

Complaint Form

Please feel free to make copies of this form, use additional paper, or call the ConsultLine at 1-800-879-2301 or the Bureau of Special Education (BSE) at 717-783-6913 for additional copies.

My preferred method of contact by the Adviser assigned to this complaint would be:

- By phone (please provide number):**
Best time during normal business hours to call:
- By email (please provide email address):** mmcinerney@elc-pa.org
- In person at a public facility during normal business hours.** The location would probably be a school or Intermediate Unit building to permit duplication of documents.

Are you filing this complaint on behalf of a specific child? Yes No

Please provide your contact information, relationship to child, and signature.

Name: Maura McInerney

Address: 1800 John F. Kennedy Blvd Suite 1900A Philadelphia, PA 19103

Phone Number: 215-346-6906 (work)

Home:

Work:

Cell: 610-331-8125

E-mail:

Relationship to child or children:

- Parent Attorney Advocate Other

The name and address of the residence of the child, school, and school district.

Child's Name: [REDACTED]

Date of Birth: [REDACTED]

Address: Please See Attached

Is the child currently in school? Yes No

If so, where is the child's current program:

School Building: KidsPeace (Donley Tech)

School District: Parkland school District and Salisbury Township School District

Charter School:

Complete *only* if the complaint is filed on behalf of a homeless child or youth.

Contact Person:

Telephone:

Did the violation occur within the past year? If so, on or about what date?

Date: March 16, 2020 into the present

To clarify my allegations, I would like the Adviser to interview the following person(s). (Optional)

Name	Occupation/Title	Phone Number/E-Mail Address

Please provide a statement about the violation or issue, which you believe has occurred. Please include a description about the nature of the problem.

Please See Attached

Please list the facts that support your statement.

Please See Attached

To the best of your knowledge, please suggest a solution to this problem.

Please See Attached

This complaint must be signed for BSE to investigate. You must also send a copy of this complaint to the Local Educational Agency (LEA). By signing below, you indicate to BSE that you have provided a copy of the complaint to the LEA.

Maura McAnaney

7/10/2020

Signature

Date

Please return form to:

PDE/BSE

Division of Compliance Monitoring and Planning

333 Market Street, 7th Floor

Harrisburg, PA 17126-0333

ConsultLine – CRP _____

Initials

Date



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July 10, 2020

Via Email
Pennsylvania Department of Education
Bureau of Special Education
Division of Compliance Monitoring and Planning
333 Market Street, 7th Floor
Harrisburg, PA 17126-0333

RE: Complaint on Behalf of [redacted] and Other Students Similarly Situated

I. Introduction

The Education Law Center ("ELC") files this Complaint as an organization and on behalf of [redacted] (DOB: [redacted])¹ and all similarly situated students who reside or have resided at KidsPeace Residential Treatment Facility in Orefield, Pennsylvania ("KidsPeace") We seek to remedy policies and practices that have resulted in the systematic deprivation of a free, appropriate, public education ("FAPE") of [redacted] and other similarly situated students.

Specifically, we request that the Bureau investigate the provision of special education services to children with disabilities residing at KidsPeace during the COVID-19 crisis and address the alleged failure of Parkland School District ("Parkland School District" or "Parkland"), and Salisbury Township School District ("Salisbury") to comply with their obligations under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA") and Chapter 14 of the Pennsylvania School Code. In addition to failing to provide a FAPE to students with disabilities during the COVID-19 crisis, we also ask that the Bureau investigate compliance with the following issues which have been raised to ELC by concerned callers including: ensuring meaningful parent participation in the special education process and in placement decisions, providing mandated procedural safeguards, offering students residing at KidsPeace a continuum of placements and ensuring they are educated in the least restrictive environment, and ensuring their access to public schools. As a result of these practices, we also assert that children residing at KidsPeace have also been discriminated against on the basis of their disability or perceived disability in violation of Section 504 of the Rehabilitation Act.

Respondents

This Complaint is asserted against both Parkland and Salisbury school districts. The relevant KidsPeace residential facility is located in Parkland School District, which makes Parkland the "host district" for [redacted] pursuant to 24 P.S. § 13-1306. However, based on information and belief, Parkland and Salisbury currently have a contract whereby Salisbury acts as a "Supervisory"

¹ [redacted]'s IDEA Parent will fully participate in the any investigation undertaken by the Bureau of Special Education but has requested that her name and her son's remain anonymous.

Local Educational Agency (“LEA”)” and participates in the Individualized Education Program (“IEP”) meetings of children and young people who are residing at KidsPeace. In addition, upon information and belief, Parkland School District, Salisbury Township School District, and Allentown School District, have entered into a Memorandum of Agreement (“MOA”) whereby Salisbury agrees to ensure that eligible students at KidsPeace receive a FAPE.

By operation of law, however, Parkland, as the host school district continues to bear some responsibility for ensuring that [REDACTED] and similarly situated students are appropriately placed and receive a FAPE. This responsibility is acknowledged in the MOA whereby Parkland continues to be notified when new children arrive at KidsPeace and students at KidsPeace are entitled “to attend the public schools” of Parkland. *See* 24 P.S. § 13-1306. When a school district contracts with another entity to provide special education services, federal and state law “irrefutably place the responsibility to provide and to ensure the provision of a FAPE with respect to a student’s educational program upon a [host] school district. This obligation cannot be delegated or contracted away.” *Lakeland Area Sch. Dist.*, Pa. ODR File No. 00387-0910AS at 6 (Pennsylvania Office of Dispute Resolution May 28, 2010), available at <http://204.186.159.23/odr/HearingOfficerDecisions/00387-09-10.pdf>.

