EXHIBIT B

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Student,[1] **Petitioner,**	)	**Hearing Dates: 9/25/23, 9/29/23, 10/4/23**
v.	)	**Case No. 2023-0032**
District of Columbia Public Schools and Office of the State Superintendent of Education,	)	**Hearing Officer: Michael Lazan**
Respondents.	)	

HEARING OFFICER DETERMINATION

I. Introduction

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

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

A due process complaint ("Complaint") pursuant to the Individuals with Disabilities Education Act ("IDEA") was received by District of Columbia Public Schools ("DCPS") and Office of the State Superintendent of Education ("OSSE") on February 21, 2023. The Complaint was filed by the Student. A resolution meeting was held on March 15, 2023. The matter was not resolved. DCPS filed a response on March 3, 2023. OSSE filed a response on March 13, 2023. Both Respondents contended, in brief, that they have no authority to provide a student with a Free Appropriate Public Education ("FAPE") when that student resides in a BOP prison.

II. Subject Matter Jurisdiction

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

III. Procedural History

A resolution meeting was held on March 15, 2023. The parties were unable to resolve the case. A prehearing conference took place by telephone on April 27, 2023. Participating in the prehearing conference were Petitioner's representatives, Attorney A, Esq., Attorney B, Esq., and Attorney C, Esq.; DCPS's representative, Attorney D, Esq.; and OSSE's representatives, Attorney H, Esq., and Attorney J, Esq. On May 2, 2023, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The hearing on this matter was originally scheduled for June 2023. The parties and this Hearing Officer met in May 2023 to synchronize the hearing dates with the

hearing dates for a related case involving the same counsel. New hearing dates were set for July 17, 2023, July 18, 2023, and July 19, 2023. The Hearing Officer Determination ("HOD") due date was extended to September 30, 2023, a continuance of thirty days.

The parties and this Hearing Officer conducted additional prehearing conferences, including on May 17, 2023, June 28, 2023, July 7, 2023, July 21, 2023, and September 7, 2023, to address issues, related to: 1) the need for and availability of federal witnesses; 2) the need for Notices to Appear; and 3) the coordination of this case with Case 2023-0031, which was filed by the same counsel on the same issues. The prehearing conference order was then revised three times, with a final prehearing conference order issued on September 11, 2023.

On August 31, 2023, the deadline for motions, OSSE moved to dismiss the Complaint, arguing that the Complaint amounted to a systemic challenge to the District's policy regarding special education for students incarcerated in federal prison. On September 14, 2023, Petitioner cross-moved for summary judgment and opposed the motion to dismiss. On September 25, 2023, this Hearing Officer issued an order denying both motions, without ruling on whether claims relating to similarly situated students are actionable in this forum.

The parties then agreed to change the hearing dates, due to persistent issues with federal witness availability. The hearings were scheduled for September 25, 2023, September 29, 2023, and October 4, 2023. Because the parties wanted to litigate this case on a parallel track to Case 2023-2031, which was tried later in October, the parties selected November 13, 2023 as the new HOD due date for both cases. A corresponding order was issued on September 28, 2023.

The matter proceeded to trial on September 25, 2023, September 29, 2023, and October 4, 2023. After the hearings in both cases concluded, all three parties requested an opportunity to brief the issues, given the complexity of the legal issues and the possible importance of these cases for future litigants and students. The parties also wanted an opportunity to file briefs after receiving the written transcripts of the hearings. The parties asked for an extension to December 1, 2023, to file their briefs and moved to extend the HOD deadline to December 15, 2023. This request was memorialized by an order dated November 11, 2023.

The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. After testimony and evidence, the parties presented closing briefs on December 4, 2023. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-26, without objection. DCPS and OSSE submitted evidence jointly as exhibits R-1 through R-34. Objections to exhibits R-1 through R-5, R-9, R-10, R-14 through R-16, R-21, R-23, and R-25 through R-27 were overruled. Exhibits R-1 through R-34 were admitted. Petitioner presented as witnesses, in the following order: Petitioner; Witness A, a professor (expert in special education and correctional education); Witness B, an educational consultant (expert in the harm suffered by students for denials and deprivations of FAPE); Witness C, deputy chief of DCPS's division of specialized instruction; and Witness D, director of special education at OSSE. Witness B was then recalled by Petitioner. OSSE presented Witness E, director of enrollment and residency and interim executive director of a school in the District of Columbia. DCPS presented Witness F, a resolution specialist.

