially improved since the hearing officer made these findings in December 2020. For example, as of March 2021, Charles, who was recently moved to a new unit, reports that he is being offered live virtual sessions with the school's social worker in a private room at the jail. Charles H. Decl., Pl. Ex. 15, paras. 17, 23. However, with few exceptions, he has been unable to take advantage of the sessions because when he is taken to the room where the virtual sessions are to be held, another person is using the room. *Id.*, paras. 23. Since his arrival at the DC Jail complex in November 2020, Israel has received only one hour of counseling. Israel F. Decl., Pl. Ex. 12, para. 25. Charles should receive three hours of behavioral support services per month, Charles H. Decl., Pl. Ex. 15, para. 6, and Israel two. Israel F. Decl., Pl. Ex. 12, para. 6.

The lack of related services, including behavioral supports, for IYP students means that they are prevented from accessing the general education curriculum and are being denied FAPE. Gagnon Decl., Pl. Ex. 20, paras. 67-68. The IEPs of both Charles and Israel state that behavior

negatively affects their ability to access the general education curriculum, yet neither have regularly received the behavioral supports mandated in their IEPs. *Id.*, para. 62.

Moreover, Dr. Brojomohun-Gagnon explains that “in the current COVID-19 context [] young people, including Charles, Israel, and students with disabilities and mental disorders, spend 22 or 23 hours per day isolated in their cells,” and could experience dramatic psychological effects of isolation. Gagnon Decl., Pl. Ex. 20, paras. 65, 67. These effects, combined with the pre-existing mental disorders and trauma that are characteristic of incarcerated youth, include depression, anxiety, anger, obsessive thoughts, paranoia, psychosis, and suicide, and “require consideration and potentially the provision of additional related services,” which they are not receiving. *Id.*, paras. 68-70. Based on his review of the IEPs of Charles and Israel and conversations with them, “there is no evidence that additional evaluations of young people’s behavior or mental status is being collected, analyzed, or acted upon to potentially change the related services provided.” *Id.*, para. 65. Further, the complete lack of necessary positive behavior interventions and supports (PBIS) for Charles and Israel means that they are lacking for all IYP students since PBIS is a school-wide behavior modification system. *Id.* para. 62.

* * *

Defendants are materially failing to provide the related services required by IYP students’ IEPs. Thus, plaintiffs are likely to prevail on the merits of their claim alleging denial of FAPE.

(c) Virtual or In-Person Direct Instruction is Necessary to Provide IYP Students with the Special Education and Related Services in their IEPs

In Dr. Brojomohun-Gagnon’s opinion, for IYP students to receive FAPE, they must have at minimum, explicit direct instruction—via either in-person or virtual instruction—in conformity with the specialized instruction and related services in their IEPs. Gagnon Decl., Pl. Ex. 20, para. 18. This approach to special education instruction is evidence-based and necessarily provides

essential teacher-student interaction. Gagnon Decl., Pl. Ex. 20, paras. 18, 39. This type of instruction provides: teacher review, explanation of new skills and information, opportunities for students to practice skills with teacher guidance, ongoing teacher correction and feedback, independent practice, and weekly and monthly review. *Id.*, para. 18. There is no research demonstrating that providing a tablet and solely relying on asynchronous information and activities, such as recorded lectures or educational games, is an effective educational approach for students with disabilities. *Id.* Work packets alone do not provide the necessary instructional adaptations and monitoring required. *Id.*, paras. 18, 22-31. Even when asynchronous information and activities (in this case, printed or tablet computer-delivered work packets) are coupled with synchronous activities (interactive instruction), there is limited evidence of benefits to high school students with learning disabilities or emotional disturbance, without additional monitoring and supports. *Id.*, para. 18. And of course, here, plaintiffs are not receiving corresponding synchronous activities. HOD, Pl. Ex. 25, p. 20; Charles H., Decl., Pl. Ex. 15, paras. 8, 24; Israel F. Decl., Pl. Ex. 12, para. 24. Thus, it is Dr. Brojomohun-Gagnon's opinion that IYP students need at minimum, explicit direct instruction—via either in-person or virtual instruction—to access FAPE. Gagnon Decl., Pl. Ex. 20, para. 39. In addition, IYP students require additional monitoring, and high-leverage and evidence-based instructional and behavioral adaptations and supports including those in their IEPs. *Id.*, paras. 39-41. These approaches to instruction would ensure the availability of teacher feedback, monitoring of students' academic and behavioral progress, and implementation of instructional adaptations, as noted on the students' IEPs. *Id.*, para. 39.

(d) Explicit Direct Virtual Instruction, Consistent with Security and Public Health Concerns at the DC Jail Complex, is Possible

Under the IDEA, the District has an obligation “to provide FAPE to a student with a disability during extended closures resulting in distance or blended-learning models arising from

a local or national emergency” and to “continue to provide, to the greatest extent possible, the special education and related services identified in students’ individualized education programs (IEPs) and any needed modifications or alternatives to make the curriculum and services accessible to students with disabilities.” OSSE 2020 Guidance, Pl. Ex. 5, p. 4 (emphasis added). This obligation extends to incarcerated students in the District. 34 C.F.R. §§ 300.102(a)(2)(i), 300.713(b); 5 D.C.M.R. § 3002.2. The provision of FAPE to IYP students “to the greatest extent possible” relies entirely on effective cooperation among OSSE, DCPS, and DOC, the three District agencies involved in the education of IYP students, to resolve any existing barriers. The District failed to meet this obligation; the District could have and can provide FAPE using currently available technology.