As the Court explained in *Colon v. Colonial Intermediate Unit 20*, 443 F. Supp. 2d 659 (M.D. Pa. 2006), while “[t]he law in Pennsylvania provides that the primary responsibility for identifying exceptional children and developing appropriate educational programs to meet their needs lies with the local school district,” Intermediate Units (“IUs”) “may also be held liable under IDEA.” *Id.* at 667 (emphasis added). Accordingly, “the school district and the IU can be jointly responsible for the FAPE of [the plaintiff].” *Id.* at 668. Notably, the hearing officer in *Lakeland* relied on *Colon* in holding the respondent school district liable. There, the respondent school district tried to evade responsibility for providing FAPE by claiming that the IU, with which it contracted for special education services, was the only responsible entity. Rejecting this argument, the hearing officer held that the contractual relationship did not absolve the school district of its obligation to provide FAPE; at most, the entities would be jointly liable. *Id.* at 8 (relying on *Colon*, 443 F. Supp. 2d at 667-68). *See also Vicky M. v. Northeastern Educational Intermediate Unit*, 689 F. Supp. 2d 721, 736 (M.D. Pa. 2009) (finding that a school district did not delegate its responsibilities under the IDEA when it contracted with an IU to provide autistic support services and determining that both the school district and the IU could be jointly responsible for provision of a FAPE); *Adam C. v. Scranton Sch. Dist.*, No. 3:07-CV-532, 2011 U.S. Dist. LEXIS 102981 (M.D. Pa. Sept. 13, 2011) (citing *Vicky M.* in a Section 504 action, the court refused to grant summary judgment in favor of defendant IU on the ground that joint responsibility of the school district and IU was possible).

Similarly, where, as here, two LEAs have contracted to provide special education services for KidsPeace residents both the host school district, Parkland and Salisbury are jointly liable for providing FAPE and ensuring compliance with all aspects of the IDEA and Section 504. Accordingly, Complainants assert all allegations against both Parkland and Salisbury school districts on the ground that they are **jointly** liable for violating [REDACTED] rights and the rights of similarly situated youth at KidsPeace under the IDEA, as more fully set forth herein.

Summary of Argument

We file this Complaint to address the failure of Parkland and Salisbury to provide [REDACTED] and other similarly situated students residing at KidsPeace with a FAPE beginning in March and continuing to June during the COVID-19 crisis.² In addition, based on information and belief, we assert that at all times students at KidsPeace are unilaterally placed in on-grounds schools and are not offered a continuum of placements, including access to public school; that IDEA Parents are deprived of their right to consistently participate in placement decisions, and that the Parkland and Salisbury school districts fail to ensure that all students are educated in the least restrictive environment (“LRE”) with peers who are not people who have disabilities. At the current time, and throughout many years, it is our understanding that very few students residing at KidsPeace are offered the opportunity to attend the local public school. Instead, they are automatically placed in one of three on-grounds schools at KidsPeace with more limited educational opportunities, separate and apart from their peers educated in the regular education setting in Parkland.

For the reasons set forth below, we contend that the Salisbury School District and Parkland have violated federal laws including, *inter alia*, the Individuals with Disabilities in Education Act (“IDEA”), 20 U.S.C. §1400 *et seq.*, its implementing regulations at 34 C.F.R. Part 300 and 22 PA Code Chapter 14 by failing to provide these students with a FAPE during the COVID-19 crisis. In addition, by immediately and unilaterally placing all residents of KidsPeace at the on-site schools, the school districts fail to make individualized educational placement decisions and fail to ensure the provision of a free and appropriate public education in the LRE, as is required by federal and state law.

The policy and practice of placing all children residing at KidsPeace at on-grounds schools also violates Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Upon information and belief, almost all of the children residing at the KidsPeace have “a physical or mental impairment which substantially limits one or more major life activities” have “a record of such an impairment,” or be “regarded as having such an impairment.” 34 C.F.R. § 104.3.³ Upon information and belief, these children are eligible for the protections of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“§ 504”), its implementing regulations at 34 C.F.R. Part 104, and the state implementing regulations at 22 PA Code Chapter 15.⁴ Complainants assert claims on behalf of [REDACTED] and other similarly situated students placed at KidsPeace to be free from discrimination on the basis of their disabilities. The current practices also contravene the Basic Education Circular issued by the Department of Education (“the Department”), entitled

² It is unknown whether students residing at KidsPeace are receiving Extended School Year (ESY) services this summer. This is an additional issue we would ask the Bureau to investigate.

³ “Major life activities” include functions such as learning, reading, concentrating, thinking, and working. 42 U.S.C. § 12102(2)(A); 29 U.S.C. § 705(9)(B); 34 C.F.R. § 104.3(j)(ii).

⁴ The Department of Education has jurisdiction over and the duty to resolve complaints that the School District is not complying with the provisions of 22 PA Code Chapter 15 or “claims regarding denial of access, equal treatment or discrimination based on handicap.” 22 PA Code § 15.10; *see also* 22 PA Code § 15.8(b) which sets out the Department’s obligation to resolve such complaints within 60 calendar days.

Educational Programs for Students in Non-Educational Placements (Date of Review May 2010), which seeks to ensure that local education agencies like the School District comply with these laws with respect to students like █████⁵

For the foregoing reasons, the violations alleged herein are asserted against both school districts.

