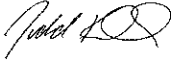




**ANNOUNCEMENT: EI-11 #01**  
**OFFICE OF CHILD DEVELOPMENT AND EARLY LEARNING**  
**BUREAU OF EARLY INTERVENTION SERVICES**

**ISSUE DATE: June 1, 2011**  
**EFFECTIVE DATE: June 1, 2011**  
**EXPIRATION DATE: Announcement applicable until further notice**

<b>SUBJECT:</b>	<b>IDEA Early Intervention Complaint Procedures</b>
<b>TO:</b>	<b>Early Intervention Leadership</b>
<b>FROM:</b>	<b>Todd M. Klunk</b>  <b>Acting Deputy Secretary, Office of Child Development and Early Learning</b>

**PURPOSE:**

The purpose of this Announcement is to communicate the Office of Child Development and Early Learning (OCDEL), Bureau of Early Intervention Services (BEIS) procedures for filing, investigating and resolving complaints within the Infant/Toddler and Preschool Early Intervention (EI) system related to any alleged violation of requirements under Parts B (Section 619) and C of the Individuals with Disabilities Education Act (IDEA), Pennsylvania Act 212-1990 and other applicable state or federal legislation or regulations.

**BACKGROUND:**

Part B and Part C of the Individuals with Disabilities Education Act (IDEA) under 34 CFR §300.151-153 and 34 CFR §303.510-512 respectively requires states to adopt complaint procedures for resolving any complaint that is in violation of federal or state requirements. The procedures in this announcement have been updated in response to the Office of Special Education Programs (OSEP) recent verification visit in Pennsylvania to ensure the complaint resolution process utilized to investigate complaints related to violations of federal and state requirements conducted through BEIS meet the requirements of the statute.

**DISCUSSION:**

Parents with children receiving EI services must be informed of their rights and procedural safeguards throughout the time their child receives EI services. Parents should receive information on procedural safeguards upon initial contact with the Early Intervention program; upon parent's request for evaluation; whenever there is a change to Early Intervention services and/or revisions to the IFSP/IEP; and any time a parent requests a copy.

Additionally, OCDEL has developed a fact sheet entitled *Problem Solving in Early Intervention* which provides information on conflict resolution at the local Infant/Toddler EI or Preschool EI level, IFSP/IEP facilitation, the EI Complaint Resolution Process (form attached), mediation, and due

process defined in this announcement. The choice of any one option outlined on the fact sheet neither precludes the parent from choosing any other option, nor does the parent have to exhaust any one option in order to utilize another. The fact sheet should be used in conjunction with the presentation of procedural safeguards to explain the options to families. The fact sheet can be found at [http://www.education.state.pa.us/portal/server.pt/community/early\\_intervention/8710](http://www.education.state.pa.us/portal/server.pt/community/early_intervention/8710).

An Early Intervention Complaint Resolution Process (EICRP) has been developed and is available to assist parents in resolving concerns at the local level before the concern elevates to the written complaint level. (Attachment #1)

## **DEFINITIONS:**

### **1. COMPLAINT**

A complaint is a written signed report stating the issues or allegations filed by an individual, parent or organization indicating a deficiency in the fulfillment of the requirements or a violation of the requirements by an Infant/Toddler or Preschool EI program that receives funding or payment under Parts B or C of IDEA, Pennsylvania Act 212-1990 or other pertinent state or federal legislation. A few examples of complaints are:

- a. Timelines not met;
- b. Service on an IFSP/IEP not provided;
- c. Denial of appropriate service(s);
- d. Failure to implement a due process hearing decision.

An alleged violation must have occurred within one year of the date the complaint is received by BEIS. For Infant/Toddler and Preschool EI programs, a longer period may be considered reasonable if the complainant is requesting reimbursement or corrective action for a violation that occurred not more than three years before the date on which the complaint is received by BEIS.

If a written complaint is received that is also the subject of a due process hearing, or contains multiple issues of which one or more are part of that hearing, BEIS will set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint to BEIS that is not part of the due process action must be resolved within the 60 calendar day timeline using the complaint process outlined within this Announcement.

Any complaint against OCDEL involving its failure to establish or implement policies as required by Parts B & C of IDEA or Pennsylvania Act 212-1990 shall be directed to the Secretary of the Department of Education for Preschool EI or the Secretary of the Department of Public Welfare for Infant/Toddler EI.

Anonymous reports will not be accepted.

### **2. COMPLAINANT**

A complainant is an individual, parent or organization who files a complaint with OCDEL.

### 3. RESPONDENT

A respondent is the party against which the complaint is filed, i.e., any Infant/Toddler or Preschool EI program.

