

Article

Provision of a Free and Appropriate Public Education in an Adult Jail during COVID-19: The Case of Charles H. et al. v. District of Columbia et al.

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Abstract: COVID-19 has engendered serious challenges with the provision of special education services for youth and young adults incarcerated in U.S. adult correctional facilities. This article describes the recent lawsuit, Charles H. et al. v. District of Columbia et al., which focused on the lack of a free and appropriate public education (FAPE) at the Inspiring Youth Program (IYP) school in the Washington DC jail during the pandemic. Following a brief review of relevant components of the Individuals with Disabilities Education Act (2006) regulations, we describe the three areas in which there were violations to the provision of IDEA and FAPE, as well as the harm incurred. Specifically, we discuss the lack of: (a) instruction and monitoring of youth academic progress; (b) related services (i.e., behavioral interventions and supports, counseling); and (c) DC public schools Office of the State Superintendent of Education (OSSE) supervision and oversight. Finally, we provide a discussion of the need for compensatory education to remediate harm.

Keywords: special education; adult jail; COVID-19; lawsuit



Citation: Gagnon, J.C.; Benedick, A.R. Provision of a Free and Appropriate Public Education in an Adult Jail during COVID-19: The Case of Charles H. et al. v. District of Columbia et al. *Educ. Sci.* **2021**, *11*, 767. <https://doi.org/10.3390/educsci11120767>

Academic Editors: Tiina Itkonen and Henri Pesonen

Received: 26 September 2021
Accepted: 22 November 2021
Published: 29 November 2021

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1. Introduction

Litigation related to compliance with federal regulations has served as a significant force in ensuring incarcerated youth and young adults (the term “youth” is used throughout this paper to indicate youth and young adults eligible for special education services up to the age of 22) with disabilities are provided special education services while in the juvenile and adult correctional systems [1]. In a recent example, in June 2021, a United States (U.S.) District Court judge granted plaintiffs’ motion for a preliminary injunction in the case of Charles H. et al. v. District of Columbia et al. (referred to as Charles H.). Plaintiffs held that the most basic attributes of special education services and a free and appropriate public education (FAPE) were denied youth incarcerated in the Inspiring Youth Program (IYP) school at the Washington DC jail in the District of Columbia (DC) since the onset of the COVID-19 crisis. Consequently, the District of Columbia Public Schools (DCPS) and the Office of the State Superintendent of Education (OSSE) were required to “provide Plaintiffs, and all other members of the provisionally certified class (i.e., every student enrolled in the Inspiring Youth Program) with the full hours of special education and related services mandated by their Individualized Education Programs (IEPs) through direct, teacher-or-counselor-led group classes and/or one-on-one sessions, delivered via live videoconference calls and/or in-person interactions” [2] (p. 1). While the provision of special education services is a longstanding issue within the juvenile and adult corrections systems [3,4], the onset of the pandemic has further compromised adherence to the Individuals with Disabilities Education Act (IDEA) (2006) regulations. The goals of this paper are to provide a brief explanation of a free and appropriate public education (FAPE) as identified in IDEA, followed by a discussion of the specific aspects of the aforementioned case, the harm to

youth, and the lessons learned that can inform future policy and practice. In particular, there is a focus on named plaintiffs, Charles H., Israel F., and Malik Z. (pseudonyms).

2. Free and Appropriate Public Education

The provision of special education services in the U.S. is guided by the IDEA (2006) regulations. They provide a comprehensive and specific set of requirements that ensure individualized student needs are met. An important aspect of IDEA (2006) is the assurance that students with disabilities are provided FAPE, which is defined as, “special education and related services that—(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.” (§ 300.17). Within sections 300.320 through 300.324, there is further delineation that includes (a) an explanation of the IEP, associated procedures, and IEP team (including parent participation); (b) notation of the requirement to provide related services, as needed; (c) identification of when the IEP must be in effect (including when there are school changes) and the development, review, and revision of the IEP. With regard to FAPE, IDEA also includes information that individualized academic, behavioral, and related services should be provided in order to “enable the child—(4)(i) To advance appropriately toward attaining the annual goals; (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section; (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section” (§§ 320(a)(4–5)).