1. Failure to Provide a FAPE During COVID-19 Crisis

█████ is a 10th grade student who has been diagnosed with behavioral and emotional disabilities and is eligible for special education services through an IEP. He previously attended a public high school in the Lehigh Valley, but since early February he has been in a residential treatment program at KidsPeace. According to its website, KidsPeace provides “emotional and physical health care and educational services in an atmosphere of teamwork, compassion and creativity.” See KidsPeace website at <https://www.kidspeace.org/about-us/#:~:text=Founded%20in%201882%2C%20KidsPeace%20provides,changes%20and%20tra nsform%20their%20lives.>

Children and youth in the residential treatment program (roughly 150 students in total) typically attend an on-grounds school on the KidsPeace campus. It remains unclear what percentage of students, if any, attend the local public school and how individual determinations are made. Parents of students at KidsPeace are informed that the school is overseen by the Salisbury School District. Upon information and belief, a significant number of children at KidsPeace are entitled to special education services. When Governor Wolf ordered that schools be closed due to the COVID-19 crisis on or around March 16, 2020, it is our understanding that all education at KidsPeace was moved from the on-grounds schools (such as Donley Tech that █████ attended) to individual residential houses. However, KidsPeace forbids the use or possession of all technological devices by their residents, including phones, tablets, laptops, and desktops. There is a computer lab at in the Donley Tech building which the students can use during a normal school day prior to school closures. However, this critical resource is unavailable to students in residential housing during COVID-19 school closures. As a result, upon information and belief, no students at KidsPeace received access to online learning for the duration of the COVID-19 school closures.

The Parkland School District’s continuity of education references that KidsPeace will follow its own continuity of education plan. See <https://resources.finalseite.net/images/v1587142008/parklandsdorg/zkbq0cq6yzo2gjl3zti/PSDCo ntinuityofEducationPlan.pdf> (last paragraph in the document). The “KidsPeace Plan” says that there is a schedule, but families of children and youth placed at KidsPeace have informed ELC

⁵ The Department, as the state educational agency (SEA), has supervisory responsibility under the IDEA to ensure that the requirements of the statute are met and that eligible children are receiving a free appropriate public education. 20 U.S.C. § 1412(a)(11)(A) (SEA responsible for ensuring the requirements of the IDEA are met); see also 34 C.F.R. § 300.149 (SEA responsibility for general supervision). §504 imposes similar requirements on the Department. See 34 C.F.R. § 104.4(b)(1)(v), which prohibits recipients of federal financial assistance from aiding or perpetuating discrimination by providing significant assistance to an entity, in this case the school district, that discriminates.

that students did not receive any instruction and received only minimal hard-copy packets. In some cases, students at KidsPeace were provided with hard copy packets from their home school district. See KidsPeace Continuity of Education Plan at https://resources.finalsite.net/images/v1587044129/parklandsdorg/cc381zlx0khxywx8ozgv/KidsPeace_Continuity_of_Education_Plan.pdf.

Based on reports of concerned callers it is ELC's understanding that for a few weeks in March 2020 some teachers were coming into the residences to teach. However, the teachers provided only one set of lessons for all students with a wide range of special education needs and grade levels. Notably, between March 27 and April 2, KidsPeace also experienced a COVID-19 outbreak with six employees testing positive. *See e.g.*, <https://www.lehighvalleylive.com/coronavirus/2020/04/kidspeace-says-6-employees-tested-positive-for-covid-19.html>.

Beginning sometime in April 2020, a teacher continued to go into the residences nearly every day, but instead of teaching, the teacher handed out worksheets and packets. For █████, the work was completely inadequate and no modified instruction was provided. █████ was not able to access any of the work he was provided as a result. █████'s parent, █████ is concerned that the worksheets provided to him were woefully insufficient and did not enable him to make progress towards his IEP goals. She is also concerned that █████, who suffers from severe school anxiety, will be unable to participate in his grade level classes upon his return to back to public school in the Fall and that his anxiety and behaviors caused by his disabilities will spiral out of control in part due to the disruption in his education.

In light of █████'s experience, we ask that the Bureau investigate this matter and issue a remedy directing Salisbury School District or Parkland to notify all parents of students at KidsPeace of their right to compensatory education services for the failure to receive special education services during the COVID-19 crisis. In addition, we ask that the responsible district be directed to address this issue to ensure provision of a FAPE to all students in the upcoming school year.

2. Failure to take proper steps to involve IDEA parents in IEP meetings and placement decisions upon initial placement of the student and Failure to Provide Comparable Services.

Concerned callers have also raised concerns that IDEA Parents are not always invited to attend the initial IEP meetings for children placed at KidsPeace. Upon information and belief, a KidsPeace procedures document instructs that a KidsPeace School Supervisor will contact the Salisbury Township LEA to set up an IEP meeting within ten (10) school days but that the home school district and parents will be invited to attend the *next* IEP meeting. Convening any IEP meeting without inviting the IDEA parent directly violates the IDEA's mandate that Local Education Agencies attempt to secure participation by IDEA parents in all IEP meetings. *See* 34 CFR § 300.322; § 300.501(b)-(c). This violation also has critical ramifications for the student's long-term educational placement and program, as students are far more likely to stay in the school where they are initially placed for the duration of their time at KidsPeace. We ask the Bureau to investigate whether parents are involved in initial and all IEP meetings and how

school placement decisions are made. Parents have reported that it was their understanding that all children automatically attend the on-grounds school and that it becomes the student's pendent or "default" placement.

In addition, we ask that the Bureau investigate how KidsPeace secures IDEA parental participation in any subsequent IEP meetings and additional steps that are taken to apprise and include IDEA parents in IEP meetings, including calling them on the phone and requiring documentation of those efforts. *See* 34 CFR § 300.322(d); § 300.328. In light of the fact that many IDEA parents do not live close to KidsPeace, compliance with this portion of the IDEA is especially crucial here. At a minimum, the Bureau should require revisions to these policies to ensure parents are given notice and a meaningful opportunity to participate in *all* IEP meetings, particularly the *initial* IEP meeting.