### **COMPLAINT SYSTEM PROCEDURES:**

1. The EI Complaint Registry Form (Attachment #2) can be used by individuals, parents or organizations to file a complaint with OCDEL against an Infant/Toddler or Preschool EI Program. The form can be obtained from OCDEL at 717-346-9320; by emailing the request to [ra-ocdintervention@state.pa.us](mailto:ra-ocdintervention@state.pa.us) or on-line at [http://www.education.state.pa.us/portal/server.pt/community/early\\_intervention/8710/forms/522291](http://www.education.state.pa.us/portal/server.pt/community/early_intervention/8710/forms/522291).  
Complainants are not required to use the EI Complaint Registry Form to file a complaint with OCDEL. Complaints received that are written on other forms of documentations shall be accepted and acted upon as appropriate.
2. The complaint may be mailed, emailed or faxed to:  
Departments of Public Welfare and Education  
Office of Child Development and Early Learning  
Bureau of Early Intervention Services  
333 Market Street, 6<sup>th</sup> Floor  
Harrisburg, PA 17126-0333  
Email: [ra-ocdintervention@state.pa.us](mailto:ra-ocdintervention@state.pa.us)  
Fax: 717-346-9330
3. All complaints received by BEIS staff via email, through the complaint registry form or any other forms of written documentation are date stamped and entered into a complaint log upon receipt by BEIS staff to ensure the investigation into the complaint will begin and is completed within the 60 day timeframe. The information is then forwarded to the EI Advisor for that area who will then contact the complainant.
4. BEIS staff will offer assistance to the complainant, whenever necessary, using the complainant's native language and/or mode of communication, with the writing/transmission of statements outlining the details of each complaint. The statement will include sufficient detailed information concerning the alleged violations of regulatory requirements or the provision of services.
5. The complainant must forward a signed copy of the complaint to the Infant/Toddler or Preschool EI program serving the child at the same time the complainant files the complaint with BEIS.
6. Within 60 calendar days after a complaint is filed, BEIS will issue a written decision to the complainant and the respondent that addresses each allegation in the complaint. This written decision will include:
  - a. Findings of fact

- b. Conclusions that may include corrective action necessary to address the needs of the child and, if appropriate, future provision of EI services.
  - c. The reasons for OCDEL's decision.
7. An extension of the 60 calendar day time line may be granted if:
    - a. Exceptional circumstances exist with respect to the review and investigation of a particular complaint; or
    - b. The parent and Infant/Toddler or Preschool EI program involved voluntarily agree to extend the time to resolve the matter through mediation or alternative means of dispute resolution. All parties will be informed in writing of the extension, the circumstances for the extension and the new time lines for resolution of the complaint.
  8. If an EI Advisor, in conjunction with their supervisor, determines the issue/s provided in the written complaints do not meet the requirements for initiating an investigation or are not within the jurisdiction of OCDEL, notification will be provided in writing to the complainant addressing the reason/s why OCDEL was not conducting an investigation or was unable to resolve the allegation.
  9. Families that do not agree with OCDEL's decision may pursue the matter by writing to the appropriate Secretary's of the Department of Education or Public Welfare. The complaint must submit a written request for reconsideration within 15 days of the date the state has issued their decision. The reconsideration from the respective Secretary for each Department will be issued within 45 days of receipt of the written request. If a complainant chooses to pursue this option, any corrective action required in OCDEL's final decision shall not be delayed pending this review if the review process is completed later than 60 days after the original filing of the complaint.

**CORRECTIVE ACTION PROCESS:**

1. If the complaint has been substantiated as a violation and/or noncompliance of Part B or C of IDEA, Act 212-1990, or other applicable state or federal legislation or regulation, corrective action to restore, amend, or improve the circumstances cited in the complaint shall be taken within 30 calendar days after receipt of the written decision. If full implementation of the corrective action plan requires more than 30 calendar days, the respective EI program will develop a corrective action plan with time frames as directed by BEIS. The corrective action plan must be approved by BEIS.
2. BEIS will monitor the implementation of the corrective action plan to assure correction of the circumstances in the complaint.
3. Infant/Toddler or Preschool EI programs that fail to correct areas of noncompliance within one year, or sooner if required by an approved corrective action plan, may require actions or sanctions, including but not limited to:

- a. Revising a plan of correction with updated timelines for correcting areas of noncompliance;
- b. Focusing training and technical assistance related to correcting the areas of noncompliance;
- c. Placing restrictions or special conditions on funding;
- d. Withholding of funds;
- e. Requiring a fiscal audit;
- f. Stipulating other actions in the written complaint decision.

**NEXT STEPS:**

1. Infant/Toddler and Preschool EI programs shall ensure that all staff and providers receive training on procedural safeguards and information on the procedures outlined in this announcement.
2. Infant/Toddler and Preschool EI programs shall implement a process by which complaints are tracked and data regarding local conflict resolution activities is maintained.
3. The Infant/Toddler and Preschool programs should use information from the tracking of complaints and local conflict resolution activities to develop and maintain a continuous quality improvement management system.
4. Infant/Toddler and Preschool EI programs should review their current practices and revise any local procedures to ensure the guidance in this announcement is implemented.

Comments and Questions Regarding this Announcement Should be Directed to the Office of Child Development and Early Learning, Bureau of Early Intervention Services EI Advisors or to [ra-ocdintervention@state.pa.us](mailto:ra-ocdintervention@state.pa.us)

**ATTACHMENT #1**

**EARLY INTERVENTION**  
**COMPLAINT RESOLUTION PROCESS**

In order to increase communication and collaboration in assisting parents in resolving concerns at the local level, the Office of Child Development and Early Learning (OCDEL), Bureau of Early Intervention Services (BEIS), has instituted a birth to five Early Intervention Complaint Resolution Process (EICRP).

The purpose of this process is to reduce the number of formal complaints filed with the Bureau of Early Intervention Services as a result of concerns with the local Infant/Toddler Early Intervention (EI) program or Preschool Early Intervention program. This process allows complainants and BEIS EI Advisors to resolve a concern/problem directly with a local program and assist them first in resolving the issue.

Parents have the opportunity to phone, fax, or email the Infant/Toddler or Preschool EI Program and/or the EI Advisor at any time to resolve an issue before elevating it to the complaint level. That information should be sent to:

Departments of Public Welfare and Education  
Office of Child Development and Early Learning  
Bureau of Early Intervention Services  
333 Market Street, 6<sup>th</sup> Floor  
Harrisburg, PA 17126-0333  
Email: [ra-ocdintervention@state.pa.us](mailto:ra-ocdintervention@state.pa.us)  
Phone: 717-346-9320  
Fax: 717-346-9330

If a resolution cannot be reached after a review of the issue by the BEIS EI Advisor, the parents have the option to pursue the formal complaint process. The EICRP process is BEIS's preferred way to deal proactively with complaint issues and to remain committed in helping families resolve concerns as early and efficiently as possible.