IV. Issues

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

1. Did DCPS fail to provide the Student with any special education services from January 2019 to present? If so, did DCPS deny the Student a FAPE?

2. Did OSSE fail to supervise and monitor the provision of a FAPE to students with disabilities in the BOP from January 2019 to present? If so, did OSSE deny the Student a FAPE?

3. Did OSSE fail to intervene in light of an absent and unwilling local educational agency ("LEA") when DCPS failed to provide the Student with special education services beginning in January 2019? If so, did OSSE deny the Student a FAPE?

As relief, Petitioner seeks a finding of FAPE denial; extended eligibility for the Student until age twenty-nine; the provision of special education services for the Student; independent educational evaluations; a revised IEP; an order that the Student be returned to the District of Columbia and be enrolled in a high school program at the Department of Corrections; the provision of a new educational placement in conformity with the revised IEP; compensatory education; and systemic relief for all similarly situated students.

V. Findings of Fact

1. The Student is an X-year old whose last IEP found him/her to be eligible for services as a student with Multiple Disabilities (Specific Learning Disability and Other Health Impairment). Prior to the 2018-2019 school year, the Student lived in the District of Columbia and attended District of Columbia schools, including charter schools within the District of Columbia. P-2; P-3; P-4; P-5; P-6; P-7.

2. On or about September, 25, 2018, the Student enrolled at School A at Center A. Staff at the school determined that the Student was a strong candidate for a

credit recovery program, and that the Student's overall willingness to consistently participate in school was reflected in his/her grades and instructor feedback. The Student shared goals of earning and maintaining honor roll, working on his/her anger, and graduating from high school. The Student had "very" consistent attendance throughout the time s/he was enrolled at School A at Center A. The Student remained positively engaged and, while talkative at times, s/he consistently participated in class and worked well independently. The Student's instructors encouraged him/her to ignore the "negativity" around him/her and stay focused to continue to experience success in the classroom. P-9-1.

3. In October 2018, educational testing of the Student was conducted through the Woodcock-Johnson IV Tests of Achievement Form B and Extended. The Student scored in the average range in all academic areas. P-10-1. On December 5, 2018, an IEP was written for the Student while s/he attended School A at Center A. The IEP required the Student to receive twenty hours per week of specialized instruction in the general education setting and thirty minutes per week of behavioral support services outside the general education setting. P-2.

4. The IEP noted that the Student struggled to express emotions when s/he was frustrated or upset. The Student also struggled with concentrating in class and using copying skills and self-monitoring skills, which impacted his/her ability to remain in the classroom and stay focused on academic tasks. The Student needed the following services to access the general education curriculum: weekly pull-out for social/emotional support; pull-out when s/he needed to process his/her emotions, take breaks, and get back on track; daily check-ins to gauge his/her mood and intervene if necessary; and positive

feedback when s/he was observed doing well. The IEP indicated that, when triggered, the Student had difficulty expressing thoughts and emotions and displayed aggression toward peers. The IEP suggested coaching, positive support, and encouragement to help the Student manage his/her moods and make better decisions about his/her academic achievements. P-2; Testimony of Witness A; P-13.

5. The Student earned school-wide awards and other incentives while at School A at Center A. The Student won a "Most Improved Scholar Award" for demonstrating the greatest growth, and the Student's participation and respect points were outstanding. The Student identified math as the class s/he wanted to improve in the most, and s/he did just that, earning and maintaining an A+ average in math, as well as high A's in chemistry, English, and U.S. history. The Student's lowest grades were C's, which prevented him/her from achieving his/her goal of making the honor roll. P-9.

6. The Student was transferred from School A at Center A to BOP custody in February 2019. DCPS and OSSE were not notified when the Student was transferred to BOP custody. Petitioner did not contact DCPS or OSSE to notify the agencies about his/her transfer to a BOP facility or desire to receive IDEA services during his/her incarceration at a BOP facility. Testimony of Witness C; Testimony of Witness F.