We also ask that the Bureau investigate whether students receive "services comparable to those" in the student's last IEP in consultation with the child's IDEA parent(s) when a child transfers to the school place from a prior local educational agency. *See* 20 U.S.C. 1414(d)(2)(C)(i)(I).

3. Illegal Presumption in Favor of Placement at KidsPeace On-Grounds Schools

Concerned callers have also indicated that procedures at KidsPeace create a clear assumption that the student will attend a school on-grounds at KidsPeace and only "if appropriate" and after the completion of an internal review process that excludes the IDEA parent, will a public school option be explored through a recommendation letter to Parkland. There is no explanation provided to parents regarding when an on-grounds placement is inappropriate. Importantly, parents also allege that decisions are not individualized. These policies and practices creating a presumption in favor of placement at the on-grounds schools contravene the IDEA's requirement that the LEA must make *individualized* placement decisions, offer a continuum of placements to every child and ensure that students are educated in the least restrictive environment. By offering an on-grounds schools at KidsPeace as the only possible school placement option, rather than offering a continuum of placements students at KidsPeace are deprived of their rights under federal and state laws. *See* 34 C.F.R. § 300.115; 22 PA. CODE §§ 14.102(a)(1)(iv), 14.145(5).

Moreover, KidsPeace does not routinely immediately convene IEP meetings with parents or other legal authorized special education decision-makers to determine whether the children should be admitted to Parkland's public schools, if necessary with supplementary aids or services, prior to placing children at one of the KidsPeace on-grounds schools. *See* 34 C.F.R. § 300.116. As a result, residents of KidsPeace may also be deprived of their right to be educated in the "least restrictive environment" including providing opportunities for students to be educated with and interact with peers who do not have disabilities outside of the academic classroom, such as in extra-curricular activities, lunch, recess, or "specials" classes such as art, music, and physical education. *See* 34 C.F.R. § 300.114(a)(2); 34 C.F.R. § 104.34. Moreover, parents or other legal authorized special education decision-makers fail to receive written notice of their child's change in placement (*i.e.* a Notice of Recommended Educational Placement ("NOREP")) or to receive proper procedural safeguards prior to KidsPeace placing their child in

an on-grounds school. *See* 20 U.S.C. § 1415; 34 C.F.R. § 300.503(a)(1), (b); 34 C.F.R. § 300.501(b)-(c).

Such a procedure also disregards the Department of Education’s policy guidance which expressly directs exactly the opposite – the presumption is that all students placed in a non-educational residential placement will attend a regular public school rather than an on-grounds school. *See* Basic Education Circular, *Educational Programs for Students in Non-Educational Placements* at 1 (Date of Review May 2010) (“[W]hen a ‘non-educational’ placement is made, such placement is presumed to determine where the child lives, and where the child may receive non-educational services, but this residential placement is not presumed to determine where the child will be educated. Rather, the presumption is that the student will receive his or her education in a regular public school unless the parents/guardians and appropriate public officials determine that such an educational placement is unwise for the child or improper.”).

Students who are eligible under the IDEA and Chapter 14, students at KidsPeace are entitled to a written IEP regarding services and school placement that is developed, reviewed and revised for each individual student. 34 C.F.R. § 300.320; 22 Pa. Code § 14.102(a)(2)(xxvii). Each school placement decision must be individualized and based on the child’s IEP. 34 C.F.R. § 300.116(a)(2), (b); 22 Pa. Code § 14.102(a)(2)(xiii). By immediately placing all students at on-grounds schools at KidsPeace, students are deprived of their right to an individualized placement decision, as guaranteed by the IDEA and Chapter 14. *See also* 24 P.S. § 13-1306(c) (school district in which a children’s institution is located is responsible for providing an appropriate program in compliance with applicable special education laws); 34 C.F.R. § 300.116; 22 Pa. Code § 14.102(a)(2)(xiii).

Courts have concluded that “the placement decision must be based on the IEP produced by the IEP team and cannot be made before the IEP is produced.” *Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Michael R.*, No. 02 C 6098, 2005 U.S. Dist. LEXIS 17450 at *42 (N.D. Ill. Aug. 15, 2005) (citing *Spielberg v. Henrico County Public Schs.*, 853 F.2d 256, 258-59 (4th Cir. 1988)). “Consequently, a school district’s unilateral decision to change a student’s placement before the IEP meeting with the student’s parents, referred to as ‘predetermination,’ can constitute a violation of the IDEA.” *James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102*, 642 F. Supp. 2d 804, 821 (N.D. Ill. July 22, 2009) (quoting *Michael R.*, 2005 WL 2008919 at *14).

In delineating the types of placements in which districts can place students who qualify for special education, the Department has reiterated that placements decisions must be individualized. *See e.g.*, Basic Education Circular, *Placement Options for Special Education* (Date of Review October 2009) (“Placement BEC”). Students cannot be placed in a particular school merely because it is the most convenient. Placement BEC at 2 (“regardless of the type of placement being considered,” there remains “an obligation to place a student in the least restrictive environment (LRE) in which the student’s IEP can be implemented; and . . . a corresponding prohibition against placing children based solely on factors of administrative convenience.”). *Id.* The Department in fact cautioned districts that utilizing “nontraditional sites, particularly if they are segregated and are not based on an individual placement decision,

[would] result in the disapproval of the school district's special education plan by the Bureau of Special Education.” *Id.* at 2-3.