Based on defendants’ own admissions, the District’s agencies did not effectively cooperate to resolve their concerns over secure access to the Internet, thus denying FAPE to IYP students. As to internet security concerns, DCPS alleges that the issue is a DOC policy, which states that “[i]nmates shall never be provided or allowed access to the Email or Internet system that do not meet security requirements for DOC GED or other DOC sanctioned educational site requirements.” DOC Policy 2420.4D, Pl. Ex. 30, p. 6. DCPS claims that this restriction did not permit DCPS’s proposed virtual instruction mode, which accesses synchronous learning through a Microsoft Teams virtual platform and relies on the Internet for live instruction. *See* 2020-2021 IYP Student Handbook, Pl. Ex. 18, p. 5. However, nothing in DOC policy prevents DCPS from finding a technological solution to provide synchronous virtual instruction that meets DOC’s internet security restrictions. Amy Lopez, Deputy Director at DOC, testified at Charles’s administrative hearing that the DOC would have allowed DCPS to provide its own tablets “as long as their [DCPS’s] tablets passed our [DOC] security.” Lopez Testimony, Pl. Ex 10, Tr. 37:21-

38:1. Also, contrary to DCPS's stated position at Charles' hearing, nothing in this Court's COVID-19 orders in *Banks v. Booth* prevents DCPS and DOC from working together to find and accommodate existing spaces at the DC Jail complex and move students to those spaces in small groups to safely provide them a synchronous virtual or in-person education. *See Banks* Temporary Injunction Order, Pl. Ex. 13; *Banks* Preliminary Injunction Order, Pl. Ex. 14. Indeed, the hearing officer in Charles's administrative hearing found that the District's public health safety measures at the DC Jail complex did not preclude DCPS's ability to provide students with "more intensive services," finding that:

DCPS argued that the U.S. District Court of the District ordered DOC to take measures to ensure the health and safety of residents and staff at DC Jail during the pandemic that precluded its ability to provide more intensive services to Student. The court ordered DOC to "reduce the extent to which common spaces encourages [persons] to congregate in close quarters" and to "consistently apply their stated policy of allowing no more than small groups of inmates out of their cells at any given time." DOC apparently determined that it could best meet these mandates by imposing a 23-hour per day lockdown. Thus, this policy was devised and implemented by DOC, and was not specifically ordered by the court. DOC's policy regarding internet access appears to be totally unrelated to the issues of unsafe conditions in the inmate population due to COVID-19 that were the subject of the dispute in *Banks*. As such, under the MOA, the opportunity existed for OSSE and DCPS to negotiate an exception to DOC's rules to facilitate DCPS' obligation to provide education to eligible inmates and detainees.

HOD, Pl. Ex. 25, p. 17. The hearing officer further found that (*id.*, p. 19) "there is no evidence that DCPS ever sought an exception to the no-internet policy in the instant matter."

In the opinion of Eden Nelson, an expert in educational technology solutions at correctional facilities throughout the country, there are feasible technology solutions for virtual instruction that could be configured to comply with DOC policy on internet use and that would allow for live interaction between students and teachers over a secure internet connection. Nelson Decl., Pl. Ex. 29. Indeed, students at YSC and New Beginnings Youth Development Center ("New Beginnings"), the two other District detention facilities for young people, are already receiving

such synchronous virtual instruction. Starting in the 2020-2021 school year, students at YSC had access to laptops to participate in two-way videoconference classes utilizing Microsoft Teams. Roane Testimony, Pl. Ex. 10, Tr. 85:27-86:1, 96:19-96:23; *see also* Russo Decl., Pl. Ex. 11, para. 17; *see also* DCPS 2020-2021 Recovery Plan, Pl. Ex. 32, pp. 4, 10. Students at New Beginnings, a secure facility for young people run by the DC Department of Youth Rehabilitation Services in which students are enrolled in Maya Angelou Public Charter School (“Maya Angelou PCS”),⁷ began receiving two-way videoconference classes shortly after the school closed for in-person instruction in March 2020 and continue to receive such services in the current 2020-20201 school year. *See* 2019-2020 Maya Angelou PCS Report, Pl. Ex. 31, p. 6; Israel F. Decl., Pl. Ex. 12, para. 10.

With regard to public health restrictions, defendants can accommodate student needs by taking small groups of students from their cells throughout the day to existing or repurposed classrooms for in-person or virtual instruction, or otherwise arranging instruction in a manner that complies with the IDEA and public health mandates. Based on a 2020 Inspection Report (Pl. Ex. 33, pp. 3, 12-26) and IYP’s draft October 2020 reopening plan (Pl. Ex. 34), the DOC and DCPS indirectly acknowledge that there are spaces available for small group classrooms which could be utilized for synchronous virtual instruction of IYP students. *See also* DOC Policy 4110.7F, Pl. Ex. 3, p. 6, paras. 9(b), 9(c)); MOA, p. 7; Umoja Testimony, Pl. Ex. 10, Tr. 68:25-68:26; Roane Testimony, Pl. Tr. 105:22; Lopez Testimony, Pl. Ex. 10, Tr. 10:1-10:8.⁸ As Mr. Nelson notes,

⁷ *See* <https://dyrs.dc.gov/service/maya-angelou-academy-new-beginnings> (archived on April 8, 2021).

⁸ Despite its long-running refusal to make an exception to its 23-hour lockdown for IYP students, DOC has now started taking small groups of individuals in its Lead Up program to designated areas for tutoring and other non-IYP related programming. *See* DOC Lead Up Program Statement,

these spaces can be outfitted with the appropriate secure technology to allow students to access synchronous virtual instruction and related services. Nelson Decl., Pl. Ex. 29, para. 26. It is the DOC's obligation, under its interagency agreement with DCPS and OSSE, to "[p]rovid[e] designated classroom(s) for the IYP program" and to "[e]nsur[e] that students attending IYP are escorted to their educational program in accordance with their prescribed schedule." MOA, Pl. Ex. 2, pp. 6-7. If DOC cannot meet these requirements, it is required to initiate the conflict resolution process proscribed by the MOA. *Id.*, p. 9.