## Early Intervention Complaint Registry Form

Please feel free to make copies of this form or use additional paper. Please print or type.

My preferred method of contact by the Office of Child Development and Early Learning (OCDEL) Early Intervention (EI) Advisor assigned to this complaint is:

- By phone (list numbers) [REDACTED]  
Best time during normal business hours to call Morning
- In person at a public facility during normal business hours. The location will likely be a Infant/Toddler Early Intervention Program Office or Preschool Early Intervention Program Office.

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

Please provide the name and address of the child:

Child's Name: Please see attached Date of Birth: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_

Please provide the name of the Infant/Toddler EI Program or the name of the Preschool EI Program:

Elwyn SEEDs

Please provide your contact information and your relationship to the child.

Name: Maura McInerney, Margret Wakelin, and Paige Joki  
Address: 1800 John F. Kennedy Blvd Suite 1900A Philadelphia, PA 19103

Phone Number: \_\_\_\_\_  
Home Work Cell

Relationship to child:

- Parent  Attorney  Advocate  Community Organization  Other

On or about what date did the alleged violation occur? March 13, 2020 into the present.  
Date

Attachment #2

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

Name	Occupation/Title	Phone Number/E-Mail Address
Please See Attached		

Please provide a statement about the issue or violation which you believe has occurred. Please include a description about the nature of the problem. Please list the facts that support your statement.

**Feel free to use extra paper and staple to this form.**

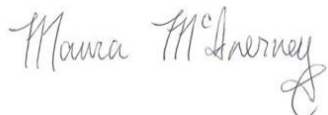
Please See Attached

What do you feel is a satisfactory remedy to this situation?

Please See Attached

Please mail original form to: Departments of Public Welfare and Education, Office of Child Development and Early Learning, Bureau of Early Intervention Services, 333 Market Street, 6<sup>th</sup> Floor, Harrisburg, PA 17126-0333  
Or Email: [ra-ocdintervention@state.pa.us](mailto:ra-ocdintervention@state.pa.us). Also, please provide a copy of this complaint form and any attachments to the child's EI program. For Infants/Toddlers under the age of three, the form should be sent to the Infant/Toddler Early Intervention Coordinator. For Preschoolers age 3-5, the form should be sent to the Preschool Early Intervention Supervisor.

By signing below, you indicate to the EI Advisor that you have provided a copy of the complaint to the appropriate EI program offices. If you are not sure who to send this complaint form to, please contact OCDEL at 717-346-9320 for assistance.



\_\_\_\_\_  
Signature

12/10/2020

\_\_\_\_\_  
Date





PHILADELPHIA  
1800 JFK Blvd., Suite 1900A  
Philadelphia, PA 19103  
T 215-238-6970  
F 215-772-3125

PITTSBURGH  
429 Fourth Ave., Suite 702  
Pittsburgh, PA 15219  
T 412-258-2120  
F 412-535-8225

*Via Email*

December 10, 2020

Office of Child Development and Early Learning (OCDEL)  
Bureau of Early Intervention Services  
Department of Education and Human Services  
6<sup>th</sup> Floor  
333 Market Street  
Harrisburg, PA 17126-0333  
[ra-ocdintervention@state.pa.us](mailto:ra-ocdintervention@state.pa.us)

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

Dear Bureau of Early Intervention Services:

The Education Law Center (“ELC”) files this Complaint as an organization,<sup>1</sup> and on behalf of individual students [REDACTED] ([REDACTED]) ([REDACTED]), [REDACTED] and other similarly-situated students with disabilities who have not been provided with appropriate early intervention services from Elwyn SEEDS (“Elwyn”). Complainants seek individualized relief for the Named Complainants and systemic relief for all those similarly situated, including specific corrective action and monitoring to remedy current policies and practices that result in the denial of a free appropriate public education (“FAPE”) to students with disabilities in receiving services from Elwyn.

**Introduction**

Complainants seek an investigation and corrective action to remedy Elwyn’s failure to fulfill its fundamental duty to ensure early intervention services during the COVID-19 pandemic for eligible students with disabilities in the City of Philadelphia. We seek to remedy policies and practices that have resulted in the systematic deprivation of a free, appropriate, public education for [REDACTED], [REDACTED], [REDACTED], and other students who were denied critical services from on or around March 13, 2020 into the present.

Specifically, we request that the Bureau of Early Intervention Services (“Bureau”) of the Office of Child Development and Early Learning (“OCDEL”) investigate the complaints brought on behalf of the Named Complainants and identify all other students who have been denied access to early intervention services by Elwyn beginning in March 2020 and extending to the present. We request that the BEIS redress the failures of Elwyn to comply with their obligations under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (“IDEA”) Chapter 14 of the

<sup>1</sup> 34 C.F.R. § 300.153(a) (“An organization or individual may file a signed written complaint under the procedures described in §§ 300.151 through 300.152.”).

Pennsylvania School Code. Furthermore, we request that the BEIS award compensatory education services to the Named Complainants and to other similarly-situated students who experienced denials of a free appropriate public education due to Elwyn’s failure to ensure access to early intervention services. In addition, we request that the BEIS conduct an in-depth assessment of Elwyn’s current practices and procedures relating to ensuring access to early intervention services for all eligible children throughout COVID-19-related closures.

