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### **Statement by Joseph B. Tulman To the Chuck Colson Task Force**

I am a professor of law, and I direct the Juvenile and Special Education Law Clinic at the University of the District of Columbia David A. Clarke School of Law. My students and I represent several clients from the District of Columbia who are eligible for services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, and who are incarcerated in Federal Bureau of Prisons (BOP) facilities.

The substantial growth of the federal (as well as state) incarceration population since 1970 is in large part a result of a massive institutionalization of people with disabilities. This phenomenon is ironic in light of substantial progress, over the same period, in closing institutions that housed people with intellectual disabilities and mental illness.

People who are incarcerated in federal correctional institutions, who are not yet twenty-two, who have disabilities that substantially affect education, who were identified, pursuant to the IDEA, as eligible prior to sentencing/incarceration, and who have not yet obtained a high school diploma generally are eligible for special education and related services and have a right to the procedural protections of the IDEA. *See* 20 U.S.C. §1415(m)(1)(D) and §1400(d)(1)(A)-(C); *see generally* 20 U.S.C. § 1412(a)(1) and 34 C.F.R. § 300.102(a)(2).

D.C. inmates who are in the custody of the BOP are uniquely situated because the BOP assumed responsibility for these “state” inmates – people convicted in D.C.’s local court on local D.C. charges – as a result of the 1997 D.C. Revitalization Act, D.C. Code §§ 24-101 *et seq.* This responsibility includes “the custody, care, subsistence, *education*, treatment and training of [District of Columbia felony prisoners].” *Id.* at § 24-101(b) (emphasis added). Education necessarily includes special education for students with disabilities. The U.S. Department of Justice (DOJ) and BOP are obligated to protect the IDEA rights, as well as the Youth Rehabilitation Act rights, D.C. Code §24-901 *et seq.*, of eligible D.C. inmates who are in BOP custody.\* As to their special education rights, however, these D.C. inmates are also representative of many federal inmates. The DOJ and BOP are obligated to provide a free appropriate public education (specialized instruction and related services) to all IDEA-eligible students with disabilities who are in BOP custody. The DOJ and BOP are obligated, as well, to honor the procedural rights of those IDEA-eligible students who are in their custody.

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\* Only D.C. inmates have the D.C. Youth Rehabilitation Act rights, but recognizing and effectuating those rights would be a useful step toward re-establishing a version of the Federal Youth Corrections Act.

The BOP should focus initially on DC inmates and should act immediately to address the needs and rights of D.C. inmates in BOP custody. The BOP accepted the obligation to address the educational needs of D.C. inmates; it has not honored that obligation. BOP compliance with the IDEA in regard to eligible D.C. inmates will create an opportunity to observe and demonstrate the benefits of addressing the educational and emotional needs of inmates who have education-related disabilities. These benefits likely will include improved communication with, and lowered rates of infractions by, incarcerated people; improved reintegration and lower recidivism. Ultimately, this approach for educating and treating young adults could parallel the remarkable results that the State of Missouri has achieved in transforming its approach for addressing the needs of serious offenders in that state's delinquency system. The Task Force could charge the Urban Institute and the Center for Effective Public Policy with the job of studying and documenting the impact of providing legally mandated education and rehabilitation services.\*

The failure by the BOP to provide special education services also violates Section 504 of the Rehabilitation Act of 1973. *See* 29 U.S.C. §794(a); *see also* 28 C.F.R. §39.130 (section 504 applies to programs conducted by the Department of Justice). A federal agency violates section 504 when it denies an individual with a disability the reasonable accommodations that individual needs in order to receive meaningful access to public service benefits. Failing to provide IDEA-eligible inmates special education and related services is discriminatory and impedes their access to education and rehabilitation services to which they are entitled while in the legal custody of the BOP. A reasonable accommodation, pursuant to section 504, is for the BOP to transfer D.C. inmates who wish to receive IDEA services to the Correctional Treatment Facility (CTF) in Washington, DC for the duration of their IDEA eligibility, including extended eligibility for the current denial of FAPE.