* * *

In sum, defendants admit that they have abandoned live teacher instruction and the supports and services necessary to implement the specialized education and related services in the IEPs of IYP students with the level of sufficiently individualized instruction needed to access the curriculum. DCPS's Closing Statement, Pl. Ex. 28, p. 23. There is no doubt that defendants' abandonment of direct teacher instruction and needed supports constitutes a material failure to implement the IYP students' IEPs. Thus, plaintiffs are likely to prevail on their claim that they have been denied FAPE. Furthermore, plaintiffs have demonstrated that direct instruction through either synchronous virtual instruction or in-person instruction and needed supports can be provided while accommodating the DOC's internet security and social distancing concerns.

Pl. Ex. 35. As part of the jail's Lead Up Program, plaintiff Charles began in March 2021 to leave his cell daily to gather in a room with a few people studying for their GED and join two other IYP students in a case manager's office to meet with two IYP teachers three times or less a week. Charles H. Decl., Pl. Ex. 15, paras. 17, 19.

2. **Defendant OSSE is Failing to Adequately Supervise and Monitor DCPS's Provision of Special Education and Related Services to IYP Students**

Defendant OSSE, as the State Educational Agency, is failing to supervise and monitor DCPS, pursuant to the IDEA, its implementing regulations, and local law, and these failures have resulted in a substantive denial of FAPE to IYP students. ECF No. 4, paras. 191-196. To prevail on a claim that a SEA is responsible for violations of the IDEA, a plaintiff must show that “the state agency in some way fails to comply with its duty to assure that the IDEA’s substantive requirements are implemented.” *Pachl v. Seagren*, 453 F.3d 1064, 1070 (8th Cir. 2006) (cleaned up). Under the IDEA, a SEA can be liable for a systemic violation of the State’s responsibilities to ensure FAPE. *See, e.g., D.L. v. D.C.*, 194 F. Supp. 3d 30, 91 (D.D.C. 2016) (OSSE is liable for systemically failing to ensure that FAPE was available to preschool-age children with disabilities in the District), *aff’d*, 860 F.3d 713 (D.C. Cir. 2017); *Morgan Hill Concerned Parents Ass’n v. California Dep’t of Educ.*, 258 F. Supp. 3d 1114, 1125 (E.D. Cal. 2017) (“Congress . . . anticipated private suits in response to statewide, systemic failures in the education of students with disabilities”); *Cordero by Bates v. Pennsylvania Dep’t of Educ.*, 795 F. Supp. 1352, 1364 (M.D. Pa. 1992) (holding the State liable for “pervasive problems in Pennsylvania’s special education system”).

Here, OSSE has failed to assure that the IDEA’s substantive requirements are implemented because (1) OSSE was on notice of DCPS’s failure to provide FAPE to IYP students, yet failed to effectively monitor and take appropriate action to ensure that DCPS provides special education and related services to students; (2) under its interagency agreement, OSSE committed to taking an active role in ensuring DCPS compliance with the IDEA within the DC Jail complex, including scheduling meetings to resolve disputes between DPCS and DOC, but failed to do so; (3) OSSE’s system of IDEA Part B monitoring has failed to timely identify and correct DCPS’s failures to

provide special education and related services to IYP students since the start of the COVID-19 public health emergency.

The hearing officer in Charles's administrative hearing held OSSE liable for violating the IDEA, finding:

OSSE has failed to meet its obligation to ensure DCPS' compliance with IDEA within [IYP] by failing to exert its authority to monitor and supervise DCPS' compliance with IDEA within [IYP], and by failing to intervene upon notice of an alleged failure of DCPS to provide appropriate special education services within [IYP] [citations omitted]...

OSSE offered no evidence that it performed even the minimal monitoring and supervising functions that it concedes are its responsibility.

HOD, Pl. Ex. 25, p. 24. *See n. 5.*

(a) OSSE Is on Notice that IYP Students Had No Meaningful Access to Specialized Education Instruction or Related Services

OSSE—and the District—have known or should have known that DCPS was not providing special education and related services at the DC Jail complex from the beginning of the COVID-19 pandemic. OSSE representatives, who have an obligation to participate in monthly meetings concerning the provision of special education for IYP students, pursuant to the agencies' MOA, should have been aware that as of March 2020, IYP students were receiving work packets in lieu of actual instruction and were receiving no related services. *See* MOA, Pl. Ex. 2, p. 3; Roane Testimony, Pl. Ex. 10, Tr. 117:15-118-8, 122:6-122:7. Moreover, since August 2020, OSSE has had direct notice that DCPS has not been providing special education and related services at the DC Jail complex due to a letter sent to senior leadership at DCPS and OSSE concerning the denials of FAPE at the DC Jail complex by education advocates. Letter to District from Advocates, Pl. Ex. 17. Former State Superintendent for Education, Hanseul Kang, was copied in the District's response from DCPS Chancellor Lewis Ferebee. Email from Chancellor Ferebee to Advocates, Pl. Ex. 36.

In the fall of 2020 and early 2021, IYP students brought complaints against DCPS and OSSE challenging their failure to provide FAPE. *See* Charles H. Complaint, Pl. Ex. 24; Israel F. Complaint, Pl. Ex. 27. OSSE’s representative, Gregory Burnett, was present at the due process hearing on December 1, 2020, when DOC and DCPS staff testified at length during plaintiff Charles’s administrative hearing about the lack of special education and related services at the DC Jail complex. *See* Pl. Ex. 10, p. 2. OSSE was also on notice of DCPS’s clearly stated position that it was unable to provide FAPE to IYP students. *See* DCPS’s Closing Statement, Pl. Ex. 28, p. 5 (“Under the current circumstances in the facility[,] the staff members are not able to provide the supports and services outlined in student IEPs.”). However, despite this knowledge, OSSE disavowed any responsibility, claiming that “OSSE was not the student’s LEA and therefore was not legally responsible for direct provision of FAPE to the student.” OSSE’s Closing Statement, Pl. Ex. 37, p. 4.