With few exceptions, incarcerated youth in adult jails/prisons are guaranteed the same special education rights and services delineated in IDEA (2006) as youth in the community. It is important to briefly note the exceptions, particularly in light of the fact that adult correctional facilities have been known to inappropriately extend exceptions and provide inadequate special education services [3]. The first area in which exceptions could be made relates to youth age (IDEA, § 300.102). Of relevance is the fact that the age of youth for which there are guaranteed services must be consistent with state law. For example, in DC a youth with special needs is eligible for services until the end of the semester in which he/she turn 22 years old [5]. In addition, a youth incarcerated in an adult facility need not be provided special education services if state law in the youth’s placement prior to incarceration does not require such services for youth ages 18–21. Services are also not required if a youth was not classified with a disability, did not have an IEP, or has earned a regular high school diploma. However, a youth is entitled to services if, “(a) he/she had been classified with a disability and received services, but left school prior to incarceration or (b) “Did not have an IEP in their last educational setting, but who had actually been identified as a child with a disability” (IDEA, § 300.102(a)(2)(ii)(B)).

There are other specific aspects of special education services that do not apply to youth convicted as adults serving time in adult prisons: (a) youth need not participate in general assessments; (b) requirements related to transition planning and services do not apply if a youth will exit the facility after the age at which their special education services end; (c) modifications can be made to a youth’s IEP if “the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated” (IDEA, 2006, § 300.324(d)(2)); and (d) the requirements concerning the provision of service in the least restrictive environment are not applicable.

Another aspect of IDEA (2006) that is relevant in terms of the provision of FAPE and also a component of the lawsuit of interest is the requirement that the state educational agency (SEA) has primary responsibility for supervision of public schools, including

correctional facilities. The SEA, in this case, OSSE, is responsible for ensuring that each educational program for children with disabilities administered within the State “meets the educational standards of the SEA” (IDEA, § 300.149(a)(2)(ii)). OSSE is responsible, therefore, to ensure that FAPE is provided to youth with special needs incarcerated at correctional facilities, including the DC Jail.

While there are a few exceptions concerning the provision of FAPE for convicted youth incarcerated in adult corrections, the key components remain for youth that are detained in an adult jail. In the case of Charles H. et al. v. District of Columbia et al., the information discussed below provides compelling evidence that DCPS did not provide and OSSE did not ensure the provision of FAPE to youth incarcerated in the DC Jail since the onset of the COVID-19 pandemic.

3. Incarcerated Youth Education during COVID-19

It is unequivocal that COVID-19 has complicated the provision of special education services to youth incarcerated in adult correctional facilities. However, the right to FAPE and special education services must be maintained during COVID-19. In its clarification of existing legal requirements during COVID-19, the U.S. Department of Education noted, “No matter what primary instructional delivery approach is chosen, SEAs, LEAs [Local Education Agencies], and individualized education program (IEP) Teams remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities” [6] (p. 2).

An interruption in the provision of FAPE during the pandemic can have a profound impact on incarcerated young adults that are eligible for special education services under IDEA [7]. Broadly, those participating in a prison education program are 24% more likely to be employed post-incarceration than those who have not [8]. Similarly, compared to those not participating in education, youth that participated specifically in high school/General Educational Development (GED) programs are less likely to recidivate [9,10]. However, it is important to disaggregate outcomes for those that earn a GED vs. a high school diploma. For example, earning a high school diploma while incarcerated significantly improves youth and adult’s chances of obtaining post-release employment [11]. In contrast, Jensen and colleagues [12] reported that no relationship existed between earning a GED and obtaining employment following release. While there may be some short-term benefits of earning a GED, it has been noted that these benefits decrease over time [13].

4. The Case of Charles H. et al. v. District of Columbia et al.

4.1. Named Plaintiffs

Information on the named plaintiffs is publicly available in the Charles H. Class Action Complaint [14] and the court’s Charles H. Memorandum Opinion [15]. Charles H. is a 20-year-old young man classified with a specific learning disability (LD) and other health impairment. Charles also met the diagnostic criteria for unspecified neurodevelopmental disorder; unspecified disruptive, impulse-control, and conduct disorder; major depressive disorder, recurrent episode, mild; and adjustment disorder with anxiety [14]. Israel F. is 18 years old and is classified with emotional disturbance (ED). He has also been diagnosed with major depressive disorder; persistent, depressive disorder with anxious distress, early onset, moderate; conduct disorder; oppositional defiant disorder; and attention deficit hyperactivity disorder (ADHD), combined type [14]. For Malik Z., the third named Plaintiff, the Memorandum Opinion [15] does not identify his age, but does note that he has a disability and has been diagnosed with ADHD.

