



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

December 21, 2023

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

RE: Systemic Complaint Against the Pittsburgh Public Schools and Allegheny Intermediate Unit on Behalf of Qualified Students with Disabilities Placed at Allegheny County Jail

Dear Bureau of Special Education:

The Education Law Center files this Complaint as an organization¹ and on behalf of qualified students with disabilities who have within the past year or currently reside at Allegheny County Jail (“Jail” or “ACJ”). The Complaint is filed against the applicable local educational agency (“LEA”) Pittsburgh Public Schools (“PPS”) and the Allegheny Intermediate Unit (“AIU”) which operates the Jail’s educational program in conjunction with PPS. ELC alleges that these LEAs discriminated against students with disabilities placed at the Jail on the basis of disability and deprived students with disabilities of a Free Appropriate Public Education (“FAPE”) in multiple ways. For the reasons set forth below, we assert that named Respondents have violated Part B of the Individuals with Disabilities Education Act (“IDEA”) 20 U.S.C. 1400, *et seq.* and its implementing regulation, 34 C.F.R. Part 300, Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and its implementing regulation, 34 C.F.R. Part 104, Chapter 14 of the Pennsylvania Code, 22 Pa. Code Chapter 14 (“Chapter 14”), and Chapter 15 of the Pennsylvania Code, 22 Pa. Code Chapter 15 (“Chapter 15”).

The Complaint alleges a systemic denial of a FAPE and discrimination on the basis of disability against students who are court-placed at the ACJ. Complainants allege that these harms emanate from system-wide policies and practices that deny access to educational services to students, including policies and practices that fail to comply with federal and state legal obligations applicable to students with disabilities. Complainants also allege some students may have been impacted by the failure to remedy violations of FAPE that occurred during the school closures due to the COVID-19 pandemic beginning March 16, 2020 and continuing throughout

¹ See 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.”).

the pandemic, including the failure to provide compensatory education services to make up for the lack of access to educational programs and services through school years 2020-2021, 2021-2022, 2022-2023 as well as 2023-24.²

To remedy these harms, Complainants seek systemic and individual relief for all qualified students with disabilities, including specific corrective action and monitoring to remedy policies and practices that result in the denial of FAPE to students with disabilities residing at Allegheny County Jail. In addition, in light of the gravity of the deprivation of education to all students, ELC is submitting a copy of this Complaint to the Department’s Program Monitoring and Accountability Office and the Child Advocate in the Governor’s Office of Advocacy & Reform.

Complainants

Education Law Center (“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 vulnerable children, including children with disabilities, children living in poverty, children of color, children in the foster care and juvenile justice systems, English language learners, LGBTQ students, and children experiencing homelessness.

Respondents

Respondents PPS and AIU are both LEAs with duties to identify, locate, and serve qualified students with disabilities who now seek relief. *See* 20 U.S.C. § 1401(19); 34 CFR § 300.28. Both Respondents qualify as a recipient of federal financial assistance within the definition of 34 CFR § 104.3(f) and both collaborate and coordinate to serve students placed at ACJ.

I. Factual Background

The ACJ is a direct supervision jail located in downtown Pittsburgh. Incarcerated individuals are housed at the ACJ facility and at two alternative housing facilities pursuant to a court order while awaiting adjudication of charges imposed against them. While the facility has a capacity to house over 3,000 individuals, the average daily population has been below 2,000 over the course of recent years.

The inmate population at the Jail includes “school-age” youth placed in the detention center as a result of “direct file” – meaning that they have been charged, but not convicted, with

² *See e.g., Allegheny County Jail reporting 60 inmates recently tested positive for COVID-19* available at <https://www.wtae.com/article/allegheny-county-jail-covid-cases-september-2023/45085910>.

crimes as an adult and are placed at the Jail prior to adjudication. On average, on any given day, there are 20-35 juveniles between the ages of 15-17 years residing at Allegheny Jail and many additional youth between the ages of 18-21 years old in the Jail.³

Pittsburgh Public Schools (“PPS”) is the Local Educational Agency and host district responsible for the provision of educational services to juveniles and provision of a FAPE to students with disabilities placed at Allegheny Jail. According to the PPS Special Education Plan for years 2023-2026 the Allegheny Intermediate Unit (AIU) is “responsible for the oversight and provision of special education services” at the Jail.⁴ This Plan also states that the school is “managed” by the AIU which “partners” with Pittsburgh Public Schools to “enable students the opportunity to achieve credits toward a high school diploma.” PPS represents that the courses offered are aligned with the curriculum at the Pittsburgh Public Schools and that Pennsylvania-certified teachers teach at the Jail and are employed by the AIU. Complainant does not have access to a contract of Memorandum of Understanding that might further delineate their roles and responsibilities in this context. Complainant ELC also made three attempts to discuss ACJ’s policies relating to their refusal to educate students 18 and older through communications with legal counsel for PPS, but Complainant received no response to these inquiries.