Transferring these inmates to CTF will allow them to obtain the special education and related services to which they are entitled. The District of Columbia Public Schools (DCPS) operates the Incarcerated Youth Program (IYP) in order to provide special education services to IDEA-eligible people at the D.C. Jail and at CTF. Therefore, these D.C. inmates whom the BOP transfers to CTF should be able to receive appropriate IDEA services at CTF. If this does not occur, these inmates will be able to enforce their rights, as contemplated in the IDEA, through a due process hearing against DCPS. *See* 20 U.S.C. § 1415(b)(6)(A). In a BOP facility, by contrast, these inmates do not have individualized education programs or access to the statutorily required impartial hearing process.

The BOP is able to effectuate these transfers of D.C. inmates. The BOP and the D.C. Department of Corrections executed an intergovernmental agreement a few years ago that resulted in placing sixteen- and seventeen-year-old D.C. inmates, convicted as adults, at CTF. In addition, the BOP regularly moves prisoners to and from D.C.'s facilities (the D.C. Jail and CTF). My students and I previously represented a client convicted under D.C. law whom the BOP returned to the D.C. Jail to face additional charges. While this client was detained in D.C.,

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\* The IDEA includes, as well, a right to transition services, 20 U.S.C. §1401(34), for incarcerated people who will be released prior to the expiration of their IDEA eligibility. *See id.* at §1412(a)(1); 34 C.F.R. §300.102(a)(2).

with our legal assistance, he received appropriate private special education services through DCPS. We were also able to enforce that client's rights through a due process hearing at the D.C. Jail.

As I present in the attached proposal, the long-term solution is not to place D.C. inmates with special education needs or Youth Act treatment rights at CTF. Nor is the solution to assume that the BOP will begin to provide special education services, something that has not happened in the forty years since Congress first passed the federal special education law. Rather, the long-term solution is to create a small, education- and treatment-oriented facility in or near the District of Columbia. This facility can be modeled on the success noted above in creating a new incarceration paradigm in Missouri and modeled, as well, on the District of Columbia Department of Youth Rehabilitation Services' New Beginnings facility.

Congress passed the IDEA, section 504 of the Rehabilitation Act, and the Americans with Disabilities Act precisely due to concern regarding marginalization – including over-institutionalization – of people with disabilities. Section 504, as well as 20 U.S.C. §1415(m)(1)(D) and §1400(d)(1)(C), establish clearly that these obligations are federal obligations that apply to the BOP. The request on behalf of my clients for action by the Task Force and by the BOP/DOJ will have positive implications, over time, for many BOP inmates. Further, in creating and studying a small facility that emphasizes education and treatment, the federal government can lead the way for states in lowering average lengths of stay and lowering recidivism.

The BOP is not complying with the IDEA. Given the history of forty years of non-compliance by the BOP with the federal special education law, one should not expect the BOP to change course without some clear information and direct messaging from those charged with this task. The Task Force should address how to enforce the law and transform outcomes for people in BOP custody who have disabilities and who have IDEA rights.

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## **A Proposal for a Different Systemic Approach for Incarcerated Young Adults**

America incarcerates people at a per capita rate that is approximately five to fourteen times higher than other advanced democracies. America is the most incarcerated country in the world. This high rate of incarceration is a relatively new phenomenon. The rate of incarceration in America was roughly equivalent to the rate in other advanced democracies until about 1970. The high rate of incarceration in America has a significantly disproportionate impact on poor people, people of color, and people with disabilities.\*

The District of Columbia has a unique problem in that, as a result of the 1997 D.C. Revitalization Act, D.C. Code §§ 24-101 *et seq.*, D.C. felony inmates are incarcerated in Federal Bureau of Prisons (BOP) facilities across the country, hundreds or even thousands of miles from home and from relatives. In assuming responsibility for D.C. felony inmates, the BOP explicitly assumed responsibility for providing education. The BOP, however, does not comply with the federal special education law, the Individuals with Disabilities Education Act (IDEA, 20 U.S.C. §§1400 *et seq.*). An unintended consequence of the Revitalization Act, therefore, is that D.C. felony inmates who have education-related disabilities are the only IDEA-eligible inmates charged, convicted, and sentenced in state (local) court who do not have access to a full high school curriculum, specialized instruction, related services, and the other substantive rights in the IDEA. These D.C. inmates also do not have access to the procedural rights granted to all students with disabilities – e.g., a right to periodic comprehensive evaluations, individualized education programs (IEPs), administrative hearings to challenge a denial of a free appropriate public education. By failing to provide IDEA services to eligible D.C. inmates, the BOP is violating the Revitalization Act and the IDEA.\*\*

A big part of solving the mass incarceration problem and the school-to-prison-pipeline problem lies with instituting a different approach to incarceration. Another part of solving the problem is recognizing that young adults are different than, and distinguishable from, older people who break the law and who present a danger to the community. If properly conceptualized and implemented, this approach will increase community safety, save taxpayer dollars, and dramatically decrease incarceration and disproportionate incarceration.