4.2. Sources of Information

In his role as the Special Education Expert, the first author was provided access to Charles H. and Israel F.’s confidential files (e.g., IEP, psychiatric and psychological reports), cumulative school files (e.g., report cards and progress notes), information related to the services provided, facility behavior logs, and youth academic work packets. Additionally,

the first author conducted online video interviews with Charles H. and Israel F., and reviewed their declarations. Additionally reviewed were the U.S. Department of Education Guidance, guidance and documents issued by OSSE (e.g., Consolidated Monitoring Report Tool), DCPS IYP Student Handbook, agreements between OSSE, DCPS and DOC concerning the provision of services to students with disabilities enrolled in IYP, and the declaration of plaintiffs' expert on educational technology.

4.3. Details of the Case

Having described and framed the importance of providing uninterrupted FAPE to incarcerated youth in adult corrections, we turn to the specifics in the case of Charles H., wherein youth at the IYP school in the DC Jail were denied FAPE during COVID-19 and consequently, incurred serious academic and psychological harm. As a matter of context, two issues related to education during the pandemic are noteworthy. First, education for IYP students, "should be comparable in quality, program selection, and rigor to the education offered to the public" [16] (p. 5). As detailed in the sections that follow, this is clearly not the case. Second, according to the DCPS Education Program and Resource Guide for Families for the 2020–2021 School Year [17], during the pandemic, each student should have an Individualized Distance Learning Plan (IDL). These IDLPs are supposed to include a description of instructional delivery, method for service delivery, and a plan for communication. Specific to the Charles H. case, there was no mention of an IDLP being developed for Charles H. or Israel F. In their most recent IEPs (dated 20 October 2020 and 21 January 2021, respectively). If the IDLP existed, it is expected that it would be described in the students' IEPs, as the two would necessarily need to be implemented in concert with each other.

Below, we describe the three areas in which there were violations to the provision of IDEA and FAPE in the Charles H. case: (a) instruction and monitoring of youth academic progress; (b) related services (i.e., behavioral interventions and supports, counseling); and (c) OSSE supervision and oversight. In each section, we also address the harm incurred as a result of the violations. Finally, we discuss the need for compensatory services and final thoughts.

4.4. Lack of Instruction and Monitoring of Youth Academic Progress

As noted, the requirement to provide FAPE to incarcerated youth with disabilities, including specially designed instruction and monitoring of student academic progress, did not cease with the onset of the COVID-19 pandemic. In IDEA (2006), it is noted that, "Special education means specially designed instruction . . . to meet the unique needs of a child with a disability" (§ 300.39(a)(1)). "(3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—(i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children" (300.39(b)(2)(ii)(3)(i–ii)).

In terms of the frequency and duration of instruction, use of appropriate materials, implementation of research based instructional adaptations, and monitoring of student progress, it is important to keep in mind a recent Supreme Court ruling. In *Endrew F. ex rel. Joseph F. v. Douglas County School District* (*Endrew F. v. DCSD*), it was stated, "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" [18] (p. 2). The ruling increased expectations on the level of benefit asserted by circuit courts, known as "de minimis, or trivial benefit, to determine whether FAPE had been conferred" [19] (p. 291). As will be evident throughout, the negligible special education supports provided to youth with disabilities at IYP during COVID-19 do not even reach the de minimis level.

4.5. Lack of Instruction

During the pandemic, instead of in-person classes or real-time/synchronous virtual instruction, IYP students received paper packets of worksheets and pre-programmed information and activities on a tablet. Israel F. reported that the work in the packet and on the tablet was essentially the same. It was his understanding that he needed to choose between the packet or the tablet and complete each assignment. This notion was supported by information in one of the packets where the teacher wrote that the student should rely on the tablet and use the packet as a back-up.