Failure to Provide Special Education Services to Youth Aged 18 and Older

Pursuant to policies and practices adopted by Respondent LEAs PPS and AIU, once a youth turns 18, the youth is no longer authorized to access the Jail’s in-person school program which includes access to a special education teacher and other teachers who teach core subjects. Rather, beginning on the day the youth turns 18, the youth – while still school-age -- is permanently deprived of access to this school program. Upon information and belief, this practice has been in place for many years, but Respondents have refused to change the policy when challenged by parents and advocates.

Rather than be educated with other high school students, all students 18 and over are offered (1) self-guided study packets to be completely on their own with minimal (once weekly) support from teachers⁵ or (2) access to a General Educational Development (GED) program to prepare them to take the Commonwealth’s high school equivalency test which is available to individuals who have not earned a high school diploma. Notably, the student’s rejection from the Jail’s school program is imposed on all students regardless of a student’s disability, language

³ For example, a recent daily report indicated 281 individuals between the ages of 18-24 living in the Jail. It is unknown how many of these residents are ages 18-21.

⁴ See *PPS Special Education Plan 2023-2026* at p. 16 available at <https://www.pghschools.org/cms/lib/PA01000449/Centricity/Domain/1307/PSE/Special%20Education%20Plan%20-%202023%20-%202026.pdf>.

⁵ See *Allegheny County Jail Oversight Meeting at pp. 114-115*, November 3, 2022

instruction level, or other educational needs. Once a youth with a disability turns 18, each student receives the same minimal support. Their IEPs are no longer followed and they are deprived of access to transition services or related services such as speech or occupational therapy, and wholly deprived of a free appropriate public education.

For example, on his 18th birthday, S.L. a student with an IQ in the mid-60s at the Jail was given a red prison uniform in exchange for his tan one and told he could no longer be educated at the ACJ school, also known as the “Academic Institute.” Beginning on that day and thereafter S.L. was unable to participate in learning or work towards his IEP goals. Instead of receiving individualized instruction, he was handed study packets to complete on his own. His IEP was abandoned. As a result, S.L. was unable to make progress towards graduation.

Like other students with disabilities, S.L. received almost no support or accommodations despite his significant disabilities. Rather, upon information and belief, he was offered only unmodified self-paced “packet work.” While some students over age 18 may receive work packets at varying grade levels, the packets are not modified based on a student’s individual needs and IEP goals.

ELC represented Z.P., a 19-year-old student with a disability placed at ACJ. Z.P. has had an IEP since middle school. From the time of his arrival at ACJ in March 2023 until his release in November 2023, Z.P. was never enrolled in school despite repeated requests. He, did not receive any worksheets, and received no special education services. Further, Z.P.’s IEP and his most recent evaluation were not timely reviewed nor revised and were out of compliance with federal and state laws. While in placement at the ACJ, testing required to be conducted by the Court determined that Z.P had significant cognitive deficiencies and a full-scale IQ of 67, falling in the extremely low range of functioning. Prior school records from 9th grade indicated that Z.P. was last performing on a 4th to 5th grade level in both reading and math. These existing academic and cognitive barriers were compounded by the significant educational deprivations at the ACJ, and resulted in Z.P. returning to the community with 0 credits earned towards his high school diploma. This reality was further exacerbated by the lack of any transition services which Z.P. was legally entitled to receive and other examples of non-compliance with his IEP while at the ACJ.

Moreover, students with disabilities aged 18 and over who do not have many high school credits are counseled to “sign themselves out” of secondary school and urged to take the GED, regardless of their unique needs and even if they have intellectual disabilities and need significant programming and support. There is a GED pre-test, but no accommodations or special education instruction is provided as part of the GED program.

Students Placed in Isolation Units Are Deprived of Education

In addition to depriving youth over 18 of a secondary education, all school-age youth, including those with disabilities are deprived of access to the Jail’s school program if they are placed in certain “isolation” units located within the Jail. Youth may be placed in “isolation” units for a variety of reasons including due to a qualifying disability, as a disciplinary placement, or because the student is at risk of being harmed by another inmate.

In addition, upon information and belief, all youth who identify as female are placed in isolation units by virtue of their gender and deprived of the opportunity to participate in the regular school program on the ground that female and male cannot interact and therefore females are deprived of their right to an education on the basis of sex.