Moreover, by initially treating the on-grounds schools as the only possible school placement, a district fails to meet its obligation to provide students with access to a full continuum of placements as required by the IDEA and 22 PA. CODE Chapter 14. *See* 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.115; 22 PA. Code §§ 14.102(a)(1)(iv), 14.145(5). The continuum of placements starts at instruction in regular classes, as the least restrictive, and ends with instruction in hospitals and institutions as the most restrictive. *See* 34 C.F.R. § 300.115(b)(1); *D.B. v. Ocean Twp. Bd. of Educ.*, 985 F. Supp. 457, 490 (D.N.J. 1997). As the district court explained in *D.B.*, “[j]ust as placement in a regular class with supplementary aids and services is at one end of the continuum of alternative placements required to be made available to special education students under IDEA, placement at a completely segregated, full time residential facility is at the other end of the continuum.” *Id.* at 490 (citing *Oberti v. Bd. of Educ.*, 801 F. Sup. 1392, 1400 (D.N.J. 1992), *aff’d*, 995 F.2d 1204 (3d Cir. 1993)). Indeed, the court explained that “whether residential placement is required for educational purposes under the IDEA must begin with the recognition that by its very nature, full-time residential placement is an extremely restrictive type of placement because it completely removes the child from their home and their community.” *Id.* at 491.

Courts have specifically acknowledged that who students have significant programmatic needs as a result of their disabilities “can and must be accommodated in community-based educational settings.” *Id.* (collecting cases). In *Michael R.*, for example, the district court concluded that the school district’s proposed placement “represents an appropriate point along the continuum of services” because it allowed the plaintiff to be “mainstreamed to the maximum extent appropriate.” 2005 U.S. Dist. LEXIS 17450 at *62-*63. Specifically, although plaintiff in that case required a “highly structured” specialized program for children with multiple needs, the placement allowed the plaintiff to interact with regular education students at lunch. *Id.* (relying on *Beth B. v. Van Clay*, 282 F.3d 493, 499 (7th Cir. 2002), in which the Seventh Circuit determined that placement was “at an acceptable point along the ‘continuum of services’ between total integration and complete segregation” because it “included reverse mainstreaming and the opportunity to spend time with nondisabled peers.”).

This improper presumption impacts hundreds of students who participate in KidsPeace residential programs each year. Parkland must offer appropriate services (*e.g.*, emotional support classrooms) to children in their public schools to ensure access to a continuum of educational placements and that all students at KidsPeace can be educated in the least restrictive environment.

4. Failure to address the education of children at KidsPeace’s Onsite Hospital

We also request that the Bureau investigate the education provided to children placed at the KidsPeace hospital. ELC has consistently received reports from concerned callers that students receive no education while placed at the hospital, are deprived of a FAPE and there is no attempt to contact a potential IDEA parent to address this. At a minimum, the Bureau should require corrective action to ensure that every child’s IDEA parent/Educational Decision Maker is

contacted when a child is placed in the KidsPeace hospital and to ensure implementation of the IEP to the maximum extent appropriate so that these children do not lose ground.

Proposed Remedies

In view of the above, we request the following relief:

1. We request that the Bureau investigate the issues raised in this Complaint.
2. We request that the Bureau issue a CIR to include the following corrective action:
 - Direct that all students who resided at KidsPeace during the COVID-19 closures and who failed to receive a free, appropriate, public education during this time be awarded compensatory education services and that all IDEA Parents be notified of their students' eligibility for compensatory education services, even if they are no longer residing at the facility.
 - Direct Parkland School District to develop and implement a protocol approved by the Bureau for ensuring that a parent or other legally authorized education decision-maker is contacted and participates in a placement decision when a child is first admitted to KidsPeace and that individualized school placement decisions are made in accordance with the procedures set out in the IDEA and 22 Pa. Code Chapter 14. Other policies and procedures may need to be revised to mandate that all IDEA Parents be invited to all IEP meetings, including the initial IEP meetings and that all efforts to secure parental participation be documented.
 - Direct that policies and procedures at KidsPeace be revised to clarify that the educational placement is presumed to be the local public school unless and until the IEP team meets and determines an alternative placement is the least restrictive environment for the individual child. Invitations to IEP meetings must inform IDEA parents that their child has a right to attend the local public school and to be educated in the least restrictive environment. Policies and procedures must also be revised to clarify that all children must be offered a continuum of placements and must receive comparable educational services until a new IEP is developed.
 - Direct that all children with disabilities placed in the KidsPeace Hospital receive special education services in accordance with their then-current IEP and that IDEA Parents participate in IEP meetings regarding this any proposed change in placement.
 - Direct that relevant staff receive training regarding all changes in policies and procedures, including the legal presumption in favor of educating all children in the least restrictive environment, and the educational placement options available to ensure access to a continuum of placements.

3. That the Bureau monitor the Districts every six months to determine if IDEA parents are participating in IEP meetings and initial placement decisions and are fully informed of all rights, as well as to determine whether more children are being educated in a local public school setting.

Thank you for your consideration of this complaint.

Respectfully submitted,



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October 29, 2020

Pennsylvania Department of Education
Bureau of Special Education
Division of Compliance Monitoring and Planning
333 Market Street, 7th Floor
Harrisburg, PA 17126-0333

RE: Request for Reconsideration On Behalf of [REDACTED] and Other Students Similarly Situated

I. Introduction

The Education Law Center (“ELC”) files this Request for Reconsideration as an organization and on behalf of [REDACTED] (DOB: [REDACTED]) and all similarly situated students who reside or have previously resided at KidsPeace Residential Treatment Facility in Orefield, Pennsylvania (“KidsPeace”). We seek to remedy policies and practices that have resulted in the systematic deprivation of a free, appropriate, public education of [REDACTED] and other similarly situated students.