Ultimately, as this Court has noted, the SEA bears responsibility for ensuring that students receive FAPE:

As defined by the IDEA, the state’s role amounts to more than creating and publishing some procedures and then waiting for the phone to ring. The IDEA imposes on the state an overarching responsibility to ensure that the rights created by the statute are protected, regardless of the actions of local school districts The state must assure that in fact the requirements of the IDEA are being fulfilled.

D.L., 194 F. Supp. 3d at 84 (D.D.C. 2016), *aff’d*, 860 F.3d 713 (D.C. Cir. 2017) (internal citations omitted). Here, despite OSSE’s legal obligation to ensure that the rights of IYP students to FAPE are protected and its actual knowledge that DCPS is not providing FAPE to IYP students, OSSE is knowingly allowing these deprivations to continue in violation of the IDEA.

(b) OSSE is Failing to Utilize the Agreed Interagency Process to Address Barriers to the Provision of FAPE to IYP Students

OSSE has not utilized the MOA process to address the barriers affecting the delivery of special education services to IYP students (and, even if they have engaged in this process, it has not resulted in the provision of FAPE to IYP students). OSSE has both failed to comply with its regular monitoring, *see* MOA Pl. Ex. 2, Section III(A)(1), p. 3 (scheduling meetings with DCPS and the DOC, monitoring IYP for IDEA compliance) and to address DCPS’s failure to provide special education during the pandemic, *see id.*, Section III(A)(2), p. 3 (requiring OSSE to “[t]ake appropriate action, as needed, when issues arise with regard to special education service delivery at DOC facilities, if a matter is not resolved by DCPS and DOC.”). Sworn testimony provided by DCPS and DOC employees in Charles’s administrative hearing shows that during the monthly interagency meetings held pursuant to the MOA, neither DCPS nor OSSE discussed students’ lack of an education or asked for modifications to the MOA to address the barriers in implementing DCPS’s virtual learning plan at the DC Jail complex during the public health emergency. Lopez Testimony, Pl. Ex. 10, Tr. 30:18-30:23; 32:6-32:9; Roane Testimony, Tr. 118:5-118:18. As a result, nothing was done to remove the known barriers that IYP students face in obtaining FAPE during the public health emergency, namely, the lack of adequate technology and other physical logistics necessary to access special education and related services at the DC Jail complex. As the hearing officer in plaintiff Charles’s administrative proceeding stated:

[U]nder the MOA, it [OSSE] committed to schedule meetings with DCPS and DOC as needed, to discuss the delivery of special education services and coordination of activities . . . , and to take appropriate action, as needed, when issues arise with regard to special education service delivery at DOC facilities, if a matter is not resolved by DCPS and DOC. Thus, OSSE committed to taking an active role in ensuring DCPS’ compliance with IDEA within DOC facilities. Nevertheless, OSSE offered no documentary or testimonial evidence of any involvement on its part to ensure DCPS’ provision of FAPE within DOC. DCPS offered no evidence that it notified OSSE that it was unable to provide remote instruction to Student. Thus, there is no evidence that OSSE ever monitored the

provision of FAPE within DOC facilities once DCPS imposed COVID-19 restrictions by converting to virtual instruction.

HOD, Pl. Ex. 25, p. 23 (emphasis added).

(c) OSSE is Failing to Effectively Monitor and Supervise the Provision of FAPE to IYP Students by DCPS

To comply with its monitoring and oversight obligations for IYP, OSSE conducts monitoring reviews of compliance by DCPS with the IDEA, which includes corrective action if it finds DCPS to be out of compliance. *See* OSSE 2020-2021 Risk Based Monitoring Tool, Part B, Pl. Ex. 38. IDEA regulations require that the District “ensure that when it identifies noncompliance with the requirements . . . by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the State’s identification of the noncompliance.” 34 C.F.R. § 300.600(e) (emphasis added).

OSSE’s system of IDEA Part B monitoring, even if conducted to any extent, has not led to any changes resulting in the provision of special education and related services to IYP students. It has been over one year since IYP students stopped receiving special education and related services, yet the District, through OSSE, has still not ensured that DCPS’s noncompliance is corrected “as soon as possible,” as it is required to do. *See* 34 C.F.R. § 300.600(e). The hearing officer in plaintiff Charles’s administrative proceeding found that:

OSSE offered no evidence that it performed even the minimal monitoring and supervising functions that it concedes are its responsibility. OSSE offered no testimonial evidence during the hearing. It disclosed eleven exhibits, but none of those exhibits indicate OSSE ever monitored the provision of services within DOC facilities once COVID-19 restrictions were imposed.

HOD, Pl. Ex. 25, p. 24; *See also* Gagnon Decl., Pl. Ex. 20, paras. 73-75.

* * *

In sum, plaintiffs have demonstrated that they are likely to prevail on their claim that Defendant OSSE is failing to adequately supervise and monitor DCPS's provision of special education and related services to IYP students.

B. DEFENDANTS ARE VIOLATING THE REHABILITATION ACT, THE AMERICANS WITH DISABILITIES ACT, AND THE DISTRICT OF COLUMBIA HUMAN RIGHTS ACT

Plaintiffs are likely to prevail on their claims under Section 504 of the Rehabilitation Act, the ADA, and the District of Columbia Human Rights Act (DCHRA). ECF No. 4, paras. 197-217. Defendants have deprived them of FAPE designed to meet the needs of children with disabilities as adequately as the needs of children without disabilities in a manner that amounts to bad faith gross misjudgment, and/or gross departure from their own educational policies and standards.