There are four such isolation units at the Jail:

- (1) “**Restrictive Housing Unit**” where students are placed in isolation as a form of discipline for conduct that occurred in school or anywhere at the Jail. Upon information and believe, no manifestation determination reviews are conducted when students with disabilities are unilaterally placed in this unit as a disciplinary placement.
- (2) “**Administrative Consignment**” where students are placed in isolation because they are known or perceived to be in danger from other inmates at the Jail.
- (3) “**Mental Health Pod**” where students with qualifying disabilities are placed in isolation for mental health conditions identified by the Jail and Allegheny Health Network.
- (4) “**Medical Health Pod**” where students are placed in isolation for medical conditions identified by the Jail and the Allegheny Health Network.

Over the course of a month, numerous students with disabilities are diverted to these isolation units. Placement in any of these units may continue for days, weeks, or several months. During this time, youth ages 15-21 with disabilities are deprived of a FAPE and denied the supports and services mandated by their IEPs or Section 504 Plans. Instead, they sporadically receive “packets” which are not modified or individualized in any manner.

As an example, L.K. was placed in the Medical and/or Mental Health Units at the age of 17. During his approximately five-month stay in this Unit, he occasionally received work packets but was wholly deprived of a FAPE throughout this time period and lost ground academically. Moreover, there was no attempt to address his learning loss following this 5-month period of failing to receive special education services.

Absence of Mandated Special Education Services and Supports

With regard to students with disabilities educated in the school operated by AIU through a contract with Pittsburgh Public, known as the Academic Institute School, these students are deprived of certain mandated services including related services, transition services, progress monitoring, and parents are deprived of their right to participate in legally compliant IEP meetings. In addition, youth are not evaluated or re-evaluated to determine eligibility and students fail to receive comparable services upon arriving at the facility.

For example, S.M. was a student at Academic Institute during the 2022-2023 school year who entered at age 16 with an IEP for Emotional Support and significant academic needs. Upon information and belief, he did not have a legally compliant IEP meeting. His parent does not recall receiving any progress monitoring on his IEP goals as required by his IEP. Furthermore, although S.M. entered the Academic Institute with a Positive Behavior Support Plan, that plan was never implemented. S.M. spent months in isolation for his behavior, for mental health concerns, and for his own protection. During those removals, he was not allowed to attend the school at all. Upon information and belief, his parent was not contacted by the school for meetings regarding the removals or to discuss revising his program, supports, and services.

Another student on the juvenile pod also attended the Academic Institute at ACJ. This student, M.M., entered the facility with an IEP identifying him as a student with intellectual disability, as well as other disabilities. In his previous school district, he was receiving full-time supports and services from special educators and M.M.'s IEP contained related services necessary for M.M. to make educational progress. Despite clear documentation of significant needs, the Academic Institute did not provide M.M. with those related services or any comparable services.

Failure to Provide COVID-19 Compensatory Education Services

Finally, during the pandemic the Jail's school program was suspended and students lost days and weeks of schooling. Students with disabilities were deprived of a FAPE and unable to make progress and only sporadically received unmodified education packets. Students with disabilities did not receive the supports, services, and accommodations to which they were entitled and could not learn, make progress, or access the curriculum. This denial of a FAPE for students with disabilities continues to remain unaddressed.

Request for Investigation by BSE

As part of its investigation, we request that Bureau of Special Education ("BSE") interview the following persons who have information related to the foregoing allegations:

Name	Occupation/Title	Phone Number and Email
[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

III. Legal Analysis

A. The Bureau of Special Education (“BSE”) Has Jurisdiction Over This Complaint.

BSE has jurisdiction over this Complaint because it alleges that Respondents LEAs discriminated against qualified students on the basis of their disabilities and denied them a FAPE,⁶ in violation of Part B of the IDEA, Section 504, Chapter 14, and Chapter 15, all of which BSE enforces.⁷

This Complaint is timely because the alleged FAPE violations and discriminatory conduct occurred within one year of the filing of this Complaint and are continuing. Specifically, over the past year, the named LEAs discriminated against students with disabilities by:

⁶ The Third Circuit has held that the “[f]ailure to provide a FAPE violates Part B of the IDEA and generally violates the ADA and RA because it deprives disabled students of a benefit that nondisabled students receive simply by attending school in the normal course—a free, appropriate public education.” *CG v. Pennsylvania Dep’t of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013). As such, courts have found allegations that a student has been denied a FAPE sufficient to allege a claim under the Rehabilitation Act. *See, e.g., Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 489 (E.D. Pa. 2011).

⁷ *See* 22 Pa. Code § 14.107; 22 Pa. Code § 15.8(a) and 22 Pa. Code § 15.10.