As part of its investigation, we request that the BEIS interview the following persons:

Name	Occupation/Title	Phone Number and Email	Regarding
██████████ ██████████	██████████	(██████████ ██████████	██████████ denial of access to early intervention services
██████████ ██████████	██████████ ██████████	██████████ ██████████	██████████ access barriers to early intervention services
██████████ ██████████	██████████ ██████████	██████████ ██████████	██████████ denial of access to early intervention services
██████████	██████████	██████████ ██████████	██████████ access barriers to early intervention services
██████████ ██████████	██████████ ██████████	(██████████ ██████████	██████████ denial of access to early intervention services
██████████ ██████████	██████████	██████████ ██████████	██████████ denial of access to early intervention services
██████████	██████████ ██████████ ██████████	██████████	██████████ access barriers to early intervention services

## **Complainant**

The [Education Law Center-PA \(“ELC”\)](#) is a non-profit, legal advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, and policy advocacy, ELC advances the rights of students who are most underserved by our current education system, including children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English language learners, LGBTQ students, and children experiencing homelessness. ELC files this Complaint pursuant to 34 C.F.R. § 300.153(a) which permits an organization to file a signed written complaint under the procedures described in §§ 300.151 through 300.152.

██████████ (DOB: ██████████) is a four-year-old, McKinney-Vento eligible child who resides in Philadelphia and is eligible to receive early intervention services as a child with a disability through Elwyn in accordance with 20 U.S.C. § 1401(3) and 22 Pa. Code § 14.154. She has been denied a free appropriate public education due to Elwyn’s failure to ensure access to virtual learning and other significant service disruptions.

██████████ ██████████) is a ██████████ who resides in ██████████ and is eligible to receive early intervention services as a child with a disability through Elwyn in accordance with 20 U.S.C. § 1401(3) and 22 Pa. Code § 14.154. He has been denied a free appropriate public education due to Elwyn’s failure to ensure access to virtual learning.

██████████ ██████████ is a ██████████ who resides in ██████████ and is eligible to receive early intervention services as a child with a disability through Elwyn in accordance with 20 U.S.C. § 1401(3) and 22 Pa. Code § 14.154. He has been denied a free appropriate public education due to Elwyn’s failure to ensure access during virtual learning.

## **Respondent**

Elwyn SEEDS (“Special Education for Early Developmental Success”) provides evaluations and services for children 2 year 10 months to 5 years old who are eligible for early intervention services (“EI”) and reside within the City of Philadelphia. Elwyn operates pursuant to the terms of a grant agreement with the Pennsylvania Department of Education (“PDE”). The grant agreement format replaces and constitutes the current-day Mutually Agreed-upon Written Arrangement (“MAWA”) between PDE and Elwyn as provided for in the Early Intervention Services System Act, Mutually Agreed-upon Written Agreement (“MAWA”) from Pa. Dep’t of Educ., Preschool Early Intervention Agreement, Elwyn INC, Federal Award No: H173A170090 (July 1, 2019). *See* MAWA, attached hereto as Exhibit A. Elwyn operates several Early Learning Services (“ELS”) sites across Philadelphia.

## **Factual Background**

On or about March 13, 2020, when schools physically closed due to COVID-19, Elwyn offered both “a continuation of services to children primarily through virtual means, referred to as Tele-

Intervention and, in some cases, through traditional face-to-face intervention” for eligible children during the pandemic, as documented in the Elwyn ELS Tele-Intervention Parent Letter dated November 12, 2020. *See* ELS Tele- Intervention Letter, attached hereto as Exhibit B. From March through August, Elwyn solely provided “tele-intervention” services. Beginning in September, some students began to receive in-person services with significant safety protocols for children, families, and providers. However, many students were still offered tele-intervention exclusively, despite parent requests for in-person services.

Due to rising case counts in the City of Philadelphia, Elwyn sent notice to an unknown number of parents on November 12, 2020, indicating that on November 16, 2020 “Elwyn ELS will return to an instructional model of full remote learning and Tele-Intervention. The implementation of this “Tele-Intervention mode” specified that the change was “applicable to *all* preschool early intervention services rendered to children in the City of Philadelphia, including multi-disciplinary evaluations, Individualized Education Program (IEP) meetings, “and service delivery.” Exhibit B, at 1 (emphasis added). Families were only given a four-day period to adjust to the change in service delivery and attempt to procure a device that would support virtual early intervention services like a laptop, Chromebook, or tablet. However, the letter made no mention of how families could procure a necessary device, and instead directed families “that need any sort of assistance in accessing community resources to reach out to our *Family Resource Center* at 215-222-8054, option #2.” Exhibit B, at 2.

In Philadelphia, a city that has the “second-lowest” internet access “among the 25 largest cities.”<sup>2</sup> Black and Brown young children are least likely to have the means to receive needed services, while their families bear the brunt of the pandemic.<sup>3</sup> Upon information and belief, Elwyn has not developed any distribution plan to ensure that all eligible children who need a device to access guaranteed services will receive one. Nor has Elwyn addressed internet access issues, guaranteeing that these educational deprivations will fall disproportionately on young Black and Brown children.

In addition, the letter did not provide any plan for how students who attend community-based preschools in order to access education in the least restrictive environment would continue to receive early intervention services at all now that they would receive all services solely virtually.