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\* Through the delinquency system, according to the Annie E. Casey Foundation, America locks up nearly five times more children per capita than the next highest country (South Africa). These patterns of incarceration demonstrate race and class discrimination that is apparent. Many people do not recognize, though, that this massive increase in incarceration is also overwhelmingly a result of institutionalizing people with disabilities in jails and prisons. The irony, of course, is that advocates have worked diligently over the past three or four decades to close institutions for people with mental illness and people with intellectual disabilities. At the same time, notwithstanding the requirement in the Americans with Disabilities Act – *see Olmstead v. L.C.*, 527 U.S. 581 (1999) – to keep people with disabilities in the least restrictive environment, America has increased by two million the number of incarcerated people, with probably eighty or ninety percent of that increase (no one has really measured) representing a re-institutionalization, as it were, of people with disabilities. Clearly apparent is the vast waste of human and financial resources associated with being the world’s most-incarcerated nation.

\*\* All students with disabilities who are IDEA eligible and in BOP facilities should be receiving a free appropriate public education as required by the IDEA. *See*, 20 U.S.C. §1415(m)(1)(D) (“all rights accorded to parents under this part [IDEA services for children from the age of three through twenty-one, inclusive] transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution”) (emphasis added).

The essence of this different approach is

- to place young people (if, indeed, they must be confined) in small, calm, education- and rehabilitation-oriented facilities that provide transition services (job training, preparation for higher education, preparation for independent living); and
- to authorize judges to provide sentences for young people that are not subject to the ordinary mandatory minimums – a sentencing approach that incentivizes young people to benefit from education and other services in order to accelerate their release and enhance their reintegration.

The U.S. Supreme Court recently ruled in *Roper v. Simmons*<sup>\*</sup> that the death penalty for people who were under eighteen at the time of the crime is unconstitutional; executing children violates the eighth amendment's ban on cruel and unusual punishment. The Court ruled similarly in *Graham, Miller, and Jackson*, the three juvenile-life-without-parole cases. In each of these four cases (and *J.D.B.*, as well), the Court relied upon neuro-scientific findings that – as everyone knows from experience – young people are different than adults. In particular, the adolescent brain is not fully wired to make judgments consistently. Young people are not as culpable as adults, and young people are, generally speaking, more capable of changing, reforming, and redeeming themselves. This distinction is true for young people through the mid-twenties, not just through the age of eighteen.

Similarly, and not coincidentally, federal special education law provides rights for students with disabilities (who have not graduated from high school) through the twenty-second birthday. 20 U.S.C. §1412(a)(1)(A). For D.C. students, this eligibility extends to the end of the semester in which the student turns twenty-two. 5 D.C.M.R. §E-3002.1(b). Students previously denied a free appropriate public education have a right to compensatory education and extended eligibility (i.e., eligibility past twenty-two to make up for the prior denial of services).<sup>\*\*</sup>

An interim solution for eighteen-to-twenty-four-year old D.C. inmates who have unmet special education needs or Youth Rehabilitation Act sentences is to develop, sign, and implement an inter-governmental agreement between the BOP and the D.C. government, similar to the agreement that returned sixteen- and seventeen-year-old D.C. inmates from the BOP to a special unit at the Correctional Treatment Facility (CTF). For young people with disabilities, a return to D.C. for the duration of their IDEA eligibility constitutes a “reasonable accommodation” that is required by section 504 of the Rehabilitation Act. *See* 29 U.S.C. §794(a); *see also* 28 C.F.R. §39.130 (Section 504 applies to programs conducted by the Department of Justice).<sup>\*\*\*</sup>

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\* 543 U.S. 551 (2005).

\*\* The IDEA has a two-year statute of limitations, *see* 34 C.F.R. §300.300(e). For young adults who are incarcerated, a standard extension of eligibility (in light of prior denial of services) could be two years. Thus, inmates previously denied services could remain eligible until the age of twenty-four.