- (1) failing to provide any secondary educational services, including special education services or accommodations to youth age 18 and older residing at the Jail, including students with disabilities who are entitled to a FAPE until they turn 22;
- (2) failing to provide individualized special education services or accommodations to students with disabilities placed in any of the four isolation units at the Jail;
- (3) failing to provide mandated special education services to students educated in the regular school (“Academic Institute”); and
- (4) failing to implement a plan to provide compensatory education to students with disabilities impacted by COVID-19, (including failing to hold meetings to conduct individualized determinations of eligibility for compensatory education, failing to identify whether students are eligible for compensatory education, failing to track compensatory education services provided, failing to track student progress or lack thereof, and failing to provide compensatory education services to make up for deprivations of FAPE).

B. Respondents Discriminated Against Students with Disabilities and Failed to Provide a FAPE by Failing to Provide a Secondary Education Program and Special Education Services to Students Aged 18 and Older.

Part B of the IDEA requires that a free appropriate public education (“FAPE”) must be available to all children with disabilities residing in the State between the ages of 3 and 21.⁸ *See* 20 U.S.C. § 1412(a)(1)(A); *see also* *Endrew F. ex rel. Joseph F. v. Douglas Sch. Dist.*, 137 S. Ct. 988, 993 (2017); *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 556 (3d Cir. 2010). As the Pennsylvania Department recently clarified, all students with disabilities are entitled to a FAPE until their 22nd birthday. The Department therefore revised its guidance pertaining to the IDEA Part B Policies and Procedures Under 34 CFR §§ 300.101—300.176 to state as follows:

The Commonwealth of Pennsylvania ensures that all children with disabilities ages 3 years through 21 years residing in Pennsylvania have the right to a FAPE, including children with disabilities who have been suspended or expelled from school. The commonwealth shall make FAPE available to a child with a disability eligible under IDEA until the student turns 22. Notwithstanding any other provision of law to the contrary, a child eligible under IDEA who attains the age of twenty-one (21) years may remain enrolled in their resident district free of charge until their 22nd birthday.

PENN*LINK, *Change in Age of Eligibility for Free and Appropriate Public Education* available at https://www.education.pa.gov/Documents/K-12/Special%20Education/IDEIA-IDEA/Special%20Education%20Change%20of%20Age%20of%20Eligibility%20Penn%20Link_August_30_2023.pdf.

⁸ 34 CFR § 300.101.

The failure of an LEA to ensure a FAPE to qualifying students with disabilities constitutes a significant violation of Part B of the IDEA⁹ as well as discrimination under Section 504.¹⁰ Section 504 of the Rehabilitation Act prohibits discrimination against persons on the basis of their disabilities. In order to establish a violation of Section 504, a student must demonstrate: (1) the student has a disability, as defined by the Act; (2) the student otherwise qualified to participate in school activities; (3) the school or board of education receives federal financial assistance; and (4) the student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *C.G. v. Pennsylvania Dep't of Educ.*, 888 F. Supp. 2d 534, 573 (M.D. Pa. 2012).

In this case, students with disabilities age 18 and older are being deprived of their right to a FAPE as a result of Respondents' failure to provide any secondary education to youth beginning on their 18th birthday. These students are abruptly deprived of access to the classroom and planned instruction even if they have few credits needed to graduate or have intellectual disabilities and cannot learn or make progress in the absence of individualized programming and support services. Here, Respondent LEAs have already determined that these students have impairments that "substantially limit one or more major life activities," and require specially designed instruction through an IEP or accommodations through a 504 Plan. All students with disabilities who are school-age and reside at the Jail qualify to participate in school programming and activities and are entitled to a FAPE until they turn 22. Yet, in clear contravention of their unequivocal rights, students with disabilities age 18 and older are unilaterally stripped of these rights and cannot participate in any secondary school program. Nor are their IEPs or Section 504 Plans followed. Instead, these students are denied their right to a FAPE and wrongfully excluded from participation in, denied the benefits of education and services required by their IEPs or 504 Plans.

C. Students with Disabilities Placed in Isolation Units Are Discriminated Against On the Basis of their Disabilities and Deprived of Their Right to a FAPE

As described above, the Jail maintains four distinct "isolation units." Students placed in each of these units are prohibited from accessing the school at ACJ (a/k/a Juvenile Pod). At best, these students, including those with disabilities sporadically receive work packets which are not individualized and must be completed by students on their own without the support of teachers, special education teachers, individualized instruction, or modifications to the curriculum. Youth in these settings may stay in these units for months at a time. Notably, the "packets only" rule is strictly enforced in these units and no decisions regarding education are made on any individualized basis. As a result, students with disabilities are deprived of special education services, specially designed instruction, related services, and a FAPE. They are unable to make

⁹ 34 CFR § 300.101.

¹⁰ *C.G.*, 734 F.3d at 235.

progress. In addition, students with qualifying disabilities under Section 504 do not receive modifications to access the curriculum. Moreover, there is no attempt to assist students or make up for the deprivation of FAPE when they exit isolation units, including returning to the regular school program within the Jail.