██████ is a McKinney-Vento eligible child who receives early intervention services through Elwyn. Her most recent IEP dated July 22, 2020 entitles her to 45 minutes of Speech Therapy (3 units at 15 minutes each) and 45 minutes (3 units at 15 minutes each) of Specialized Instruction per week. ██████’s mother, ████████████████████, communicates using American Sign Language (“ASL”). When given the choice between in-person and virtual services, ██████████ elected for ██████ to receive in-person services while complying with significant safety protocols during the COVID-19 crisis. ██████████ concluded that ██████ benefits more fully from in-person instruction.

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<sup>2</sup>Bob Fernandez, Philadelphia Inquirer, In Comcast’s Hometown, the Chasm Between Internet Have and Have Not Looks Intractable, New Census Data Shows, Philadelphia Inquirer, Dec. 10. 2018, available at: <https://www.inquirer.com/news/comcast-digital-internet-access-philly-poor-people-20181210.html>.

<sup>3</sup> *Id.*

When physical school closures were first ordered on or around March 13, 2020, it was very difficult for ██████ to get services reinitiated for ██████. Thereafter, ██████ experienced repeated service disruptions.<sup>4</sup> As a result, as of December 10, 2020, ██████ has only received approximately three sessions of in-person Speech Therapy and one session of virtual services. However, as the pandemic recently worsened, this in-person option terminated on November 16, 2020. ██████ received an email containing the Elwyn Tele-Intervention Letter, on or around November 12, 2020 informing her that ██████ would no longer receive in-person services.<sup>5</sup> See Exhibit B. This letter, which was sent to an unknown number of parents, failed to offer ██████ a computer or internet access which are essential to enable ██████ to access IDEA-mandated services.

On or around November 16, 2020, ██████ also received an email from ██████ M.S. CCC-SLP, ██████ Speech Therapist, informing her that ██████'s services could only be provided virtually for the "foreseeable future," and that ██████ could no longer make weekly visits to her home. See Email From ██████ dated November 16, 2020, attached hereto as Exhibit C. ██████ concluded her email with an offer to "talk about the best way to make this work" for ██████. In response, ██████ called ██████ using call relay and informed her that she would not be able to secure a device for her daughter and requested assistance in securing a device. ██████ also informed ██████, ██████ case manager, that her daughter needed a device on or around November 16, 2020 and requested his assistance in securing a device.

In addition to efforts undertaken by ██████, ELC began informing ██████, counsel for Elwyn, of ██████'s need for a device on November 16, 2020, and again on November 18, 2020 and December 1, 2020. Economic barriers continue to prevent ██████ from being able to secure her own personal device or internet for ██████ to enable her to access the early intervention services she is guaranteed through her IEP.

In response to ELC's renewed requests for a device, ██████ stated that ELC raised "an important equity issue. It does not, however, raise a FAPE issue." See Email From ██████ dated December 1, 2020, attached hereto as Exhibit D. He further elaborated that "the lack of a computer device is akin to the lack of good nutrition, regular healthcare, and adequate housing, *all* of which can directly affect a child's ability to access education, but none of which finds a solution in the IDEA's FAPE mandate." *Id.* (emphasis in original). Ultimately, he asserted that "although helping overcome economic barriers is not an obligation that Elwyn must bear *legally*, it is an ethical objective that Elwyn is attempting to undertake *voluntarily*." *Id.* (emphasis in original). He agreed to provide ██████ and "other children in need" with a Chromebook "if and when" Elwyn's "very limited resources" permit. *Id.*

In response to this email and the grave equity concerns contained therein, ELC apprised ██████ we intended to file a Complaint. Approximately, fifteen minutes after ██████

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<sup>4</sup> There is also an open matter which is being negotiated relating to deprivations of a FAPE for repeated service disruption experienced by ██████ prior to the COVID-19 crisis.

<sup>5</sup> ELC is aware that not all parents received this letter. At this time, it is unclear what methods Elwyn used to communicate this important information about the abrupt change in how services would be provided to parents.

received notice of ELC's intentions he emailed ELC stating, "a device is available for pickup at the Elwyn offices," and agreed to provide a written offer of resolution to "avoid a hearing." *Id.*

On December 8, 2020, Elwyn emailed a "Device Agreement" form to [REDACTED] offering her a "one-time gift of a tablet computer," from Elwyn in exchange for her agreement to a number of conditions. *See* Device Agreement, attached hereto as Exhibit E. Other conditions specified that the "device is not considered an 'assistive device,' 'neither my child or I have a legally enforceable right to this device as part of my child's free appropriate public education ('FAPE'),' 'if the device is lost, stolen, or damaged, Elwyn will not replace or repair it,' and Elwyn will not provide 'technical support' for this device." *Id.* Importantly, the agreement also specifies that "this device *must be connected to the Internet to access tele-intervention,*" (emphasis added) and that the parent is "responsible for providing that access." *Id.* [REDACTED] signed the agreement on December 8, 2020, as there was no alternative offered to ensure her daughter, at minimum had a device to use. [REDACTED] obtained the device on December 10, 2020. However, she was not provided with internet access, despite [REDACTED] requesting assistance with obtaining internet access. [REDACTED]'s Service Coordinator, [REDACTED], informed [REDACTED] in that due to the Device Agreement she signed, no hotspots or other assistance would be provided to obtain the internet. *See* Exhibit E, at 1. At present, [REDACTED] still does not have internet access, which precludes the "one-time gift" device from working, as confirmed in the Device Agreement. *Id.* As of December 10, 2020, Elwyn actively refused to help [REDACTED] secure internet access, despite her identified need. Rather, Elwyn continues to maintain that this not their responsibility.