Section 504 of the Rehabilitation Act forbids the District from discriminating against or excluding an otherwise qualified person from participation in a federally-funded program or activity because of the person's disability. It states that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" 29 U.S.C. § 794(a). Section 504 further states that, "[f]or the purposes of this section, the term 'program or activity' means all of the operations of . . . a local educational agency . . . or other school system." 29 U.S.C. § 794(b)(2)(B). Implementation of an IEP developed in accordance with the IDEA is one means of meeting Section 504's requirement. *See* 34 C.F.R. § 104.33(b)(2).

Similarly, the ADA prohibits public entities from excluding qualified individuals with disabilities from participation in or denying the benefits of the services, programs, or activities of that entity, or subjecting such individuals to discrimination, on the basis of disability. 42 U.S.C. § 12132. The DCHRA does essentially the same. *See Reid-Witt on behalf of C.W. v. D.C.*, 486 F.

Supp. 3d 1, 10 (D.D.C. 2020) (“Claims under the DCHRA . . . are subject to the same standards as ADA claims, so the analysis merges.” (citation omitted)).

Defendants are federally funded public entities responsible for educating plaintiffs in a non-discriminatory manner. *See* OSSE 2020-2021 LEA Allocations and OSSE IDEA Grants Management, Pl. Ex. 39. Plaintiffs are otherwise qualified individuals with disabilities entitled to educational services from defendants. *See* Umoja Testimony, Pl. Ex. 10, Tr. 63:15-63:18.

To prevail on a claim under Section 504 in the context of IDEA violations, plaintiffs must show “more than a mere failure to provide the ‘free and appropriate public education’ required by the [IDEA][.]” *Walker v. D.C.*, 157 F.Supp.2d 11, 35 (D.D.C. 2001) (quoting *Lunceford v. D.C. Board of Education*, 745 F.2d 1577, 1580 (D.C. Cir. 1984)). Plaintiffs must show “bad faith or gross misjudgment” or that defendants “depart grossly from accepted standards among education professionals” by defendants. *Walker*, 157 F.Supp.2d at 35.⁹ Plaintiffs have met that standard.

1. Defendants Have Systematically Failed to Meet Plaintiffs Educational Needs As Adequately As Students without Disabilities

Section 504 requires education and services “designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met[.]” 34 C.F.R. 104.33(b)(1), and implementation of IEPs in accordance with the IDEA is one way to meet that requirement. 34 C.F.R. § 104.33(b)(2). Since March 24, 2020, IYP students have not received FAPE, defendants have failed to materially implement their IEPs, and students are not receiving their education through synchronous direct instruction. *See* pp. 8-14, 17-25 above; Roane Testimony, Pl. Ex. 10, Tr. 96:19-96:23; Russo Decl., Pl. Ex. 11, p. 16; Israel F. Decl., Pl. Ex. 12,

⁹ There is a similar although lower standard under the ADA (and also the DCHRA). *Compare* 29 U.S.C. § 794(a) (Rehabilitation Act requires showing of discrimination “solely” based on disability), *with*, 42 U.S.C. § 12132 (ADA) require exclusion “by reason of such disability”)

para. 15; Charles H. Decl., Pl. Ex. 15, para. 8. In contrast, students in the community have received their education through synchronous, direct instruction at regular intervals. Ferebee DC Council Testimony, Pl. Ex. 7. During the COVID-19 pandemic, DCPS has provided education, including class materials and live virtual instruction by teachers through two-way videoconference classes. *Id.* As of February 2021, some DCPS students in the community have been offered in-person instruction while students learning from home continued to receive live virtual instruction. *See* Email from Chancellor to DCPS Community, Pl. Ex. 9.

2. Defendants Have Grossly Departed from Their Own Educational Policies and Standards

OSSE and DCPS have established educational policies and standards for providing FAPE to students in the District, including those with disabilities, during the COVID-19 pandemic. OSSE 2020 Guidance, Pl. Ex. 5; DCPS Special Education Resources Guide, Pl. Ex. 8. These policies and standards include individualized distance learning plans describing how IEPs will be implemented using defendants' preferred modality: virtual live interactive classroom instruction, and other similar live virtual interactions with providers for related services. *See* DCPS Special Education Resources Guide, Pl. Ex. 8, p. 4 (“students will have more live instruction . . . online sessions will include accommodations and modifications”); OSSE 2020 Guidance, Pl. Ex. 5, p. 10 (“[Best] practices include joint planning for ongoing virtual service delivery, two-way feedback, and reflection that drives individualized service delivery.”). In its 2020-2021 School Year LEA Continuous Education and School Recovery Plan, DCPS expanded its live virtual instruction educational standard to accommodate some in-person instruction with “[a]dditional teacher-led classrooms will open specifically for students receiving special education services prioritizing seats in self-contained classes.” DCPS 2020-2021 Recovery Plan, Pl. Ex. 32, p. 3; *see also id.*, p. 15. DCPS stated that high school students would “experience a range of synchronous instruction

opportunities . . . supplemented with asynchronous learning opportunities, on-line learning program usage, group work and independent assignments.” *Id.*, p. 6. These policies and standards were consistent with guidance from the U.S. Department of Education. *See* DOE March 2020 COVID-19 Guidance, Pl. Ex. 4, pp. 2-6. However, none of this was implemented for plaintiffs, who each have a disability.