In addition, school-eligible female students are placed in isolation units and deprived of their right to be educated in the regular school at ACJ based solely on their gender. This emanates from Respondents' policy and practice of prohibiting female students from interacting with male students. As a result, female students are deprived of educational opportunities afforded to male residents including access to instruction, a more robust curriculum, as well as the chance to stay on track to graduate. Instead, female students are provided with worksheets only for their entire length of stay at ACJ. This policy clearly violates the constitutional rights of all female students as well as protections afforded by Title IX of the Education Amendments of 1972.¹¹

Students Are Discriminated Against Based on Their Disabilities

Two of the "isolation units" in the Jail are the Mental Health Pod and the Medical Health Pod. Youth placed in these units are predominantly students with qualifying disabilities who are deprived of a FAPE and discriminated against based on their disabilities. All of these students are shut out of the school program and sporadically provided with limited work packets to be completed on their own with no support. Accordingly, they are penalized and discriminated against based on their disabilities or perceived disabilities in contravention of their rights to be free from discrimination under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

In order to establish claims under § 504 of the Rehabilitation Act and the ADA, a plaintiff must demonstrate that: (1) plaintiff has a disability or was regarded as having a disability; (2) plaintiff was otherwise qualified to participate in school activities; and (3) plaintiff was denied the benefits of the program or was otherwise subject to discrimination because of their disability. *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 269 (3d Cir. 2014). *See Doe #1 v. Delaware*

¹¹ The U.S. Supreme Court's gender discrimination equal protection jurisprudence makes clear that educational programs cannot discriminate against female students to their detriment. *See e.g., United States v. Virginia*, 518 U.S. 515 (1996) (state-sponsored, male-only military college violated Equal Protection Clause). As Justice Ginsburg has explained "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Id.*, 518 U.S. at 531. Here, there is no such justification for depriving female students of access to the full education program while providing that benefit to male students. The treatment of female inmates in this regard also violates Title IX which prohibits sex-based discrimination in education programs or activities that receive federal financial assistance. Here, female students are excluded from the benefits of the full education program at ACJ. 20 U.S.C. 1681. Moreover, Title IX regulations specifically provide that an LEA cannot use any single-sex admissions policy for a program if the LEA does not "otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools." 34 CFR 106.35(b). Obviously, there has been no attempt to provide any comparable services, coursework, and instruction in this context.

Valley Sch. Dist., 572 F. Supp. 3d 38, 79–80 (M.D. Pa. 2021). The Rehabilitation Act allows a plaintiff to recover if he or she were deprived of an opportunity to participate in a program solely on the basis of disability while the Americans with Disabilities Act covers discrimination on the basis of disability, even if there is another cause as well. *CG v. Penn. Dept. of Educ.*, 734 F.3d at 235-236 & n.10, 11.

Here, youth placed in the Medical or Mental Health Pods at the Jail are denied access to school, deprived of instruction, and those with an IEP are deprived of their rights under the IDEA for the sole reason that they are disabled or perceived as disabled. See *Andrew M. v. Delaware Cnty. Off. of Mental Health & Mental Retardation*, 490 F.3d 337, 350 (3d Cir. 2007). This clearly constitutes as violation of the Rehabilitation Act.

Moreover, nearly all youth in the Medical and Mental Health Pods are deemed to have a qualifying impairment under Section 504 are therefore also entitled to a FAPE under Section 504 which is defined as an education that is “designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.” See *Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008). Here, students in these units were deprived of access to school and sporadically given one-size-fits-all work packets to complete of their own were also thereby deprived of their right to a FAPE under Section 504.

Students with disabilities with IEPs are also denied their right to a FAPE as IEPs are not followed and they fail to receive specially designed instruction. The IDEA mandates instruction that is “specially . . . designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.” D.S., 602 F.3d at 556 (quotation and citation omitted); see also 20 U.S.C. § 1401(9). Under IDEA, states “must confer an education providing ‘significant learning’ and ‘meaningful benefit’ to the child.” Id. (quoting *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999)). IDEA thus “ensures that students with special education needs receive the type of education that will ‘prepare them for further education, employment, and independent living.’” *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 717 (3d Cir. 2010) (quoting 20 U.S.C. § 1400(d)(1)(A)).

Students placed in all isolation units were similarly deprived of these rights. Some school-age youth are placed in the isolation unit known as “Administrative Consignment” if they are perceived to be in danger from others who are housed at the Jail. As with the other isolation units, students with disabilities may be placed in the Administrative Unit for weeks or months and during that time they are also denied access to the school and relegated to receiving packets. These students are similarly deprived of their right a FAPE under both the IDEA and Section 504.