Accompanying this letter, Elwyn issued a Device FAQ letter. *See* Device FAQ Letter, attached hereto as Exhibit F. It posed several questions including "will Elwyn teach me or my child how to use this computer equipment," "will Elwyn provide internet access to my student," "will Elwyn provide support me to use this computer equipment," all of which were answered with a "no." *Id.* For students like [REDACTED], this practice will at minimum and at best result in delays to her accessing services guaranteed by law and more likely, will preclude [REDACTED] from accessing services at all if [REDACTED] continues to be unable obtain internet access on her own, despite her best efforts or encounters other barriers to using this "one-time-gift" (*e.g.*, it contains faulty hardware or needs repairs.) It is not known whether the computer is new or refurbished.

ELC sought clarification from [REDACTED] on December 8, 2020, and he confirmed on December 9 2020, that Elwyn would not be providing or assisting families to secure internet access for families and reiterated that "Elwyn attempts to connect parents and guardians who identify a need with low or no cost internet, such as Comcast, and to make parents aware of Internet hotspots where connectivity might be available." *See* Email from [REDACTED] December 8, 2020, attached hereto as Exhibit G. [REDACTED] also confirmed that despite the limitation of the device being a "one-time gift" and the various other exclusions listed in the Device FAQ, "Elwyn is not inspecting" the devices "to make sure they are in good working order." *Id.* ELC is deeply concerned that [REDACTED] will continue to face predictable and resolvable access barriers despite consistent self-advocacy, and advocacy through our office, given the restrictions around Elwyn's offer of a "one-time gift." Moreover, it is unclear whether all families are receiving this offer, or the offer was made in response to persistent advocacy. We are aware of other families who did not receive this offer at all.

██████████ is a ██████████ child with a disability who receives early intervention services from Elwyn due to a developmental disability. His most recent IEP requires 90 minutes per week of specialized instruction, 45 minutes per week of speech therapy, 60 minutes per week of behavior support, and a full-time personal care assistant (“PCA”). For most of this year and prior to COVID-19 related school closures, ██████████ received his early intervention services in-person at a ██████████. However, ██████████ has been denied early intervention services while Elwyn has provided virtual services.

When Elwyn stopped providing in-person services in March 2020, ██████████ experienced significant denials of early intervention services. ██████████ did not have a computer or tablet to access services and, due to his developmental disability, he could not attend the instruction on the only device available, his mother’s phone. When ██████████’s IEP team met on September 3, 2020 to plan for this school year, the IEP team informed his mother, ██████████, that he would continue receiving early intervention services virtually only.

The LEA representative told ██████████ that she would have to provide a tablet or Chromebook for him to access the virtual services. Economic considerations prevent ██████████ from being able to provide ██████████ with a device. When ██████████ advocated for Elwyn to provide a device, the LEA representative responded that “Elwyn does not provide technology.” *See* Email From ██████████ dated September 8, 2020, attached hereto as Exhibit H. The LEA representative stated, “we can provide consultation and other creative forms of providing services to parents and teacher to support/help” ██████████. *See* Exhibit H. ██████████ successfully argued that ██████████ needed in-person services if Elwyn wasn’t going to provide a device.

In November, however, Elwyn announced that it would transition to an all-virtual early intervention delivery model beginning on November 16, 2020. Without a device, when ██████████’s services began to be implemented fully virtually, he was forced again to use his mother’s phone. This was not an appropriate platform for ██████████ to access his early intervention services due to his difficulty attending to the small screen and his difficulties tracking communication. Additionally, reliance on his mother’s phone precludes him from having uninterrupted access to his services as the device he is using is also his family’s communication lifeline.

In addition to the service disruption that ██████████ experienced due to Elwyn’s failure to provide a device to access teleservices, he also experienced disruption due to Elwyn’s failure to provide in-person services. ██████████’s general education setting, which is required for him to receive placement in the least restrictive environment remains in-person while following local and state safety guidelines. ██████████ does not have the staff capacity to support ██████████’s virtual participation in early intervention services, so ██████████ must receive them at the end of the day when he is tired and unable to access learning. In addition, Elwyn is not allowing his PCA to continue to support him at ██████████. There has been at least one incident where ██████████ has contacted ██████████ mother due to concerns of his behavior. His mother fears that without the PCA support, ██████████ will move to exclude or expel him, as it has in the past.

██████████

█████ is a █████ child with a disability who receives early intervention services from Elwyn due to a diagnosis of autism. His most recent IEP requires: weekly specialized instruction, speech therapy, and physical therapy; biweekly occupational therapy; and a full-time personal care assistant (“PCA”) to be supported by a Board Certified Behavior Analyst (“BCBA”) to implement a program of Applied Behavior Analysis. Since September and prior to Elwyn’s most recent decision to provide all-virtual services, █████ received his early intervention services in-person at a community preschool. However, since Elwyn required all services to be provided virtually, █████ has been denied any access to early intervention services.

When Elwyn first stopped providing in-person early intervention services in March 2020, █████’s parents attempted to set up a schedule for █████ to receive his early intervention services virtually. However, due to his difficulty attending to virtual services stemming from his disability-related needs, █████ could not regularly access services. As a result, he did not receive a FAPE from March 2020 through to when Elwyn’s services resumed in-person in September 2020. When █████’s early intervention services resumed in-person in September and he returned in-person to his community preschool, he was able to receive an appropriate education with the required IEP services.

When Elwyn announced in November that it would transition to an all-virtual delivery model beginning on November 16, 2020, █████’s access to early intervention services halted. █████’s full-time PCA could not support him at the community preschool and his service providers could not provide the in-person services that his IEP team agreed he required. █████’s PCA is essential to ensure that he can access the general education setting, which is required for him to receive placement in the least restrictive environment. His parents fear that without the PCA support, his continued participation in this inclusive setting will be at risk.