On July 10, 2020, we filed a Complaint and requested that the Bureau investigate the provision of special education services to children with disabilities residing at KidsPeace during the COVID-19 crisis. We also challenged the alleged failure of Parkland School District and Salisbury Township School District to comply with their obligations more generally under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (“IDEA”), its implementing regulations at 34 C.F.R. Part 300 and Chapter 14 of the Pennsylvania School Code to provide students with disabilities with a free, appropriate, public education in the least restrictive environment. We asserted in part that KidsPeace failed to provide access to public school to ensure that all students are educated in the least restrictive environment and that children residing in the KidsPeace Hospital receive a FAPE and not discriminated against on the basis of their disability or perceived disability in violation of Section 504 of the Rehabilitation Act.

We appreciate the thoroughness of the investigation conducted by the Bureau in response to our Complaint. However, we seek reconsideration with regard to several issues based on additional information provided in the Corrective Investigation Report (“CIR”) and for the reasons discussed below.

1. Issue 1: Ensuring Compensatory Education Services For Deprivations of FAPE During COVID-19 School Closures.

We concur with the Bureau’s conclusion directing Parkland School District (“PSD”) and Salisbury Township School District (“STSD”) to determine compensatory education services for students during the period of school closures from March 16th to the end of the 2019-2020 school year. However, we specifically request that these determinations regarding compensatory education services consider whether the specially designed instruction actually implemented for each individual student during closures was appropriate to address the unique needs of the child resulting from their disability, ensured access to the general curriculum so that each child could meet educational standards, and was appropriately applied with regard to content, methodology, and/or delivery of instruction. *See* 34 CFR 300.39. Notably, the minimal modifications noted in the investigation report appear to be generic and there is no information that any of the "sequences" or "modified items" were individually modified (CIR p. 17).

Any determination regarding whether a student received a free, appropriate public during this time must be predicated on each child’s mandated services set forth in their IEP and an evaluation of individual progress towards IEP goals. Notably, while the report justifies the placement of students in restrictive on-grounds school due to their 'intensive emotional needs' which "require a highly structured mental health, therapeutic and educational program," none of seemingly generic curricular modifications appear to address those needs. (p. 23).

Such an assessment must also consider whether individualized modifications needed to meet a individual students’ existing or emerging emotional needs during COVID-19 were provided. Such assessments must include any deprivation of related services during this time period. (The CIR specifies that “there is no documentation... that each student with disabilities received related services as set forth in his or her IEP.” (CIR, 24)

PSD and STSD must also determine whether newly arrived students received comparable services during this time. Given the CIR’S conclusion that "no direct special education was being provided," it appears that comparable services were not provided during the period at issue. (CIR, 17) We request that the Bureau clarify that compensatory education services must be available for both current and former students educated at KidsPeace Residential Treatment Facility (“KPRTF”). Finally, PDE’s Guidance clearly prescribes that COVID-19 Compensatory Services (“CCS”) should be calculated no later than November 30, 2020, which is clearly within the time that PSD would have to implement the already required corrective action. The CIR clearly states that PSD has until December 15 “to review the students’ progress and make a proposed determination of compensatory services.” (CIR, 25)

2. Issue 2: Students Placed at KPRTF’s Onsite Hospital Are Entitled to a FAPE Which Must Be Thoroughly Investigated and Addressed.

The Bureau found that children at KPRTF’s onsite hospital receive an education that consists of tutoring services provided in one-hour segments. (CIR,19). The CIR references a “typical” admission period of 7-10 days, but it doesn’t specify the duration of stay for the children who were part of the random sample or for all students. *Id.* There were no additional findings in the CIR regarding the number of hours of tutoring provided on a daily or weekly basis. There also wasn’t any information provided regarding the education of children who are hospitalized for periods longer than the typical period of 7-10 days. Finally, the CIR includes no information about the process by which students with disabilities are subjected to limited

tutoring curriculum or how individualized decisions are made regarding a student's educational program and the appropriateness of such instruction in light of the child's needs. Instead, the CIR merely references the applicable of state law governing temporary excusals from school as set forth in 22 Pa Code §11.25.

Children residing in hospitals continue to possess robust educational rights and protections under the IDEA as reflected in the law itself. *See e.g.*, 34 CFR 300.29(a)(1)(i)(defining special education as specially designed instruction “conducted in the classroom, in the home, *in hospitals* and institutions, and in other settings.” The Office of Special Education and Rehabilitative Services (OSERS) has issued guidance on implementing IDEA requirements for children with disabilities who reside in nursing homes which applies to children in hospitals as well. *See Dear Colleague Letter*, dated April 16, 2016 clarifying that “children with disabilities residing in nursing homes and their parents have the same rights under IDEA that apply to all other IDEA-eligible children,” available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl-children-in-nursing-homes-04-28-2016.pdf>. ELC has had conversations with OSERS about this guidance and its application to children in short-term hospital stays. OSERS expressed a willingness to provide a letter to ELC stating that the obligations set forth also apply to children in hospitals who are entitled to a free appropriate public education when placed by a non-educational public agency. Notably, Pennsylvania's state law, 22 Pa. Code §11.25 permits a temporary excusal for medical reasons as an exemption from compulsory attendance requirements but does not and cannot change the federal protections applicable to students with disabilities under the IDEA.