7. The Student was placed in a BOP facility ("FCI #1") from February 2019 through June 2022. FCI #1 had no high school education or special education program available for the Student while s/he was incarcerated there. Testimony of Petitioner.

8. Since the Student entered the BOP in January 2019, s/he has not been offered any high school program, has not had any IEP meetings, and has not received any special education or related services. Testimony of Petitioner.

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

10. On February 20, 2020, Respondents were parties to a due process hearing for a D.C. Code offender in BOP custody. In that case, the BOP's education administrator refused to answer any specific questions about the offender's access to diploma programs and special education services. R-10.

11. In July 2022, the Student was transferred to another BOP facility ("FCI #2"), where s/he remains incarcerated. FCI #2 has no high school education or special education programs. Testimony of Petitioner.

12. On April 6, 2023, Respondents sent a so-called "Touhy Request" to the BOP, seeking testimony from its then-current education administrator. R-14. On May 19, 2023, the BOP responded, denying Respondents' request on grounds including 1)

sovereign immunity; 2) the witness would be improperly asked for legal opinions; 3) the witness would be improperly asked for confidential information about inmates; and 4) the witness would be improperly asked to testify as an expert. The BOP referred Respondents to the BOP website. R-28; R-29; R-30; R-31; R-32; R-33; Testimony of Witness D.

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

14. On June 27, 2023, Respondents sent a letter to the BOP, inquiring about the District of Columbia's ability to provide a FAPE to individuals in BOP custody who were entitled to IDEA services. R-17. On August 21, 2023, the BOP responded to the District's inquiry in a letter, stating that the BOP alone is responsible for educating offenders in its custody and that the BOP has its own programs to provide education services, including to students with disabilities. The BOP stated that its policies require each institution to maintain an "education department" responsible for providing adults in custody with literacy classes and other educational programs, as well as a special learning needs ("SLN") teacher who ensures that SLN students receive appropriate support and assistance in the classroom. R-24.

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

16. The Student has completed fifteen of the required twenty-four Carnegie Unit credits needed to earn his/her DCPS high school diploma. P-13-15. The Student attempted to obtain a General Equivalency Diploma ("GED") during his/her BOP incarceration, but the Student was not successful and struggled to work independently without any specialized instructional support. The Student took the GED examination but did not pass any of the sections. Testimony of Petitioner.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: "Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement," provided that "the party requesting the due process

hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency." D.C. Code Sect. 38-2571.03 (6)(A)(i). Accordingly, on all three issues, the burden of persuasion is on Petitioner.

1. Did DCPS fail to provide the Student with any special education services from January 2019 to present? If so, did DCPS deny the Student a FAPE?

2. Did OSSE fail to supervise and monitor the provision of FAPE to students with disabilities in the BOP from January 2019 to present? If so, did OSSE deny the Student a FAPE?

3. Did OSSE fail to intervene in light of an absent and unwilling LEA when DCPS failed to provide the Student with special education services beginning in January 2019? If so, did OSSE deny the Student a FAPE?

Though the prehearing order identified three separate FAPE issues in this case, all three issues involve the same basic question: Does the Student have a legal right to special education services while s/he is housed in federal prison? As a result, all three issues are addressed in this section.

The answer to the question involves whether this Hearing Officer should adopt the legal view of the Department of Education, as expressed in its opinion letters, which state, effectively, that a state educational agency ("SEA") and an LEA have no obligation to provide special education services pursuant to the IDEA if a student is housed in a federal prison. Narrowed further, the issue is whether this Hearing Officer should be persuaded by a pair of administrative determinations and related rulings by the Department of Education's Office of Special Education Programs ("OSEP") and OSERS, or by a series of federal court decisions that call into question the wisdom of deferring to such administrative determinations, and indeed find that those rulings were wrongly decided.

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

The first ruling, Magistrate Harvey's extensive report and recommendation, based its analysis on the principles of deference described in Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), Skidmore v. Swift, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and Chevron, U.S.A., Inc. v. Nat. Res. Def.