In addition, due to the scheduling restrictions that Elwyn has imposed that require early intervention services to be provided only between 8 a.m. and 5 p.m. – the time when he attends the community preschool -- █████ has not been able to access any early intervention services. Given the vital benefits that come from █████ participating in an inclusive preschool setting with nondisabled peers, █████ is not able to access his required IEP services. As a result of Elwyn’s restrictive policies and practices regarding its all-virtual service model, █████ is not receiving a FAPE and is at risk of further removal from the least restrictive environment.

### **Students Similarly-Situated**

Since Elwyn has transitioned to an all-virtual service delivery model, ELC’s HelpLine has received many requests for assistance from concerned callers who do not have the means to provide children in their care a device to access virtual services or internet access. Elwyn is not proactively providing devices for families or screening families to determine their access needs. Instead, it is leaving them to fend for themselves and seek out information from Elwyn. No attempt has been made to determine a child’s circumstances relating to access to a device or the internet. Upon receipt of the Device Agreement, ELC sought clarification on December 8, 2020 from █████ about whether Service Coordinators would be providing the form directly to families. █████ stated that he was “unaware of whether all Service Coordinators are “reaching out” to families about requesting devices. *See Exhibit G.* ELC remains deeply



concerned that Elwyn’s failure to proactively reach out to families will push families with the fewest resources and the most obstacles for maintaining frequent communication, further from accessing the services their children need due to lack of needed devices and internet access.

Given that many eligible young children like █████. and █████ who receive services through Elwyn are also experiencing homelessness, living without economic privilege, or are without access to sufficient discretionary funds to invest in a device or internet access, ELC is deeply concerned by this response. Provision of a single device to one student or those families who are informed of the “one-time gift,” doesn’t resolve the larger systemic issue that stands likely to deprive many similarly situated children of the ability to access services and supports guaranteed to them by their IEPs. Nor does this address their need and legal entitlement to make up for those services which █████, █████, and others have already been denied due to Elwyn’s belated response. ELC is concerned that other students, like █████ who ultimately receive devices, will then be informed that Elwyn will not provide *any* support in obtaining internet access, citing the Device Agreement as grounds for this refusal. *See Exhibit E* Simply put, when early intervention services are provided only virtually, access to a device and the internet is required in order to confer a FAPE. This responsibility to ensure access to early intervention services rests with Elwyn.

In addition to these individual cases, ELC has heard from families, early intervention service providers, and preschool providers that many eligible students are not receiving any required early intervention services due to Elwyn’s all-virtual service delivery model. Throughout the City of Philadelphia, preschools remain open and are educating students with disabilities eligible for early intervention services from Elwyn. Many early intervention providers are willing to follow city and center health requirements in order to provide in-person services, including providing a Personal Care Assistants and behavioral specialists, but Elwyn will not consider these options due to its all-virtual policy. Correspondingly, many preschools do not have the devices or staffing capacity to support students’ access to virtual early intervention services and these situations must also be addressed.

Furthermore, Elwyn’s policies regarding scheduling of early intervention services virtually are preventing access. Families and early intervention providers that attempt to schedule services outside of the preschool hours are stymied by Elwyn’s restrictive hours, with behavioral services that must conclude at 3 p.m. and other services that must end at 5 p.m. On information and belief, early intervention providers are willing to schedule these services outside of Elwyn’s appointed hours so that children can receive their required IEP services, but have been instructed by Elwyn that this flexibility is not possible, despite agreements between EI providers and parents to receive mandated services in this manner. Moreover, students whose participation in the least restrictive environment is dependent upon Personal Care Assistants cannot receive those supports at all and are at-risk of program exclusion.

### **Argument**

As the Bureau is well aware, equity is a particular issue in the early intervention context as [low-income children are more likely to be at risk for developmental delay or disability, but less likely to receive services](#). Coronavirus restrictions impose additional conditions which are further

widening this gap as many families are unable to access crucial digital tools required for children to obtain services. Tele-Intervention is recognized as an effective strategy for delivering Early Intervention services during the COVID-19 public health emergency.<sup>6</sup> However, this mode of service delivery is unavailable to children like █████ and █████ who lack access to a computer. Elwyn made no attempt to address this issue. In addition, █████, █████, and █████ -- like many other children who are served through Elwyn – also experienced repeated and extended disruptions in services during the period of school closures.

We assert that █████, █████, and other students similarly situated are entitled to a computer or other remote device during this period of school closures because it is necessary to obtain mandated early intervention services. Similarly, these students must receive support to facilitate internet access. A critical component of a FAPE is that a child must receive special education and related services in conformity with the child’s IEP. 34 CFR §§ 300.17; 300.323(c). A failure to receive such services constitutes a denial of a FAPE under the IDEA. *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 486 (4th Cir. 2011); *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 823 (9<sup>th</sup> Cir. 2007). The obligation to provide a FAPE remains in full force and effect during the COVID-19 crisis as reflected in guidance issued by the U.S. Department of Education, federal disability law “requires distance instruction to be accessible to students with disabilities.” See *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (March 21, 2020) available at <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>. (clarifying that LEAs must provide a FAPE consistent with the health and safety of students with disabilities during this crisis.)

In addition, Elwyn failed to ensure the timely and consistent delivery of in-person early intervention services in accordance with █████, █████, and █████’s IEPs during this COVID-19 crisis. Upon information and belief, other students experienced similar disruptions.