By their own admission, defendants have grossly departed from their own educational policies and standards at the DC Jail complex, even those designed for IYP students. In late summer of 2020, DCPS planned for IYP students at the DC Jail complex to follow the same educational standards of synchronous instruction provided to other students. *See* 2020-2021 IYP Student Handbook, Pl. Ex. 18, p. 5. According to Dr. Roane, IYP’s principal, the school’s plan was to provide a “synchronous” education to IYP students, meaning “that students were actually sitting there in front of the computer and the teacher and the students are able to go back and forth and interact with each other in real time.” Roane Testimony, Pl. Ex. 10, Tr. 84:12-84:22. As described by the hearing officer in plaintiff Charles’s hearing:

DCPS’ plan for providing services during the pandemic was to provide virtual instruction [T]he July 21, 2020 *OSSE Guidance* indicated that services during school closures would continue to be provided through “distance or blended-learning” modalities. DCPS explicitly specified virtual instruction as the preferred modality in the DCPS *Resources Guide* and in Witness F’s August 31, 2020 correspondence to the students in [IYP]

HOD, Pl. Ex. 25, p. 16. However, defendants did not implement this plan. Instead, defendants have provided no synchronous direct instruction and no regular, synchronous mental health counseling sessions or other related services. *See e.g.*, Umoja Testimony, Pl. Ex. 10, Tr. 62:22-62:27; Roane Testimony, Tr. 84:9-84:22; 91:18-91:24; 96:1-96:23, 101:7-101:18; 103:11-103:13; Russo Decl., Pl. Ex. 11, para. 16; Charles H. Decl., Pl. Ex. 15, paras. 8, 23, Israel F. Decl., Pl. Ex. 12, paras. 15, 25. There are no individualized distance learning plans for IYP students (Charles

H. Decl., Pl. Ex. 15, para. 24; Gagnon Decl., Pl. Ex. 20, paras. 44-45), despite the fact that DCPS claims that all DCPS students have individualized distance learning plans. *See* Defendants' March 1, 2021 Report, *D.L. v D.C.*, Civ. 06-1437, D.D.C., Pl. Ex. 40, p. 8.

DCPS has known since the closing of schools in March 2020 that IYP students were not receiving the specialized education and related services set forth in their IEPs and have failed to take required actions to remedy this failure more than one year later. *See* Umoja Testimony, Pl. Ex. 10, Tr. 62:22-62:27; Roane Testimony, Tr. 84:9-84:22; 91:18-91:24; 101:7-101:18; 103:11-103:13. As described above (pp. 32-33), OSSE and the District have been on notice that DCPS is not providing special education and related services to IYP students in conformance with their IEPs, yet they have taken no action to ensure compliance with OSSE's standard of synchronous education to provide FAPE to the IYP students. *See* OSSE 2020 Guidance, Pl. Ex. 5, p. 10; Letter to District from Advocates, Pl. Ex. 17.

3. Defendants' Actions Amount to a Violation of the Rehabilitation Act, the ADA, and the DCHRA

This case is of "the rarest of cases [where a plaintiff] will . . . be able to prove that a school system's conduct is so persistent and egregious as to warrant such a unique remedy not otherwise provided for by the IDEA itself." *Walker*, 157 F.Supp.2d at 36; *see D.L.*, 194 F. Supp. 3d at 95-96 (describing years-long IDEA deprivations despite notification of problems, which amounted to Rehabilitation Act violations). Defendants have systematically deprived plaintiffs, all of whom are individuals with disabilities, of all specialized instruction or related services for over a year. This is a gross departure from accepted IDEA standards, U.S. Department of Education guidance on providing FAPE during COVID-19, and defendants' own standards on the provision of FAPE during COVID-19. This is not a question of some missed services by some students for some period. It is essentially the wholesale deprivation of services for students for over a year despite

repeated requests to fix the problem. *See* pp. 8-14, 17-25 above. *See B.R. ex rel. Rempson v. D.C.*, 524 F. Supp.2d 35, 42 (D.D.C. 2007) (“[I]f the defendants conducted an IEP, assessed the plaintiff’s child as needing full-time special services, and then placed her in a facility with no capacity to deliver special services—then the court would encounter no difficulty in characterizing such conduct as marked by gross misjudgment or bad faith.”); *Reid-Witt*, 486 F. Supp. 3d at 10 (“That sort of exclusion—removing a student from an elite school because she needs special education while telling her that she does not qualify for such services—may constitute discrimination solely by reason of [the student’s] disability.”).

For all of these reasons, it is likely that plaintiffs will prevail on their claim that defendants are in violation of Section 504 of the Rehabilitation Act, Title II of the ADA, and the DCHRA.

C. PLAINTIFFS HAVE STANDING

In order to prevail on the merits, in addition to showing likely success with regard to defendants’ violations, plaintiffs must also demonstrate their Article III standing. Plaintiffs Charles and Israel satisfy the three-prong test for standing articulated in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 180–181 (2000). Both have been injured in fact by defendants’ denial of FAPE and their violations of the Rehabilitation Act, the ADA, and the DCHRA. Charles H. Decl., Pl. Ex. 15; Israel F. Decl., Pl. Ex. 12; *see also* HOD, Pl. Ex. 25, pp. 13-25. The hearing officer in Charles’s administrative proceeding found defendants DCPS and OSSE liable under the IDEA but did not order defendants to provide him with the synchronous instruction needed to ensure FAPE. Pl. Ex. 25, p. 27. Defendants have not provided him with synchronous instruction in compliance with his IEP. Charles H. Decl., Pl. Ex. 15, para. 25. The hearing officer also concluded that he did not have jurisdiction over his Rehabilitation Act claim or his claims of systemic violations of the IDEA and the Rehabilitation Act. HOD, Pl. Ex. 25, p. 25. Charles F. has exhausted his administrative remedies under the IDEA, 20 U.S.C. § 1400 *et*

seq., and is aggrieved by the decision of the Hearing Officer to deny this relief. This Court therefore has express appellate jurisdiction over the administrative ruling issued pursuant to the IDEA. *Id.* at § 1415(i)(2). And, Charles continues to suffer injuries in fact by defendants’ ongoing systemic denial of FAPE. Israel, who has filed an administrative complaint, continues to suffer injuries in fact by defendants’ ongoing systemic denial of FAPE. Israel F. Decl., Pl. Ex. 12. Plaintiffs’ injuries will be redressed by the relief sought in the Complaint.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY IF A PRELIMINARY INJUNCTION IS NOT GRANTED

Every day that IYP students are not receiving their special education and related services is another day that their progress towards FAPE is delayed and impaired.