Here, the CIR provides no information regarding whether and how the rights of these children are being protected. There is no discussion regarding parent involvement in decision-making, the individualized nature of an educational program provided to students, compliance with procedural safeguards, whether staff providing educational tutoring services have the requisite qualifications or ensuring that each eligible child remains in the least restrictive environment to which she is legally entitled. As reflected in the OSERS letter, a child's educational services must be re-evaluated over time: “For example, if a child's condition stabilizes or improves and the child's doctor believes the child can tolerate additional instruction or be transported to a local school for instruction, the child's IEP Team may need to revise the child's IEP to determine if additional services are warranted” as well as determine whether the hospital continues to be the least restrictive setting where the child should receive FAPE. Here, there was no inquiry or discussion regarding whether the children who remained in the hospital for longer than 10 days were considered for or received any additional services that would have allowed their IEPs to be implemented to the maximum extent possible.

For the foregoing reasons, we request that the Bureau investigate these issues pertaining to students with disabilities residing in KPRTF's on-site hospital and issue any needed corrective action to remedy any deprivations they suffered.

- 3. Issues 5 and 8: KPRTF Has Failed to Ensure That Students are Educated in the Least Restrictive Environment and that Individual Placement Decisions Are Made.**
 - a. KidsPeace Cannot Have A Default Policy or Practice of Placing Children In On-Grounds Schools**

The CIR concludes that all children in the sample were placed by a court order or public agency – a fact which does not undermine any child’s educational rights under disability law. The CIR seems to use placement in KidsPeace as a valid reason justifying placement at the on-grounds school because their “intense emotional needs” require a “highly structured mental health, therapeutic, and educational program” that they are receiving at KidsPeace. (CIR, 21). Notably, *all* children placed at KidsPeace during the investigation were placed on-grounds. *Id.* The CIR specifies that the STDS Supervisor indicated that “some” students attended a public school setting but there are no findings regarding the number or percentage of students who attend public school. As stated in our Complaint, it is our experience over the last ten years that placement in public school rarely, if ever, occurs. (Complaint, 6)

The CIR also impermissibly permits what appears to be an automatic initial placement in the on grounds school, the most restrictive environment, with a “step down” approach to follow. This process has no basis or justification in the law. Specifically, the CIR reflects:

1. The child is first evaluated for “the first few weeks of placement and while documentation filters in,” regardless of whether she presents with serious behavioral risk such as risk of suicide, homicide, or elopement, and regardless of the reason she was placed a KidsPeace. (CIR, 20)
2. Then, new classroom data regarding “behavior, safety, and academic performance” is collected. (CIR, 20-21)
3. After this data is collected, a student must meet the following three criteria to be considered for a regular public school setting: “the student is not displaying egregious behavior that would pose a safety concern, transition from a neighborhood program less than full time, and demonstrating needs that can be managed in a public school.” (CIR, 21)

As a result of this process, nearly all students at KidsPeace remain at the on-grounds school where they are *first* placed, and this therefore becomes the child’s default placement for the duration of their stay.

This process is antithetical to the goals of ensuring that students with disabilities are educated in the least restrictive environment *and* are offered a continuum of placements. See 34 C.F.R. § 300.115; 22 PA. CODE §§ 14.102(a)(1)(iv), 14.145(5). The mere fact of placement at no time justifies being deprived of a free, appropriate, public education. These children have the right to be admitted to public school, if necessary with supplementary aids or services, prior to being placed at one of the KidsPeace more restrictive on-grounds schools. See 34 C.F.R. § 300.116. By initially treating the on-site schools as the only possible school placement, a district fails to meet its obligation to provide students with access to a full continuum of placements as required by the IDEA and 22 PA. CODE Chapter 14. See 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.115; 22 PA. CODE §§ 14.102(a)(1)(iv), 14.145(5). The continuum of placements starts at instruction in regular classes, as the least restrictive, and *ends* with instruction in hospitals and institutions as the most restrictive. See 34 C.F.R. § 300.115(b)(1)(emphasis added).

As a result of current practices, residents of KidsPeace are deprived of their right to be educated in the “least restrictive environment” including providing opportunities for students to be educated with peers who are not people with disabilities and interact with peers who are not people with disabilities outside of the academic classroom, such as in extra-curricular activities, lunch, recess, or “specials” classes such as art, music, and physical education. See 34 C.F.R. § 300.114(a)(2); 34 C.F.R. § 104.34. As the district court explained in *D.B. v. Ocean Twp. Bd. of Educ.*, 985 F. Supp. 457, 490 (D.N.J. 1997), “[j]ust as placement in a regular class with supplementary aids and services is at one end of the continuum of alternative placements required to be made available to special education students under IDEA, placement at a completely segregated, full time residential facility is at the other end of the continuum.” (citing *Oberti v. Bd. of Educ.*, 801 F. Sup. 1392, 1400 (D.N.J. 1992), *aff’d*, 995 F.2d 1204 (3d Cir. 1993)). Indeed, the court explained that “whether residential placement is required for educational purposes under the IDEA must begin with the recognition that by its very nature, full-time residential placement is an extremely restrictive type of placement because it completely removes the child from their home and their community.” *Id.* at 491.

As the Bureau is well aware, placement at KidsPeace on-grounds schools is not permitted to be the default educational placement for students as is presently occurring at KidsPeace. It is also in direct contravention under the state’s own guidance. As set forth in the *Basic Education Circular, Educational Programs for Students in Non-Educational Placements* (Date of Review May 2010), “when a ‘non-educational’ placement is made, such placement is presumed to determine where the child lives, and where the child may receive non-educational services, **but this residential placement is not presumed to determine where the child will be educated.**” Rather, “the presumption is that the student will receive their education in a regular public school unless the parent/guardian and appropriate public officials determine that such an educational placement is unsafe for the child or improper.” See also, Basic Education Circular, *Placement Options for Special Education* (Date of Review October 2009) (“Placement BEC”) at 2 (“regardless of the type of placement being considered,” there remains “an obligation to place a student in the least restrictive environment (LRE) in which the student’s IEP can be implemented; and . . . a corresponding prohibition against placing children based solely on factors of administrative convenience.”). See also 24 P.S. § 13-1306(c) (school district in which a children’s institution is located is responsible for providing an appropriate program in compliance with applicable special education laws).