Moreover, youth are placed in the RHU for “disciplinary reasons” and are similarly prohibited from participating in school and relegated to receiving no instruction and a one-size-fits-all work packet. Youth may be placed in the RHU for conduct that occurred in school as well

as conduct that occurred on their living units. Upon information and belief, Respondents fail to conduct any manifestation determination reviews for students with disabilities who are disciplined in this manner prior to placing them in the RHU isolation unit.

For students with disabilities disciplined by an LEA and placed out of the school and into the RHU, the IDEA provides significant protections and requires specific actions prior to imposing discipline on a student with a disability. Specifically, when a student with an IEP is facing a change in placement for disciplinary reasons, a meeting must be convened to determine whether or not the conduct in question was a manifestation of the student's disability. With limited exceptions, LEAs must conduct a manifestation determination review within 10 school days of any decision to change the child's placement based on school conduct. The LEA, the parent, and relevant members of the IEP team (as determined by the parent and LEA) must review "all relevant information" in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine: (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in was the direct result of the LEA's failure to implement the IEP. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e). If it is determined that the conduct in question had either the causal relationship with the disability or was a result of the failure to implement the child's IEP, the conduct "shall be determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(1)(E)(ii); 34 C.F.R. § 300.530(e)(2).

If the conduct is determined to be a manifestation of the child's disability, the LEA must take certain other steps which generally include returning the child to the placement from which he or she was removed. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R § 300.530(f). By contrast, if the team determines that the behavior which resulted in discipline was not a manifestation of the student's disability, the LEA may apply the same disciplinary procedures applicable to all children without disabilities, except that children with disabilities must continue to receive educational services necessary to provide a free, appropriate public education (FAPE). 20 U.S.C. §§ 1415(k)(1)(C) and (D); 34 C.F.R. §§ 300.530(c) and (d).

Section 504 of the Rehabilitation Act also requires that manifestation determinations be conducted *prior* to the imposition of any disciplinary change of placement in order to ensure that schools carefully consider a child's disability and its impact prior to the administration of disciplinary measures. The purpose of this review is to ensure that the disciplinary change of placement is not discriminatory against the student based on their disability. *See* 34 CFR § 104.1. Importantly, a change of placement occurs under the IDEA if: (1) the removal is for more than 10 consecutive school days; or (2) the child has been subjected to a series of removals that constitute a pattern (i) because the series of removals total more than 10 school days in a school year; (ii) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) because of such additional factors such

as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 C.F.R. § 300.536(a).

Moreover, the calculation of the 10 school days of suspension addressed in 34 C.F.R. § 300.530 could include exclusions that take place outside of IDEA’s discipline provisions which occur because of a child’s behavior. Actions that result in denials of access to, and significant changes in, a child’s educational program could all be considered as part of the 10 days of suspension and also could constitute an improper change in placement.

Upon information and belief there was no system in place at ACJ for conducting manifestation determination reviews and no policy of considering whether a student’s conduct subject to discipline was due to a youth’s disability or failure to follow an IEP. Accordingly, in the absence of any manifestation determination review, youth could be placed in RHU for conduct related to their disability or the failure to follow their IEP and were thereby deprived of the protections against discrimination afforded by the IDEA and Section 504 of the Rehabilitation Act.

D. Respondents Discriminated Against Students with Disabilities by Failing to Comply with Their Obligations to Students With Disabilities

Upon information and belief based on the reports of advocates, students educated in the “regular school” in the Juvenile Pod are universally deprived of certain services and rights mandated by the IDEA including: (1) related services as required by 34 CFR § 300.34; (2) transition services required by 34 CFR § 300.43; (3) progress monitoring as required by 34 CFR § 300.320; and comparable services upon arriving at the facility as required by 34 CFR § 361.53. In addition, parents are deprived of their right to participate in legally compliant IEP meetings required under 34 CFR § 300.322. Finally, youth at ACJ are not evaluated or re-evaluated to determine eligibility for special education services as mandated by 34 C.F.R. § 300.304 and 34 CFR §§ 303-305.

E. Respondents Discriminated Against Students with Disabilities by Failing to Appropriately Address and Remedy Learning Losses Resulting from the Suspension of the School Program at the Jail During the Pandemic Which Deprived Students of their Right to a FAPE under the IDEA and Section 504.