As shown, *see pp.* 8-14, 17-25 above, for over a year, IYP students have received neither special education services nor related services in conformance with their IEPs. For decades, this Court has recognized that “[a] failure to provide a FAPE constitutes irreparable injury,” in the context of a preliminary injunction. *Lofton*, 7 F. Supp. 3d at 124 (citing *Massey v. D.C.*, 400 F. Supp. 2d 66, 75 (D.D.C.2005)). Indeed, “[w]here there is a denial of a free appropriate education [FAPE] . . . there results a per se harm to the student and the irreparable injury requirement for a preliminary injunction has been satisfied.” *Blackman v. D.C.*, 277 F. Supp. 2d 71, 79 (D.D.C. 2003) (emphasis added).

Although denial of FAPE is *per se* harm for purposes of a preliminary injunction, the harm to IYP students is exacerbated. As with many other incarcerated students with disabilities, IYP students have already experienced years of academic failure; their current frustrations with the inaccessibility of the paper or tablet-based work packets and lack of instruction negatively impact their motivation, potentially leading them to abandon any hopes for earning a high school diploma. Gagnon Decl., Pl. Ex. 20, para. 48; *see also* paras. 46-55 (harms from work packet policy). Since

the onset of the pandemic, many IYP students received incompletes for their work in several classes at the end of the 2019-2020 school year, despite their attempts to participate in school. Russo Decl., Pl. Ex. 11, para. 14. Further, IYP students are experiencing educational harm due to the lack of academic and behavioral monitoring, without which, there is no way to know if students are making progress on their IEP goals and objectives. Gagnon Decl., Pl. Ex. 20, para. 50.

IYP students are also suffering social and emotional harm by not receiving the positive behavioral intervention and supports mandated in their IEPs and needed to access the general education curriculum. Gagnon Decl., Pl. Ex. 20, paras. 67-70. The lack of needed behavioral supports may result in inappropriate behavior (*e.g.*, non-compliant or aggressive behavior) that ultimately leads to IYP students being placed in restrictive housing, further compounding their isolation and lack of access to special education and related services. *Id.*, para. 69. As explained above (*see* p. 25), denial of these services exacerbates the pre-existing mental and emotional disorders and traumas prevalent among incarcerated students. Likewise, IYP students restricted to their cells for up to 23 hours per day due to the DC Jail complex's public health restrictions also have their behavioral issues exacerbated by being denied the behavioral supports mandated in their IEPs. Gagnon Decl., Pl. Ex. 20, paras. 63, 65. As noted by the court in *N.J. v. New York*, 872 F. Supp. 2d 204, 214 (E.D.N.Y. 2011) (internal citations and quotations omitted): the "interruption of a child's schooling causing a hiatus not only in the student's education but also in other social and psychological developmental processes that take place during the child's schooling, raises a strong possibility of irreparable injury."

* * *

In sum, denial of FAPE is *per se* irreparable harm for IYP students. The irreparable harm to IYP students is compounded by factors that exacerbate the harm caused by denial of FAPE

and related services. Accordingly, plaintiffs more than satisfy this injunctive relief factor.

III. THE PUBLIC INTEREST WOULD BE SERVED BY A PRELIMINARY INJUNCTION

When considering relief from the District's violation of the IDEA, this court has found on many occasions that "[t]he public interest lies in the proper enforcement of . . . the IDEA." *Petties v. D.C.*, 238 F. Supp. 2d 88, 99 (D.D.C. 2002); *see also D.L.*, 194 F. Supp. 3d at 98 (D.D.C. 2016), ("the public interest will be served by compelling the District to provide special education and related services, and access thereto, in accordance with applicable law."); *Massey v. D.C.*, 400 F. Supp. 2d 66, 76 (D.D.C. 2005) ("the relevant public interest is that of the students"). Here, of course, in addition to the interest in the enforcement of the IDEA, there is a compelling public interest to ensure that students who are detained can obtain their education and minimize, to the extent possible, current and future irreparable harms, from the lack of appropriate education.

IV. THE BALANCE OF EQUITIES FAVORS PLAINTIFFS

The balance of equities strongly supports injunctive relief for plaintiffs. The detained student population has a unique dependency on the District government. Unlike students learning from home, they cannot enroll in another school or district. They cannot avail themselves of family to assist in obtaining alternative educational services or help in securing the services of a private tutor. They rely solely on defendants, who have abandoned these students' educational welfare and needs. *Accord Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (When a government entity involuntarily commits persons to its custody, it is obligated to provide for their essential needs).

Injunctive relief will not unduly burden defendants. A preliminary injunction would necessarily require defendants to ensure cooperation among OSSE, DCPS, and DOC to resolve any barriers impeding them from making FAPE available to all eligible IYP students, a task they are already obligated to assume under their own interagency agreement but have failed to do. *See*

MOA, Pl. Ex. 2. In addition, while an injunction could result in the need for additional funding for information technology or other updates at the DC Jail complex, financial burdens should receive minimal consideration, since the District agreed to comply with the IDEA in return for federal funding. As this Court found in *Petties*, any “financial hardship” to provide or pay for special education services for eligible students under the IDEA does not “justif[y] the risk to the class members that DCPS seeks to impose [of violating their rights under the IDEA], a risk that directly results from DCPS’s own failure to follow the law.” 238 F. Supp. 2d 88, 99 (D.D.C. 2002). Similarly here, any potential burdens encountered by defendants as a result of their own failure to comply with the law are significantly outweighed by the substantial irreparable harms suffered by IYP students and the public interest that is served by the proper enforcement of the IDEA and the delivery of appropriate education to students with disabilities.