[2] OSSE argued that the findings in Brown are *dicta*, but did not explain more. This Hearing Officer fails to see how Brown can be considered *dicta* on the issue of the availability of special education services for students with disabilities who are in federal prisons. While there may be more than one reason for the Brown court's rulings, where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*. Woods v. Interstate Realty Co., 337 U.S. 535, 537, 69 S. Ct. 1235, 1237, 93 L. Ed. 1524 (1949). Judge Moss's ruling in regard to the availability of IDEA services to incarcerated students is at the heart of this case and is the basis for the finding that Brown was denied a FAPE.

Council, Inc., 467 U.S. 837, 842, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984). Deference to administrative determinations, whether characterized as "Skidmore deference" or "Chevron deference," examine the thoroughness of the rulings, the validity of the reasoning, and the consistency of the reasoning with earlier and later pronouncements." Skidmore, 323 U.S. at 140, 65 S.Ct. 161. If an interpretation contradicts the plain text of the statute, it is afforded no deference. Chevron, 467 U.S. 837, 842–43 (if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress). Brown II, 324 F. Supp. 3d at 161–62.

The policies of the Department of Education are at issue here. They are best explained in two "OSEP letters:" Letter to Yudien, 39 IDELR 270 (2003) and Letter to Mahaley 58 IDELR 20 (OSEP 2011). In Letter to Yudien, the Vermont Department of Education noted that the State of Vermont's correctional system housed prisoners from other states and from the BOP. Vermont asked OSEP what its obligations were to those inmates. OSEP recognized that, "when a youth with disabilities is referred or placed by the State into an out-of-State facility, the referring State is generally responsible for ensuring that FAPE is available to the youth during the course of the youth's placement in that facility." Regarding BOP prisoners housed in Vermont facilities, OSEP stated that, "Individuals in the federal correctional system fall under the jurisdiction of [BOP] within the Department of Justice … The IDEA makes no specific provision for funding educational services for individuals with disabilities through [BOP]." OSEP directed further inquiries to the BOP.

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

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

It is noted that Letter to Yudien and Letter to Mahaley are not completely consistent with other Department of Education correspondence that suggests it is important to expand the rights of incarcerated youth. The Department of Education has stated that, "incarcerated youth, many of whom are students with disabilities, are among those in greatest need of academic, emotional, and behavioral supports, [and] they often lack access to high-quality educational services." It has also stated that educational and

juvenile justice agencies must ensure that youth who are already confined receive the services they need to meet their educational goals, obtain employment, and avoid recidivism. The Department of Education has further stated that, to strengthen educational services for youth in confinement, it has engaged with communities and practitioners to develop a set of overarching characteristics for providing high-quality educational services for youth in long-term secure care facilities. Letter to Chief State School Officers and State Attorneys General, 114 LRP 26961 (U.S. Department of Education, Department of Justice, June 9, 2014).

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

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

Brown II, 324 F. Supp. 3d 154, 161–62 (D.D.C. 2018); see also Brown III, 2019 WL 1924245 at *4. No appeal was filed and, indeed, the court's decisions were apparently convincing enough to have, at least initially, convinced both OSSE and DCPS of their

worth. DCPS and OSSE have since made best efforts to try to convince the BOP to open its doors to District of Columbia students who are incarcerated there.

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

An "impossibility defense" does not apply to federal grant programs like the IDEA. Brown IV, No. 17-cv-348, 2019 WL 3423208, at *16; Schiff v. District of Columbia, No. 18-CV-1382 (KBJ), 2019 WL 5683903, at *7 (D.D.C. Nov. 1, 2019). There is no dispute that the Revitalization Act eliminated the District of Columbia's access to D.C. Code offenders in federal custody, including the District's ability to monitor, control, and provide education programming for students, including those entitled to IDEA services. But there also should be no dispute that the Revitalization Act

does not override the District's obligations under the IDEA. Brown II, 324 F. Supp. 3d at 161. A review of the text of the Revitalization Act reveals that it does not mention the IDEA at all, and there is nothing in its legislative history, or anywhere else, to suggest that Congress intended anything in the Revitalization Act to limit a school district's obligations under the IDEA. Id.