The paperwork packets and pre-programmed tablet activities are the materials that a teacher could use during the instructional process and should not be confused with actual instruction. Specialized instruction for students with disabilities necessarily includes teacher-student interaction. For example, explicit instruction is an evidence-based instructional approach that includes review, explanation of new skills and information, and opportunities for students to practice skills with teacher guidance, ongoing teacher correction and feedback, independent practice, and weekly and monthly review [20]. Without the interactive teaching process, students are left only with learning materials and are forced to teach themselves.

In fact, there is no research indicating that the sole use of packets or a tablet with asynchronous information and activities is an effective educational approach for students with disabilities. If asynchronous information is coupled with synchronous or interactive instruction, research still only provides limited evidence of benefit for middle and high school students with LD or ED without additional monitoring and support [21]. The sole use of work packets and asynchronous tablet assignments without instruction, monitoring, and individual support represents a denial of FAPE for the named plaintiffs and other students with disabilities at IYP.

Any small potential benefit from the tablets is hindered by several factors. First, both Charles H. and Israel F. specifically stated that they did not receive any training on how to use the tablet. This lack of explicit instruction on how to use all the features of the tablet puts both students at a significant disadvantage. Second, Charles H. shared that for each assignment there is a single textbox for all answers that can be seen only after scrolling through all of the lesson text. This has led to an undue cognitive burden for Charles H., which resulted in his choice to work on the paper packets and to disregard the tablet completely. Third, Israel F. reported that the intranet connection was so poor that he held the tablet through the slot in his cell door in order to get a somewhat workable connection. Fourth, Charles H. also reported that the assignments on the tablet were not updated. He shared that he had completed some of the assignments on the tablet months ago and no new assignments were provided. Additionally, access to tablets was limited or completely denied to students in restrictive housing units (RHU). Charles H. expressed that he did not have access to a tablet while in the RHU. Incarcerated youth have a right to uninterrupted education, including special education services, regardless of placement in an RHU.

Limited face-to-face instruction was initiated for some students more than a year after the onset of COVID-19 at IYP. However, this face-to-face instruction was only provided for up to one hour per day, three days a week. In addition, students were unable to make substantial progress toward their high school diploma because only a couple of the necessary courses were available. There were also problems due to the lack of qualified teachers. For example, Charles H. reported that his English teacher was unable to answer questions about the work packets that were not part of the English coursework. While this introduction of face-to-face instruction represents a step in the right direction, it is clearly insufficient and a violation of FAPE.

4.6. Inappropriate Materials

According to IDEA (2006), "(4) to ensure that children with disabilities who need instructional materials in accessible formats are provided those materials in a timely

manner, the SEA must ensure that all public agencies take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials at the same time as other children receive instructional materials” (§ 300.172(b)(4)). The importance of appropriate materials is evident in the current situation where students are provided instructional packets and pre-programmed table activities without teacher instruction or support. Moreover, it is not uncommon for incarcerated youth with disabilities to perform well below what is an expected level for their age in both reading and writing. Israel F. and Charles H. both typify this description. For example, Israel F. is in the 12th grade but his IEP states that he is reading at a 4th grade level. Similarly, Charles H. is in the 11th grade but his IEP states that he is reading as a 1st grade level. However, the readability level (depending on the method used) of the packets were at the following grade levels: (a) English/Language Arts IV: 9–12; (b) History: 9–11; (c) Physics: 6 and 7; (d) Health 9–11. Standard textbook reading levels are commensurate with the reading levels found in these work packets. There is no evidence that the readability of information in these packets was adjusted to meet student needs. This lack of congruity between student reading level and the readability of the work packets makes it unlikely that students will comprehend the material and be academically successful.

A mismatch was also found between the assignments in the work packets and the length of academic time the packets were intended to represent. As a basis for discussion, in DC, “An instructional day shall be at least six (6) hours in length for students, including time allotted for lunch periods, recess, and class breaks” [22]. Both Israel F. and Charles H. reported getting work packets approximately every two weeks. However, when these packets were reviewed, it was found that the maximum amount of time needed to complete the tasks provided would be only an hour or two over 2 days (if, in fact, the students could complete the packets without direct instruction from the teacher). For example, Israel F.’s packet on Probability and Statistics had only 10 questions and the music packet had just one activity that was to write a 10-sentence essay. The lack of coursework violates FAPE as it does not represent sufficient access to the general education curriculum.