CONCLUSION

Defendants have failed to implement policies, procedures, and practices to ensure that plaintiffs receive the special education they are entitled to pursuant to the IDEA, the Rehabilitation Act, the ADA, and District of Columbia law. Without this Court’s swift intervention, plaintiffs will continue to be denied the education and related services to which they are entitled, causing irreparable educational and social-emotional harm. Accordingly, this Court should issue a preliminary injunction requiring defendants to, among other things, immediately develop and implement adequate and effective policies and procedures to provide plaintiffs direct, specialized instruction and related services and provide plaintiffs special education and related services in conformity with their IEPs through the provision of in-person or live videoconference classes and sessions.

A proposed order with detailed provisions is attached.

Respectfully submitted,

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April 12, 2021

Counsel for Plaintiffs

TABLE OF EXHIBITS

Exhibit	Description
1	U.S. Department of Education, Dear Colleague Letter, December 5, 2014
2	Memorandum of Agreement Between DOC, DSPC and OSSE (MOA), March 5, 2019
3	Excerpt, DOC Policy and Procedure Educational Services 4110.7F (“DOC Policy 4410.7F”)
4	U.S. Department of Education, Questions and Answers on Providing Services to Children with Disabilities During a COVID-19 Outbreak (“DOE March 2020 COVID-19 Guidance”), March 2020
5	Excerpt, OSSE, IDEA Part B Provision of FAPE: Guidance Related to Remote and Blended Learning, July 21, 2020, updated March 24, 2021 (“OSSE 2020 Guidance”)
6	Letter from Dr. Lewis D. Ferebee, DCPS Chancellor, to DCPS Community, March 13, 2020 (“Letter from Chancellor Ferebee”)
7	Testimony of Dr. Lewis D. Ferebee, DCPS Chancellor, District of Columbia Council, Joint Public Hearing on Distance Learning in DC Public Schools and Charters Schools in the District, October 2, 2020 (“Ferebee DC Council Testimony”)
8	Special Education Program and Resources Guide for Families, School Year 2020-2021 (“DCPS Special Education Resources Guide”)
9	Email from Dr. Lewis D. Ferebee, DCPS Chancellor, to DCPS Community, February 6, 2021 (“Email from Chancellor to DCPS Community”)
10	OSSE, Office of Dispute Resolution, <i>Charles H. v DCPS</i> , Case No. 2020-0184, Hearing Transcript, December 1, 2020, including testimony of Amy Lopez (Deputy Director of College and Career Readiness), Tarisai Lumumba-Umoja (2019-2020 DCPS Special Education Coordinator), and Dr. Tanya Roane (Former IYP Principal)
11	Declaration of Rachel Russo, April 9, 2021 (“Russo Decl.”)
12	Declaration of Israel F., April 7, 2021 (“Israel F. Decl.”)
13	Temporary Restraining Order, <i>Banks v. Booth</i> , Civ. Action No. 20-849 (CKK), April 19, 2020 (“ <i>Banks</i> Temporary Injunction Order”)
14	Preliminary Injunction Order, <i>Banks v. Booth</i> , Civ. Action No. 20-849 (CKK), June 18, 2020 (“ <i>Banks</i> Preliminary Injunction Order”)
15	Declaration of Charles H., April 7, 2021 (“Charles H. Decl.”)
16	DCPS Service Tracker for Charles H.
17	Letter to District from Advocates, August 20, 2020

Exhibit	Description
18	2020-2021 IYP Student Handbook
19	DOC Instructions for APDS Tablets (“APDS Instructions”)
20	Declaration of Joseph Brojomohun-Gagnon, April 9, 2021 (“Gagnon Decl.”)
21	IEP Charles H., October 20, 2020 (“IEP”)
22	Letter from DOC Education Administrator, Ms. Tabitha, to IYP Students, April 24, 2020 (“DOC Letter to Students”)
23	DOC Work Distribution Log, March through October 2020
24	Charles H. Due Process Hearing Complaint, Case Number 2020-0184, October 16, 2020 (“Charles H. Complaint”)
25	OSSE, Office of Dispute Resolution, Hearing Officer Determination (“HOD”), January 11, 2021, <i>Charles H. v DCPS</i> , Case Number 2020-0184
26	Prehearing Order, <i>Charles H. v. DCPS</i> , Case Number 2020-0184 (“Prehearing Order”)
27	Israel F., Due Process Hearing Complaint, Case No. 2020-0184, February 1, 2021 (“Israel F. Complaint”)
28	DCPS Closing Statement, Charles H. Due Process Hearing, Case Number 2020-0184 (“DCPS Closing Statement”)
29	Declaration of Eden Nelson, April 5, 2021 (“Nelson Decl.”)
30	DOC Policy 2420.4D, Email and Internet Use
31	Excerpt, Maya Angelou Public Charter School, 2019-2020 Report, DCPS (“2019-2020 Maya Angelou PCS Report”)
32	Excerpt, 2020-21 School Year LEA Continuous Education & School Recovery Plan, DCPS (“DCPS 2020-2021 Recovery Plan”)
33	DOC 2020 Inspection Report
34	COVID-19 IYP Operations School Reopening Plan, October 23, 2020
35	DOC Lead Up Program Statement
36	Email from Chancellor Ferebee to Advocates, August 31, 2020
37	OSSE’s Closing Statement, December 15, 2020
38	Excerpt, OSSE 2020-2021 Risk Based Monitoring Tool, Part B
39	OSSE IDEA Grant Funding and LEA Allocation for 2020-2021 School Year OSSE 2020-2021 LEA Allocations and OSSE IDEA Grants Management
40	Excerpt, Defendants’ March 1, 2021 Report, <i>D.L. v D.C.</i> , Civ. 06-1437, D.D.C.