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

DCPS called the court's decision in Brown an "absurd interpretation of the statute," and OSSE argued that Brown is entirely flawed, logically, and rests on an errant reference to "federal" prisons in 20 U.S.C. Section 1415(m) regarding the permissive

action states may take concerning transfer of parental rights. That provision reads as follows:

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

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

As the court put it in Brown I, with the IDEA, Congress established a national

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

DCPS argued that it cannot be liable because it was not the last LEA that serviced Petitioner. DCPS also argued that it was not notified when the Student was transferred from School A at Center A to BOP custody, nor has it been notified about Petitioner's whereabouts during the period that s/he has been in custody. DCPS pointed out that Petitioner did not seek to enroll in DCPS or request an IEP from the agency, and that if DCPS had been notified, Petitioner would have been referred to the agency's Private and Religious Office ("PRO") and required to complete the enrollment and residency verification process before DCPS could develop an IEP.

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

DCPS also argued that it is only required to have policies and procedures to ensure a FAPE "to all children with disabilities residing" in the District. 20 U.S.C. Sect.

1412(a). Since the Student does not literally reside in the District of Columbia because of his/her prison sentence, DCPS argued that the Student is not a resident of the District of Columbia for IDEA purposes. DCPS argued that there must be a physical presence in the District of Columbia pursuant to 5-A D.C.M.R. Sect. 5001.5(a) and the OSSE Enrollment and Residency Handbook.

However, in Brown, the court made it clear that Respondents' obligation to make FAPE available to an incarcerated student under the IDEA does not hinge on the physical presence of the student. The court flatly stated that "a person's residency does not change by virtue of being incarcerated in another state." Brown I, 2018 WL 774902 at *12. Nor does the obligation to provide FAPE hinge on whether a student is enrolled in a District public school. D.S. v. District of Columbia, 699 F. Supp. 2d 229, 235 (D.D.C. 2010); District of Columbia v. Vinyard, 971 F. Supp. 2d 103, 113 (D.D.C. 2013) (residency is the basis for the obligation to provide FAPE). When students are placed in private schools located in other states, outside the District of Columbia, their enrollment does not relieve DCPS from having to fulfill its responsibilities to make FAPE available. District of Columbia v. Oliver, No. CV 13-00215 BAH/DAR, 2014 WL 686860, at *4 (D.D.C. Feb. 21, 2014); see also T.H. as next friend T.B. v. DeKalb Cnty. Sch. Dist., 564 F. Supp. 3d 1349, 1353 (N.D. Ga. 2021) (the school district's inability to access detainees made a sheriff liable for IDEA violations, even though the sheriff did not have access to incarcerated students with disabilities). It is noted that the IEP team of a child with a disability who is convicted as an adult under state law and incarcerated in an adult prison may modify the child's IEP or placement, without respect to the least restrictive

environment, if the state has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated. 34 C.F.R. Sect. 300.324(d)(2).

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

Finally, this Hearing Officer does not agree with Petitioner that a hearing officer has jurisdiction over systemic claims. Courts have long recognized "systemic" claims under the IDEA where a plaintiff has alleged a "pattern and practice" of systematic IDEA violations. Quatroche v. East Lyme Bd. of Educ., 604 F. Supp. 2d 403, 411 (D.Conn., 2009). A claim is "systemic" where the complaint requires restructuring of the education

system itself to comply with the dictates of the IDEA. Blunt v. Lower Merion School Dist., 559 F. Supp. 2d 548, 558 (E.D.Pa., 2008) (exception to the IDEA's administrative exhaustion requirement where the plaintiff has alleged "systemic legal deficiencies" unable to be remedied through administrative procedures).

But just as Hearing Officer Peter Vaden ruled in Case 2023-0031, hearing officers generally do not have jurisdiction over systemic claims. A parent or a public agency may file a due process complaint on any matters relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child. 34 C.F.R. Sect. 300.507(a)(1). The regulations refer to "a child," not to "a child or children," and there is nothing otherwise in the statute or the regulations to suggest that Congress intended to give special education hearing officers the authority to decide multiple student claims, or systemic claims, in one due process complaint.