4.7. Lack of Meaningful Evidence-Based Instructional Adaptations

The specialized instruction identified in IDEA that is necessary to provide FAPE to students with disabilities requires a reliance on evidence-based approaches (see IDEA, 2006, (§ 300.306)(b)(1)(i)). For example, to improve adolescent literacy, an identified problem for Israel F. and Charles H., specific approaches have evidence of effectiveness: “(1) Provide explicit vocabulary instruction; (2) Provide direct and explicit comprehension strategy instruction; (3) Provide opportunities for extended discussion of text meaning and interpretation; (4) Increase student motivation and engagement in literacy learning; and (5) Make available intensive and individualized interventions for struggling readers that can be provided by trained specialists” [23] (p. 7). However, the approach to supporting students with disabilities did not include these approaches and were limited to very minor adaptations that have limited impact, such as highlighted and bolded text. To a small degree, there are times when these types of adaptations can assist students with disabilities with the comprehension of curriculum materials. However, these adaptations lack the impact of the aforementioned practices and are insufficient for Israel F. and Charles H. to access and gain benefit from the curriculum materials presented to them.

4.8. Lack Instructional Feedback and Monitoring

Students need direct interaction with their teacher to obtain individualized guidance and specific feedback throughout the instructional process. The five to ten minutes that a teacher stood outside a student’s cell door is a situation wherein it was impossible for teachers to provide this necessary ongoing feedback. In fact, the situation was even worse, given that Charles H. and Israel F. stated that they did not get feedback on completed assignments on a regular basis. It is through monitoring and providing instructional feedback that teachers are able to assist and evaluate student progress toward their IEP goals

and the general education curriculum. This monitoring is critical, given that IDEA (2006, see § 300.324(b)(b)(ii)(A)) requires consideration of adapting a student's IEP if there is a lack of progress. The importance of monitoring student progress is further supported in the IYP Student Handbook 2020–2021, "Schools will be expected to utilize additional measures beyond daily attendance as indicators of student engagement in learning. These include participation in live classes, access and utilization of other learning platforms, submission of assignments, and results of student and family outreach efforts" [24] (p. 10). The failure of teachers to provide instructional feedback and monitoring is a clear violation of FAPE.

4.9. Harm Related to a Lack of and Inappropriate Instruction and Monitoring

There are a number of ways in which the lack of instruction can cause irreparable harm for students at IYP. First, it has disrupted the students' progress toward earning a high school diploma. These students experienced difficulty completing the assigned work without instruction and consequently, lost an opportunity to earn course credits. The harm incurred is magnified, given the age of the students with disabilities. Students in Washington DC are eligible for special education services through the end of the semester in which they turn 22 years old. As students get closer to that age cap, it becomes more likely that the lack of instruction during the COVID-19 pandemic could prevent them from having enough time to earn a high school diploma before the termination of special education services.

Additionally, many students with disabilities detained at IYP will exit this facility and enter the Federal Bureau of Prisons (BOP) system. Students aged 18–24 years that are convicted of a felony in DC serve their sentences in BOP facilities [16]. Once a student is in this BOP facility, they are only eligible to obtain training that could lead to taking the GED test. These students have no opportunities to receive special education services, continue high school coursework, or obtain their high school diploma [25]. As such, the lack of instruction and education lost during the pandemic could make earning a high school diploma impossible. Moreover, youth with a GED are at higher risk throughout adult life of working in lower-paying unskilled labor jobs. Employers have indicated they place GED recipients in lower-paying positions [26]. Researchers have gone so far as to say that "[a] GED testing program does little good for the substantial majority of its takers in generating economic opportunity directly and in opening the door to post-secondary education" [27] (p. 59).

Second, the lack of instruction and academic support and subsequent and repeated failure of incarcerated youth with disabilities to complete the work packets likely negatively impact their motivation and focus. The frustrations may also lead youth to feel disconnected from the school environment and abandon hope for earning a high school diploma. Researchers have found school engagement, including attendance, active participation in classroom activities, and a positive perception of "school belonging" are factors that help prevent students from dropping out [28].