Finally, Elwyn is failing to ensure a FAPE in the least restrictive environment for students like █████ and █████ who attend community preschools that cannot support their access to virtual learning. LEAs are responsible for ensuring that young children with disabilities eligible for preschool early intervention services have access to a full continuum of placements, including education with typically developing peers if that is necessary for the least restrictive environment. See *Dear Colleague Letter*, 69 IDELR 106 (OSEP 2017). This includes placement in community-based preschool settings with supportive early intervention services. See *id*; see also *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 579–80 (3d Cir. 2000) (“the school district is required to take into account a continuum of possible alternative placement options when formulating an IEP” including private preschool programs). Currently, young children with disabilities who attend these programs are not receiving early intervention services because they cannot be delivered virtually at the preschool and cannot be scheduled outside of Elwyn’s restrictive hours of operation. Children in need of PCA support are also at risk of exclusion from

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<sup>6</sup> See e.g., OCDEL Guidance *Infant Toddler Early Intervention Procedures during COVID-19 Pandemic* (March 20, 2020) available at <https://www.paproviders.org/tele-intervention-for-early-intervention-procedures-during-covid-19-pandemic/>.

the least restrictive environment because they are not receiving this critical service while Elwyn remains all-virtual, but preschools remain open. Options to address this issue should be explored.

As a result, [REDACTED], [REDACTED], [REDACTED], and others similarly situated are entitled to an award of compensatory education services. Such services are required to remedy the failure to provide a FAPE and must “make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation.” *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d at 625 (citations omitted). In cases such as this, where the denial of FAPE “permeated the student's education and resulted in a progressive and widespread decline in her academic and emotional well-being,” federal courts in Pennsylvania have consistently awarded full days of compensatory education for the duration of the deprivation. *See Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014) (awarding full days of compensatory education for a child find violation and cataloguing similar cases).

In *Jana K.*, the district court found that a student was entitled to full days of compensatory education for the school district’s child find violation because “the overall effect of a district's failure to provide a FAPE resulted in a pervasive loss of education benefit to the student.” *Id.* at 610 (citing *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F.Supp.2d 427, 438–39 (E.D.Pa. Aug. 6, 2013) (finding that when student makes little to no academic progress, it indicates that the district's failure to address his needs pervaded his entire school day and warrants the award of full days compensatory education)); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04–1395, 2006 WL 840334, \*9 (W.D.Pa. Mar. 28, 2006) (awarding full days compensatory education for period of deprivation because IEP “failed to confer any meaningful educational benefit”); *M.L./ Marple Newtown Sch. Dist.*, ODR No. 3225–11–12–KE, at 20 (Dec. 1, 2012) (concluding that the record supports full days compensatory education because the student lacked “meaningful progress in all subject areas due to behaviors interfering with learning, which also impacted Student's growth in social skills”); *L.B./Colonial Sch. Dist.*, ODR No. 1631–1011AS, at 18–19 (Nov. 12, 2011) (awarding full days compensatory education because District failed to timely evaluate the student for emotional and behavioral issue and thereafter offered inappropriate programs that failed to address the student's needs)).

Here, as with the cases above, Elwyn’s failure to provide access to early intervention services permeates all aspects of the child’s development and leads to widespread lack of progress and regression. As a result, the Bureau should award full days of compensatory education services for Elwyn’s known denial of access to eligible students by not providing devices and support to access virtual services and make up for services disruptions during the period of school closures. The Bureau must also award compensatory education services for deprivations of a FAPE emanating from the failure to make adjustments in scheduling or provision of in-person services to ensure access to early intervention services and the continuing education of students in the least restrictive environment.

### **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:
- a. Direct Elwyn to proactively reach out to all families and issue Chromebooks or other similar functioning devices to all eligible children in need of a device for as long as early intervention services are remote or for as long as parents have the option to receive services remotely<sup>7</sup> during the COVID-19 crisis.
  - b. Direct Elwyn to collaborate with pre-school providers to ensure that all children eligible for early intervention services receive those services virtually and have devices as needed.
  - c. Direct Elwyn to collaborate to ensure that PCA and similar services are provided through private contractors for children who continue to attend pre-school in person.
  - d. Direct Elwyn to permit flexibility regarding the hours when early intervention services can be provided to children to ensure the ongoing provision of services.
  - e. Direct Elwyn to review records regarding any and all disruptions in service during the COVID-19 crisis and identify all students who are eligible for compensatory education services, including those who could not access services due to barriers obtaining a working device or securing consistent and adequate internet access.<sup>8</sup>
  - f. Direct that all students who were denied a free, appropriate, public education due to the lack of a device and internet and/or service disruptions during COVID-19 closures, etc. receive compensatory education services in accordance with governing caselaw and that all IDEA Parents be notified of their children's eligibility for such compensatory education services, even if they are no longer receiving services through Elwyn.
  - g. Issue guidance to all MAWAs and Early Intervention Providers in the Commonwealth clarifying the duty of MAWAs to ensure access to devices and internet for all families as needed to ensure the provision of a FAPE during the COVID-19 pandemic.

Respectfully submitted,



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Maura McInerney, Esq.

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<sup>7</sup> ELC recognizes that parents and caregivers may be given a choice as to whether services should be delivered in-person or virtually, when such an option is consistent with current public health guidance and includes robust protections for children, families, and providers

<sup>8</sup> Consistent with ELC's request, ██████ ust recognized in his December 8, 2020 email to ELC that "the absences of education services resulting from a lack of connectivity and a lack of other service delivery options appears to be the kind of pandemic-related disruption that so called "COVID compensatory services' are intended to remedy." However, at this time it is unclear what offers may be presented to the Named Complaints or to students similarly situated who have encountered these barriers.

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