\*\*\* If, as one might anticipate, D.C. Public Schools personnel at CTF do not provide these returning D.C. inmates with appropriate individualized education programs (IEPs) and appropriate specialized instruction and related services, they can enforce their rights against the District of Columbia Public Schools (DCPS) by requesting, from the Student Hearing Office of the State Education Agency, an administrative due process hearing. Moreover, if DCPS does not provide appropriate services, these young people can seek – as some detainees at the DC Jail have in other cases -- private special education services under the *Burlington* remedy. *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369-70 (1985).

In recent years, the State of Missouri has successfully experimented with changing the nature of juvenile incarceration. They have lowered incarceration rates and simultaneously reduced recidivism dramatically. Missouri reports a re-incarceration rate (three years after children are done with the delinquency system) of eight percent. The “Missouri Model” entails limiting incarceration to serious and violent offenders, as well as placing people in small facilities that focus on education and counseling in an environment that does not re-traumatize incarcerated young people.\*

In 2009, the District of Columbia closed the large and shameful facility called Oak Hill Youth Center. In its place, D.C. opened a juvenile incarceration facility, New Beginnings that essentially follows the Missouri Model. This current proposal is to establish, with BOP funding, a Missouri Model (a second New Beginnings) for eighteen-to-twenty-four-year-old D.C. inmates who have unmet special education needs or who have Youth Rehabilitation Act (D.C. Code §§ 24-901 *et seq.*) sentences (and, therefore, a recognized need for rehabilitation services), who currently go to BOP facilities around the country. Many of the people who designed and operated New Beginnings are available to help in creating a model facility for eighteen-to-twenty-four-year-old D.C. inmates. The current practice of placing D.C. prisoners in facilities around the country, hundreds or even thousands of miles from their family members, impedes – for obvious reasons – successful reintegration. For this and related reasons, the new facility must be in or adjacent to the District of Columbia.

The property in Fort Meade is one possibility. That property is 827 acres and the value of the property belongs to the District of Columbia. The institution for people with intellectual disabilities, Forest Haven, operated on that property until D.C. closed it in 1991. Oak Hill was on that property. New Beginnings is on that property.

Properly implementing this approach will ensure compliance with the IDEA and with the Youth Rehabilitation Act. On a larger level, this model project will demonstrate that providing intensive education, related services (*see* 34 C.F.R. §300.34), and, when appropriate, transition services (*see* 34 C.F.R. §300.43) reduces recidivism, improves economic and social reintegration, and saves taxpayers a huge amount of money. This project will be an important legacy for the current D.C. and U.S. administrations. Future federal administrations can educate state corrections and education administrators and incentivize states to replicate this approach. For corrections workers, this approach paves a path for better working conditions, including, according to people in the Missouri system, much lower rates of inmate-to-inmate and inmate-to-staff violence. In addition, this approach works well with an increased reliance on evidenced-based, community-based interventions (e.g., Multi-Systemic Therapy and Functional Family Therapy).\*\*

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\* *See generally, The Missouri Model: Reinventing the Practice of Rehabilitating Youthful Offenders.* Baltimore: The Annie E. Casey Foundation, 2010. <http://www.aecf.org/m/resourcedoc/aecf-MissouriModelFullreport-2010.pdf>.

\*\* *See generally, U.S. Department of Health and Human Services.* (2001). *YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL*, Ch. 5. Rockville, MD: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control; Substance Abuse and Mental Health Services Administration, Center for Mental Health Services; and National Institutes of Health, National Institute of Mental Health, available at <http://files.eric.ed.gov/fulltext/ED451422.pdf>.

As noted above, a key component to transforming the system is to provide sentences for young people that promote rehabilitation; and to provide sentences that are shorter in duration than standard adult sentences (avoiding mandatory minimum sentences and incentivizing young people to get out before serving a full sentence when they benefit from education and other rehabilitation services). The D.C. Youth Rehabilitation Act also provides for “setting aside” the conviction of a person who successfully completes the sentence and benefits from the rehabilitation services. Essentially, this sentencing approach, combined with appropriate special education, regular education, and rehabilitation services, incentivizes the young person to benefit from positive youth development opportunities. By allowing for shorter sentences and genuinely rehabilitative services for young adults, America can re-join the rest of the advanced democracies by lowering the average length-of-stay in incarceration facilities and providing services and better institutional conditions that improve re-integration and lower recidivism.

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