Third, the lack of academic instruction resulted in more than just a sense of disconnection from school for these students. Students at IYP spent time isolated in their cells 23 h/day with almost no human interaction. Harm to a young person's brain occurs irrespective of the reasoning for the isolation (punitive, safety, etc.) "Research shows that brain cells are wired to react to environmental conditions and can die in extreme settings such as long periods of solitary confinement and even a few days of solitary confinement will predictably shift the [brain's] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium" [29] (p. 2). Adolescent brains are particularly sensitive to, "the traumatic impact of physical isolation, and even a short stay in a confinement setting can have a long-term deleterious impact on an adolescent" [30] (p. 352).

Fourth, students at IYP experienced additional harm due to the lack of ongoing instructional feedback and monitoring of academic progress. The lack of instructional feedback inhibits student learning and ability to access the general education curriculum. Additionally, in the absence of teacher monitoring, there is no way to know if a student is

making adequate progress on their IEP goals and objectives. As such, there are no data to inform teachers and allow them to make necessary modifications to a student's IEP. Additionally, there is no way to know if the frequency and duration of special education and related services should be altered.

4.10. Lack of Related Services

IDEA (2006) identifies related services as, “developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education” (§ 300.34(a)). Related services provide the necessary supports that allow students to access the general education curriculum. IDEA specifically recognizes the provision of related services to students that need them as a necessary component of FAPE (see § 300.17). Despite IDEA requirements and the importance of related services to the provision of FAPE, the principal at IYP stated under oath that, “from March 2020 to December 2020, there were no opportunities for IYP students to ‘actually receive’ the ‘related services’ outlined ‘in their IEP[s],” [2] (p. 8). As of 1 June 2021, youth were still receiving a fraction of the related services identified on their IEP.

Often, behavioral interventions and supports are written on a student's IEP within the goals and objectives. However, as is the case for some youth in the Charles H. case, behavioral services are also or instead listed under related services. Identification of behavioral supports under related services is typically a broad assertion of needed services, without the details that are included within the goals and objectives. For example, Charles H. has 180 min and Israel F. and Malik Z. each have 120 min of behavioral interventions and support services per month listed on their IEPs, with no additional specificity.

While details may be lacking under related services on IEPs, IDEA (2006) does provide additional guidance related to supporting youth with behavioral difficulties and emotional disturbance (ED). Specifically, “[i]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior” (§ 300.324(a)(2)(1)). PBIS is an evidence-based multi-tiered framework for improving student behavior that includes school-wide behavioral supports, as well increasingly intensive and individualized supports for students that need them [31]. PBIS is designed to provide behavioral and cognitive-behavioral support to students in order to prevent behavioral problems before they arise and to address problems that do exist. In addition to notation in IDEA, PBIS is effective with young people in correctional settings and has been adopted by some states to support incarcerated youth [32,33]. PBIS is applicable to youth in this case, as Charles H. is classified with Multiple Disabilities (LD and other health impairments due to his ADHD) and Israel F. is classified with ED. Both of their IEPs identify that behavior negatively affects their ability to access the general education curriculum and as such, implies the need to provide PBIS.

During interviews with Charles H. and Israel F., they both clearly asserted the complete lack of any behavioral supports. This is problematic in light of the fact that during a pandemic, the associated fear experienced by youth may lead to erratic behavior and there is increasing risk that youth engage in aggressive or self-harming behaviors [34,35]. However, any support would be quite impossible, given that they are isolated up to 23 h per day and have no possibility to interact with teachers or peers. Moreover, there is no evidence of implementation of any key attributes of PBIS, including the monitoring of youth behavior and the collection, analysis, and use of behavioral data to develop and modify behavioral interventions and supports.

The isolation of youth during the pandemic has undoubtedly exacerbated their behavioral difficulties and is linked to other IDEA (2006) violations. For example, during an interview, Charles H. reported that he has spent 23 h per day in his cell for months due to the pandemic. Given the behavioral difficulties noted on his IEP, particularly with anxiety, self-regulating behaviors, and staying focused, it is likely that this situation negatively affected his behavior. In fact, he has been in an RHU multiple times for alleged disciplinary

infractions. However, despite IDEA (2006) requirements (e.g., see § 300.530) related to a change of placement, he has received no functional behavior assessment, manifestation determinations, and behavior intervention plans, prior to, during, or after his placement in an RHU. The complete lack of adherence to behavior-related requirements to prevent and address problem behaviors are clearly in violation of IDEA. Moreover, despite the tenuous emotional situation in which Charles H., Israel F., and other youth with disabilities at IYP are placed during COVID-19, there is no evidence that additional evaluations of youth behavior or mental status have been or are being conducted to provide information on the potentially need to change the related services provided. Because there is no evidence of IDEA adherence in this respect, it is likely that other students at IYP also experience irreparable harm and a lack of FAPE.