The policies of indiscriminately placing all children residing at KidsPeace at on-grounds schools also violates Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. It is our understanding that almost all of the children residing at the KidsPeace campus at Orefield have “a physical or mental impairment which substantially limits one or more major life activities” have “a record of such an impairment,” or be “regarded as having such an impairment.” 34 C.F.R. § 104.3.¹ These children are eligible for the protections of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“§ 504”), its implementing regulations at 34 C.F.R. Part 104, and the

¹ “Major life activities” include functions such as learning, reading, concentrating, thinking, and working. 42 U.S.C. § 12102(2)(A); 29 U.S.C. § 705(9)(B); 34 C.F.R. § 104.3(j)(ii).

state implementing regulations at 22 PA Code Chapter 15.² By being deprived of their right to public school, they are being “excluded from the participation in, be denied the benefits of, or be subjected to discrimination” under a program receiving federal financial assistance. 29 U.S.C. §794(a), 34 C.F.R. §104.4(a).

b. KidsPeace Cannot Circumvent the Required IEP Team Placement Decision-Making Process

KidsPeace’s implementation of an impermissible multi-tiered placement process displaces required IEP team placement decisions. Courts have also concluded that “the placement decision must be based on the IEP produced by the IEP team and cannot be made before the IEP is produced.” *Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Michael R.*, No. 02 C 6098, 2005 U.S. Dist. LEXIS 17450 at *42 (N.D. Ill. Aug. 15, 2005) (citing *Spielberg v. Henrico County Public Schs.*, 853 F.2d 256, 258-59 (4th Cir. 1988)). They have also held that “a school district’s unilateral decision to change a student’s placement before the IEP meeting with the student’s parents, referred to as ‘predetermination,’ can constitute a violation of the IDEA.” *James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102*, 642 F. Supp. 2d 804, 821 (N.D. Ill. July 22, 2009) (quoting *Michael R.*, 2005 WL 2008919 at *14).

We continue to be deeply concerned that few, if any, students residing at KidsPeace are afforded the opportunity to attend the local public school and instead, are automatically placed in one of three on-grounds schools at KidsPeace with where they are given limited educational opportunities and are educated separate and apart from their peers. We are also concerned that this decision is never revisited during the childrens’ time at KidsPeace. By immediately placing all residents of KidsPeace at the on-site schools, the district fails to make individualized educational placement decisions and fails to ensure the provision of a free and appropriate public education in the least restrictive environment as required by federal and state law.

We ask the Bureau to further investigate the failure of students at KPRTF to have access to public school including collecting data regarding (1) the frequency with which children with disabilities at KPRTC attend public school; (2) the number or percentage of students who are placed in an on-grounds school upon admission; (3) evidence that all parents are informed of the presumption in favor of public school and provided with detailed information concerning the program, services and supports available through a public school placement; and (4) the duration of travel time to public school for students at KPRTFs. We further request that KPRTF be directed to undertake new policies and procedures to ensure that (1) all parents are notified of their children’s right to attend public school; (2) detailed information regarding the program and services at public school is reviewed at every IEP Team meeting; and (3) the initial school placement decision is made based of the child’s current IEP and does not default to all children being placed at the on-grounds school. This presumption impacts hundreds of students who participate in KidsPeace residential programs each year.

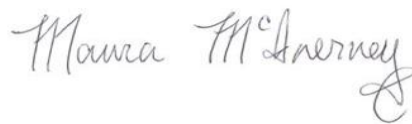
² The Department of Education has jurisdiction over and the duty to resolve complaints that the School District is not complying with the provisions of 22 PA Code Chapter 15 or “claims regarding denial of access, equal treatment or discrimination based on handicap.” 22 PA Code § 15.10; *see also* 22 PA Code § 15.8(b) which sets out the Department’s obligation to resolve such complaints within 60 calendar days.

In view of the above, we request the following relief:

1. That the Bureau investigate the issues raised in this Request for Reconsideration.
2. That the Bureau issue an Amended CIR to include the following corrective action:
 - Direct that policies and procedures be revised to clarify that the educational placement is presumed to be the regular public school unless and until the IEP team meets and determines an alternative placement is the least restrictive environment for the individual child. Invitations to IEP meetings must inform IDEA parents that their child has a right to attend the local public school and to be educated in the least restrictive environment. Policies and procedures must also be revised to clarify that all children must be offered a continuum of placements and must receive comparable educational services until a new IEP is developed.
 - Direct that all children with disabilities placed in the KidsPeace hospital receive special education services in accordance with their then-current IEP and that IDEA Parents participate in IEP meetings regarding this any proposed change in placement.
 - Direct that relevant staff receive training regarding all changes in policies and procedures, including the legal presumption in favor of educating all children in the least restrictive environment, and the educational placement options available to ensure access to a continuum of placements.
3. That the Bureau monitor these issues every six months to ensure that IDEA parents are fully informed of all rights, and that children are being educated in the least restrictive environment.

Thank you for your consideration of this Request.

Respectfully submitted,



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A handwritten signature in black ink that reads "Paige Joki". The signature is written in a cursive, flowing style.

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