During the COVID-19 pandemic, youth at ACJ were deprived of educational services although the rights of students with disabilities stemming from the IDEA, as well as Section 504, remained intact throughout that period. This includes: (1) the right of eligible students with disabilities to receive a FAPE through special education and related services individually tailored to meet their unique needs provided in conformity with their individualized education program (“IEP”) in accordance with the requirements outlined in IDEA in 34 C.F.R. §§ 300.320 through

300.328 and Section 504 at 34 C.F.R. § 104.33; and (2) the right to obtain a prompt, multidisciplinary evaluation to determine eligibility for special education and related services.¹² There were no waivers or changes to the relevant IDEA or 504 requirements and IEP teams remained obligated to develop an IEP based on student-specific data and requisite considerations, including, among others, the results of the initial or most recent evaluation, the academic, developmental, and functional needs of the student, their ability to access and benefit from online learning, and parental concerns.¹³

As explained by the U.S. Department of Education’s Office for Civil Rights (OCR) in its guidance, “No matter what primary instructional delivery approach is used, State Educational Agencies (SEAs) and Local Educational Agencies (LEAs) remain responsible for ensuring that FAPE is available to all children with disabilities.”¹⁴ The right to a FAPE and compensatory education services for deprivations of a FAPE during the pandemic was also recognized in federal guidance. “[I]t is critically important that the IEP Team also consider any adverse impacts of the COVID-19 pandemic on each child with a disability. This includes a discussion of whether the child may have new or different needs than had been determined prior to the pandemic.” Compensatory services are defined in federal guidance as “additional special education and related services to address the needs of the child that are intended to remedy a failure or inability to provide appropriate services.”¹⁵ Such services should be provided in addition to, and not in lieu of, Extended School Year (“ESY”) which is available based on entirely different criteria and provided during school breaks.¹⁶ ESY services may be provided in the summer or during the school year.¹⁷

As OCR explained in its guidance issued in February 2022 regarding the need to provide compensatory education services for students under Section 504, “if a student with a disability did not receive appropriate evaluations or services, including the services that the school had previously determined they were entitled to, then the school must convene a group of persons knowledgeable about the student to make an individualized determination whether, and to what extent, compensatory services are required. Unlike the FAPE inquiry, which requires the group to determine appropriate services going forward, the compensatory services inquiry requires

¹² 20 U.S.C.A. § 1414(a)(1)(A); 34 C.F.R. § 300.304; 34 C.F.R. § 104.35.

¹³ U.S. Dep’t of Educ., Office for Civil Rights (OCR), *Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504*, February 2022, <https://www2.ed.gov/about/offices/list/ocr/docs/fape-in-COVID-19.pdf>.

¹⁴ U.S. Dep’t of Educ., Office of Special Education and Rehabilitative Services (OSERS), Office of Special Education Programs, *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act*, September 2021, <https://sites.ed.gov/idea/idea-files/policy-letter-january-10-2022-to-wolfram-and-mandlawitz/>.

¹⁵ *Id.* at E-2, p. 33.

¹⁶ *Id.* at E-1 and E-2, pp. 32-33.

¹⁷ *Id.*

looking backwards to determine the educational and other benefits that likely would have accrued from services the student should have received in the first place.”¹⁸

Both federal and state directives instruct that decisions regarding compensatory education services must be individualized and should be made by an IEP Team.¹⁹ Similarly, PDE guidance instructed IEP Teams to make determinations regarding compensatory education services.²⁰ Compensatory education services also extend to students who have graduated from high school but were eligible for special education and related services when the FAPE violation occurred.²¹

Special education services were not provided to students with disabilities at ACJ as required due to the suspension of school services in the wake of the COVID-19 pandemic and students were denied critical services and supports to which they were entitled. As stated in the OCR Fact Sheet issued February 16, 2022, compensatory services “is a remedy that recognizes the reality that students experience injury when they do not receive appropriate and timely initial evaluations, re-evaluations, or services, including the services that the school had previously determined they were entitled to, regardless of the reason.”²² We therefore request that the failure to provide compensatory education services be addressed with regard to any eligible students.

¹⁸ U.S. Dep’t of Educ., Office for Civil Rights (OCR), *Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504*, February 16, 2022, https://www2.ed.gov/about/offices/list/ocr/docs/factsheet-504.html?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

¹⁹ See *Return to School Roadmap* at D-7, p. 28 (“The Department’s longstanding position has been that IEP Teams are the appropriate vehicle for addressing the need for, and extent of, compensatory services to address the child’s needs based on any failure or inability to provide appropriate services due to circumstances such as teacher strikes, natural disasters, and pandemics.”) See also U.S. Dep’t of Educ., Office of Special Education Programs (OSEP), *OSEP Policy Letter 22-01*, October 30, 2021, <https://sites.ed.gov/idea/files/osep-letter-to-wolfram-01-10-2022.pdf> (regarding the U.S. Department of Education’s September 30, 2021 *Return to School Roadmap*, “the decision to provide ‘make up’ or compensatory education when there is a disruption in the provision of educational services, and the nature and amount of the special education and related services that are to be provided as compensatory education, is an individualized determination made by the individualized education program (IEP) Team in accordance with the requirements in 34 CFR §§ 300.320–300.324.”).