The lack of appropriate counseling services is another aspect of related services that can have a serious detrimental effect on youth, particularly given their almost complete isolation during COVID-19. While specific counseling supports are, at times, noted as a related service on a youth's IEP, in other situations it can be included under the general term of "behavioral support." Charles H., Israel F. and Malik Z. all reported limited continuation of support from a counselor during COVID-19. For example, Israel F. reported seeing a counselor once (outside of his IEP meeting) since November 2020, Malik Z. has had one 20 min session with a counselor since he enrolled with IYP in February 2021, and Charles H. reported a counselor dropping off counseling work packets and having one online conversation with a counselor [2].

The frequency and meeting duration of counseling should be considered in conjunction with evidence of the effects of youth isolation. Such isolation can result in anger, obsessive thoughts, paranoia and psychosis, and suicide [36], as well as chronic issues with behavioral self-regulation that can lead to additional behavior problems [37]. The level of counseling support provided to youth is inconsistent with the services noted on their IEPs and certainly insufficient, given the stress and isolation experienced by youth during the pandemic.

The format of interactions with the counselor is also troubling. For example, Charles H. reported that the counselor simply dropped off and collected counseling-related work packets with no conversation. Analysis of counseling supports must take youth functioning level into consideration. For example, Charles H. full scale IQ is very low (62) and like many incarcerated youth, he has serious difficulties with reading and writing [38]. In fact, Charles H. stated that he could not do the counseling packets and did not see their relevance. He also reported that he has received one video session with a counselor, but he noted that the session was not useful, as it centered solely on review of the work packet that he was unable to complete.

4.11. Harm Related to a Lack of Related Services

Students have related services (e.g., behavioral interventions and supports, and counseling services) listed on their IEP because these supports are needed for them to access the general education curriculum and to function behaviorally and emotionally within the education context. As such, the lack of needed supports can have serious negative effects on their academic progress, potentially preventing them from obtaining a high school diploma. Social and emotional harm also occurs because IYP students that were not receiving needed related services may engage in inappropriate (e.g., non-compliant or aggressive) behavior that ultimately leads to their confinement to an RHU and/or solitary confinement, where their access to special education services are even more limited. Once placed in an RHU, as was the case with Charles H., no functional behavior assessment, manifestation determinations, and behavior intervention plans were developed and implemented—providing a situation where inappropriate behavior may increase or escalate and lead to even longer periods of increased isolation. The probability of irreparable harm is compounded by the fact that Israel F., Charles H., and approximately 70% of incarcerated young people have

existing mental disorders (e.g., conduct disorder, anxiety, and depression) that may be exacerbated by a lack of services and segregated placement [39].

4.12. Lack of OSSE Supervision and Oversight

According to IDEA (2006), the state education agency (SEA) is responsible for “[e]nsuring that public agencies meet the program requirements under Part B of the Act [i.e., IDEA], with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities” (§ 300.600(b)(2)) and that education and special education services meet the educational standards of the SEA” (§ 300.149(a)(2)(ii)). In the current case, OSSE serves as the SEA. The responsibilities of OSSE are further solidified in the Memorandum of Agreement Between the District of Columbia Department of Corrections (DOC), DCPS, OSSE relate to the Educational Services for Pretrial detainees and/or sentenced inmates incarcerated at DOC detention facilities (3 May 2019) document, wherein it is stated that “Education services are delivered in accordance with IDEA to eligible pretrial detainees and/or sentenced inmates at DOC facilities” [40] (p. 1).