Moreover, case law strongly suggests that hearing officers should not exercise jurisdiction over systemic claims brought through the filing of a single administrative process complaint by a single student. N.J. Prot. & Advoc. v. N.J. Dep't of Educ., 563 F. Supp. 2d 474 (D.N.J. 2008). For instance, in Easter v. District of Columbia, 128 F. Supp. 3d 173, 178 (D.D.C. 2015), the court stated that systemic/class-action claims are beyond the jurisdiction of an IDEA hearing officer and are precisely the type of issue that cannot be addressed on a student-by-student basis during due process hearings. The court found that the IDEA only provides for individual child-level claims and, therefore, allegations on behalf of "similarly situated students" are "misplaced and inappropriate." See also R. AG ex rel. R.B. v. Buffalo City School Dist. Bd. Of Educ., 2013 WL 3354424, 7-8 (W.D.N.Y. 2013) (systemic violations exempted from the administrative exhaustion

requirement because hearing officers do not have the ability to alter already existing policies); S.W. by J.W. v. Warren, 528 F. Supp. 2d 282, 295 (S.D.N.Y. 2007) (because plaintiffs' complaints were caused by the policies of a county, a hearing officer could not offer a remedy). Petitioner has not submitted any persuasive, on-point authority to the contrary. The systemic claims therefore must be dismissed.

Additionally, Respondents are correct that some of the applicable claims prior to two years before the filing of the Complaint. The IDEA's two-year statute of limitations only allows Petitioner to go back two years from the date of the filing of the Complaint, 20 U.S.C. Sect. 1415(f)(3)(C), and Petitioner did not clearly argue that any of the applicable exceptions apply. Therefore, relief must correspond only to FAPE deprivations occurring two years prior to the filing of the due process complaint.

Petitioner otherwise prevails on all three issues because both DCPS and OSSE denied the Student a FAPE by failing to provide him/her with any special education services during the two years prior to the filing of the Complaint.

RELIEF

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

Aside from the forms of systemic relief, which must be denied because this Hearing Officer does not have jurisdiction over such claims, Petitioner seeks the following: 1) extended eligibility for two years after the date upon which the Student is able to enroll in a high school diploma program that will allow him/her sufficient time to complete the nine credits outstanding to earn his/her high school diploma; 2) 450 hours of compensatory education services to target reading, math, and written expression; 3) fifty-to-sixty hours of compensatory education services to target transition services for post-secondary education and training, employment, and independent living to be used for anything from completing an employment assessment, receiving training around developing a resume, attending a training program in an area of interest, or research and applying for positions; and 4) fifty-five hours of compensatory education services to focus on the Student's emotional, social, and behavioral development.

Petitioner also seeks: 1) a declaration that Respondents denied the Student a FAPE and failed to comply with the IDEA's substantive requirements in violation of federal and local laws; 2) an order directing Respondents to authorize comprehensive independent education evaluations of the Student from evaluators of the Student's choice, to include a comprehensive psychological evaluation with educational testing and a comprehensive vocational evaluation; 3) an order for Respondents to convene an IEP meeting to review the Student's evaluations and update his/her IEP; 4) an order directing Respondents to provide special education and related services in conformity with the Student's IEP; 5) an order that the Student be returned to the District of Columbia to allow him/her to enroll in the high school diploma program at the District of Columbia Department of Corrections; 6) an order extending the Student's IDEA eligibility for two

years after the day in which s/he can enroll in a special education program that allows him/her the opportunity to complete his/her secondary education; and 7) an order directing Respondents to enter into an agreement with the BOP to place the Student at the District of Columbia Department of Corrections through the period of IDEA eligibility and allow him/her to enroll in the high school diploma program at the District of Columbia Department of Corrections.

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

In regard to the request for compensatory education services, hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F.3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative, fact-intensive" inquiry used to craft an award "tailored to the

unique needs of the disabled student"). A petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). The Brown court, in Brown I, specifically suggested considering this sort of approach in a case involving an incarcerated student in federal prison. Brown I, 2018 WL 774902 at *14.