²⁰ Pennsylvania Dep’t of Educ., *Free Appropriate Public Education (FAPE) – OSERS Guidance*, August & September 2021, [https://www.education.pa.gov/K-12/Special%20Education/Pages/Free-Appropriate-Public-Education-\(FAPE\)-%E2%80%94-OSERS-Guidance.aspx?fbclid=IwAR0MVtif_sO8qTVoB677RGgTzL3mle4ANiLTVUsnwi0l_cZnLi3KDtJ0Pek](https://www.education.pa.gov/K-12/Special%20Education/Pages/Free-Appropriate-Public-Education-(FAPE)-%E2%80%94-OSERS-Guidance.aspx?fbclid=IwAR0MVtif_sO8qTVoB677RGgTzL3mle4ANiLTVUsnwi0l_cZnLi3KDtJ0Pek).

²¹ See *Return to School Roadmap* at D-10, p. 30; *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 499 U.S. 923 (1991) (finding that the student was entitled to 30 months of compensatory education beyond age 21 due to district’s failure to provide an appropriate educational placement for that period of time).

²² U.S. Dep’t of Educ., Office for Civil Rights (OCR), *Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504*, February 2022, at 3, <https://www2.ed.gov/about/offices/list/ocr/docs/fape-in-COVID-19.pdf>.

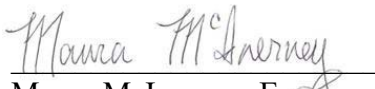
IV. Requested Relief

To remedy the violations of the IDEA, Section 504, Chapter 14, and Chapter 15 as set forth above, we respectfully request that the Bureau issue the following requested relief:

- Immediately order Respondents to rescind policies and discontinue practices that violate the IDEA and Section 504 by discriminating against students with disabilities and depriving them of their right to a FAPE and direct Respondents to do the following:
 - Eliminate the current policy that all students, including students with disabilities ages 18-22 receive no education at all;
 - Adopt and fully implement a new policy that all school-eligible students at ACJ shall be provided with a legally compliant education as required by state and federal law, including that students with disabilities shall receive a FAPE until their 22nd birthday and that students are provided with all services and supports outlined in their IEPs and Section 504 Plans;
 - Adopt and fully implement a new policy that all students, including students with disabilities placed in “isolation units” shall be provided with equal access to and the opportunity to benefit from the Juvenile Unit regular school program and that all students with disabilities shall receive a FAPE, including all services and supports outlined in their IEPs and Section 504 Plans.
 - Adopt a plan approved by BSE to ensure that students educated in the “regular school” in the Juvenile Pod receive all services and supports mandated by the IDEA and identified in their IEPs including: (1) related services as required by 34 CFR § 300.34; (2) transition services required by 34 CFR § 300.43; (3) progress monitoring as required by 34 CFR § 300.320; and comparable services upon arriving at the facility as required by 34 CFR § 361.53.
 - Adopt a plan approved by BSE to ensure that parents’ right to participate in legally compliant IEP meetings are fully enforced as required under 34 CFR § 300.322.
 - Adopt a plan approved by BSE to ensure that youth at ACJ who may have disabilities are identified, evaluated, and served and that students with disabilities are timely re-evaluated to determine eligibility for special education services as mandated by federal law.
- Order Respondents to develop and implement a plan to appropriately assess and provide compensatory education to students with disabilities who failed to receive a FAPE as a result of the illegal policies and practices discussed herein.

- Order Respondents to develop and implement a plan by to appropriately assess and provide compensatory education to students with disabilities who failed to receive a FAPE as a result of during the COVID-19 pandemic.
- Order Respondents to designate an educator to oversee and implement a plan for assessment of compensatory education. Responsibilities include:
 - Ensuring that a determination of compensatory education services is made on a hour-for-hour basis for any and all deprivations of a FAPE within the one-year time period;
 - Ensuring that parents notified by email, phone, and receive NOREPs regarding a determination of compensatory education services and their right to challenge such determinations; are informed of compensatory education services awarded determination meetings are properly convened, including participation of the parent.
- Order Respondents to track and report implement a plan for compensatory education to PDE.
- Order that the education program at the ACJ be monitored by PDE for three years.
- Order Respondents to train school staff and conduct outreach to parents, guardians, students, and other stakeholders regarding their right to compensatory education services and that Respondents be directed to publicize the new policies and plan for awarding compensatory education.

Respectfully submitted,


Maura McNerney, Esq.
Legal Director

Education Law Center
1800 JFK Blvd., 19-A
Philadelphia, PA 19103
mmcinerney@elc-pa.org

Gina Colarossi, Director, *Program Monitoring and Accountability Office*
Maryann McEvoy, M.Ed, Executive Director|Child Advocate,



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

Office of Advocacy & Reform Office of Governor Josh Shapiro