It is the responsibility of OSSE to monitor DCPS, including services at IYP, through a variety of methods, including direct observation, interviews with staff and youth, and a review of records, to ensure compliance with IDEA (2006). Structures exist that can be leveraged by OSSE when violations in the provision of FAPE occur. Specifically, OSSE uses the District of Columbia Corrective Action Tracking System (DCCATS). Within this system, there is a structure to identify potential problems with the provision of education and special education services and guidance for monitoring. However, it is clear from the scope of violations discussed above, and length of time they have occurred and continue to occur, that any possible OSSE oversight was and continues to be insufficient to ensure that IYP adheres to IDEA and provides FAPE to the named plaintiffs and members of the entire putative class of IYP students. The harms incurred to youth as a result of the lack of provision of FAPE and OSSE supervision and oversight are described within the previous sections.

4.13. Need for Compensatory Education to Remediate Harm

The value of education and its long-term positive effects on incarcerated youth are evident [41–43]. However, the lack of special education services and the provision of FAPE to the named plaintiffs and members of the class are equally as clear. As such, it is important to consider the assertion within IDEA, Part B Provision of FAPE: Guidance Related to Remote and Blended Learning (Updated 24 March 2021): “If a student does not receive services for an extended period of time (generally more than 10 consecutive school days); an IEP team must make a subsequent individualized determination to decide whether a student with a disability requires compensatory services to make up for any skills that may have been lost because the student did not receive educational benefit” [44] (p. 11).

In light of the evidence provided, it is clear that the months without special education and related services experienced by named plaintiffs and similarly situated young people at IYP meets the threshold for compensatory services. The plan forward should align with the OSSE IDEA Part B Student Compliance Monitoring Tool for the 2020–2021 School Year [45] and include a two-pronged approach. Specifically, for Prong 1, DCPS must correct individual student-level noncompliance and for Prong 2, DCPS must demonstrate that it is now correctly implementing the specific regulatory requirement. This approach would provide assurance that violations in the provision of special education services does not continue. While individual decision on the type and amount of compensatory education needed by each student is best decided by a youth’s IEP team, given the commonalities in FAPE violations, there are certain compensatory services that should be considered for named plaintiffs and any IYP student with disabilities that was incarcerated during the pandemic.

Specifically, compensatory services should include extended eligibility for special education, as well as additional and private supports/services that extend beyond youth's 22nd birthday. Compensatory supports/services must also be provided at no cost to the young people or their family. Additional supports/services should be provided in small groups or 1-1 while the youth remain incarcerated and following release, and consist of academic and non-academic supports including, but not limited to: (a) additional academic instruction and instructional supports/services; (b) behavioral supports/services; (c) training in self-advocacy skills; (d) training in social skills; (e) psychological and counseling supports/services; (f) instruction in activities for daily living, including personal finance and accessing healthcare; (g) pre-vocational/employment support services; (h) job search and retention skills; (i) job coaching/training opportunities, including supervised work experiences; (j) preparation for college and/or postsecondary education and training; (k) assistance and increased access to agency/community resources and services; and (l) transportation supports post-exit to access aforementioned supports/services.

5. Final Thoughts

During the pandemic, the rights of youth to special education services remain [6]. However, COVID-19 has taxed an education and special education system for youth in adult corrections wherein difficulties in the provision of services already existed [3]. The Charles H. case has laid bare the serious individual and systemic violations with regard to the provision of instruction, related services, and monitoring of youth academic progress, as well as OSSE supervision and oversight of the IYP school in the D.C. jail. The U.S. District Court judge's motion for a preliminary injunction is an encouraging sign that the rehabilitative effects of education and rights of incarcerated youth under IDEA are recognized and upheld. Given the difficulties of providing special education services in many correctional facilities in general and specifically during the pandemic, it is hoped that this description of the Charles H. case makes evident the relevant concerns and will aide in the identification of issues that may also exist and need to be addressed in other facilities during this difficult time.

Author Contributions: Conceptualization, J.C.G.; methodology, J.C.G.; formal analysis, J.C.G.; investigation J.C.G.; resources, J.C.G.; data curation, J.C.G.; writing—original draft preparation, J.C.G.; writing—review and editing, J.C.G., A.R.B. All authors have read and agreed to the published version of the manuscript.

Funding: This research received no external funding.

Institutional Review Board Statement: Not Applicable.

Informed Consent Statement: Not Applicable.

Data Availability Statement: Data from the current paper are based on [Details omitted for double blind reviewing].

Acknowledgments: Open access funding provided by University of Helsinki.

Conflicts of Interest: The authors declare no conflict of interest.

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