DCPS argued that Reid demands that an award not be based on an arbitrary number, that the only data that was reviewed by Witness B was four years old, and that Witness B made no attempts to obtain updated documentation about the Student, including at BOP facilities. But as DCPS itself argued throughout the hearing on other points, there is virtually no available data upon which to assess the Student, who remains in the BOP, inaccessible to evaluation. Witness B, who has years of experience in proposing compensatory education awards in this forum, presented a compensatory education plan in support of his findings, which, while not perfect, provides for a reasonably modest amount of relief for a two-year deprivation of FAPE. Witness B, who came across professionally as a witness, also said that the Student probably regressed in reading and math, which would make it harder for the Student to attain a GED, suggesting that the Student will need a lot of help to obtain the GED that s/he seeks.

The main question in regard to relief relates to whether or not the Student should be granted extended eligibility for two years after s/he is released from prison, which could be when the Student is almost thirty years of age. DCPS contended that this Hearing Officer has no authority to extend the Student's eligibility until the Student is almost thirty years old, pointing out that there is no evidence or guarantee

that any DCPS program would be able to provide Petitioner a FAPE upon his/her release. While some limited evidence was presented through the testimony of Witness F about possible programs for such a student, Petitioner did not advocate for such programs, and the record does not establish that any such program would or could be appropriate for the Student or others in the classroom. This Hearing Officer has found no authority where a court or a hearing officer has ordered anything close to this kind of extended eligibility for a student after a finding of FAPE denial, much less in a case involving an incarcerated student. It is noted that, in Brown, the court made no mention of this approach as a possible form of relief. This Hearing Officer is therefore inclined to deny the request for extended eligibility.

Nor was this Hearing Officer persuaded by Petitioner's suggestion to issue an order that the Student be released from federal prison, or issue an order directing Respondents to enter into an agreement with the BOP to place the Student at the District of Columbia Department of Corrections through the period of IDEA eligibility. Petitioner provided no authority to suggest that it is prudent for a special education hearing officer to address public safety or municipal contractual concerns in such a way, and this Hearing Officer must therefore decline to so rule.

VII. Order

As a result of the foregoing:

1. After the Student is released from prison, or if the BOP allows Respondents access to its facilities, Respondents shall arrange for a comprehensive evaluation of the Student, by a provider or providers of the Student's choice at a usual

and customary rate in the community, to include a comprehensive psychological evaluation with educational testing and a comprehensive vocational evaluation;

2. Respondents shall pay for 450 hours of compensatory tutoring for the Student in reading, math, and writing, to be provided by a certified special education teacher at a usual and customary rate in the community;

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

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

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

Dated: December 15, 2023
Corrected: December 15, 2023

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
Attorney C, Esq.
Attorney D, Esq.
Attorney E, Esq.
Attorney F, Esq.
Attorney G, Esq.
Attorney H, Esq.
Attorney I, Esq.

VIII. Notice of Appeal Rights

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

Dated: December 15, 2023

Michael Lazan
Impartial Hearing Officer

Appendix A

Darius McNeal/DCPS OSSE

Case No: 2023-0032

Student/Petitioner:	Darius McNeal
Date of Birth:	PII
Local ID:	9200985
State ID:	9390364372
Witness A:	Dr. Joseph Gagnon
Witness B:	Jay Michney
Witness C:	Regina Grimmett
Witness D:	Victoria Glick
Witness E:	Aaron Parrott
Witness F:	Camille Lesseig
School A at Center A:	Maya Angelou at YSC
FCI#1	FCI Gilmer
FCI#2:	FCI Pollock
Attorney A:	Sarah Comeau, Esq.
Attorney B:	Marja Plater, Esq.
Attorney C:	Tayo Belle, Esq.
Attorney D:	Kaitlin Banner, Esq.
Attorney E:	Margaret White, Esq.
Attorney F:	Brian Whittaker, Esq.
Attorney G:	Martha Medina, Esq.
Attorney H:	Lee Hagy, Esq.
Attorney I:	Carmela Edmunds, Esq.
Attorney J:	Sarah-Jane Forman, Esq.
X-year-old:	11-year-old