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Via Electronic Mail

January 18, 2024

[redacted]

Office of Dispute Resolution
6340 Flank Drive
Harrisburg, PA 17112
ODR@odr-pa.org

RE: ***Notice of Request for Due Process Hearing for*** [redacted]

Dear [redacted] and the Office of Dispute Resolution:

The Education Law Center files this request for a Due Process Hearing on behalf of [redacted], the court-appointed Education Decision Maker ("EDM") for [redacted]. [redacted] asserts that the School District of Philadelphia ("District") has failed to provide [redacted] with a free appropriate public education ("FAPE") in accordance with the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504") while [redacted] was hospitalized from [redacted] to [redacted] within the District. This Complaint further alleges systemic violations on the part of the District for violating its Child Find obligations pursuant to the IDEA, as well as Section 504, by failing to have a system in place which provides students with special education and services while in hospital settings. The District has denied [redacted] and similarly situated students a FAPE by: (1) failing to identify students in hospital settings who are entitled to special education services, (2) failing to offer sufficient and individualized educational services to students in hospital settings and (3) failing to rectify past violations by providing students in hospital settings with compensatory education to which they are entitled.

In light of the ongoing and persistent nature of the deprivation, this Complaint further alleges that the Pennsylvania Department of Education ("PDE") failed to ensure a FAPE for [redacted] and others similarly situated students with disabilities in hospitals. Through its lack of oversight and monitoring, PDE failed to ensure that [redacted] and others similarly situated received general and special education compliant with federal and state law. We request a finding that the District and PDE violated not only [redacted] rights, but the rights of all other similarly situated students in hospital settings in the District who were deprived of education while hospitalized. We request a remedy for [redacted] and all similarly situated students who are in or were previously in hospital settings in the District who were not provided a FAPE and whose deprivation remains unaddressed.

I. Factual Background

[redacted] is an [redacted]-year-old student in foster care who, from approximately [redacted], was wholly denied a FAPE and was provided little access to any education services at all.

[redacted] attended school in the District from [redacted] and has a history of significant behavioral and academic challenges that is well-known to the District. [redacted] was identified as a student with an emotional disturbance after being referred for a special education evaluation in the 2017-2018 school year.[1] [redacted] initially attended school at [redacted] for the start of [redacted], but then transferred to [redacted], where [redacted] attended until [redacted] was placed through [redacted] IEP in a full-time emotional support program at [redacted] in 2018 due to [redacted] significant behavioral health needs.[2]

In [redacted], [redacted] was hospitalized at [redacted] within the District, where [redacted] stayed for nearly two years.[3] [redacted] offers an inpatient behavioral health treatment program for children, teens and adolescents. Prior to [redacted] admission to [redacted] [redacted] attended school at [redacted].[4] Once [redacted] transitioned to [redacted], the District failed to provide any special education services for [redacted] for the first ten months of [redacted] stay. The District did not convene an IEP meeting until February 15, 2022, despite the clear placement change between [redacted] and [redacted] previous full-time emotional support program. This IEP meeting was convened in response to [redacted]'s EDM voicing concerns that [redacted] was not receiving a FAPE while at [redacted]. On January 31, 2022, the District issued an Invitation to Participate in an IEP Meeting for [redacted].[5]

When an IEP meeting was eventually held on February 15 2022, [redacted] raised concerns that [redacted] was not receiving the special educational services outlined in [redacted] IEP and additionally requested that the District: 1) add a goal to increase [redacted]'s engagement and tolerance of instructional time; 2) initiate a functional behavior assessment to address behaviors interfering with instructional engagement; 3) initiate an occupational therapy evaluation; and 4)

[1] See School District of Philadelphia Evaluation Report, Mar. 16, 2018.
[2] Id.; [redacted]n Individualized Education Program (IEP), p. 5, Oct. 31, 2019.
[3] [redacted] Notification of Admission to Facility or Institution and School Enrollment.
[4] [redacted] Individualized Education Program (IEP), p. 12, Feb. 15, 2022.
[5] School District of Philadelphia Invitation to Participate in Individualized Educational Program (IEP) Meeting, Jan. 31, 2022.

issue a weekly report of [redacted]'s time in instruction.[6] The IEP team, which included two representatives from the District, noted the EDM's concerns in the February 15, 2022 IEP, but failed to modify [redacted]'s IEP accordingly. Instead, the District offered an IEP with almost identical goals to [redacted]'s 2020 IEP. The District offered [redacted] a mere 1.5 hours of education daily with seven other students of varied ages and abilities, despite the fact that [redacted], who was then [redacted] years old, was working at a Kindergarten level and had regressed academically while at [redacted]. In addition, the IEP team failed to conduct a functional behavior assessment and create a positive behavior support plan, despite being on notice that [redacted] had experienced nearly 50 behavior incidents at [redacted] as of that time and contrary to the 2019, 2020 and 2022 IEP teams' recommendation that [redacted] be referred for a functional behavior assessment and that a positive behavior support plan be created. As a result, [redacted] continued to be deprived of a FAPE.

After the District failed to implement the changes requested, [redacted] requested via email on March 3, 2022 and March 8, 2022 that the District issue a Notice of Recommended Educational Placement ("NOREP") to modify [redacted]'s services to incorporate the requests made in the February 2022 IEP meeting.[7] However, in its March 9, 2022 reply email to [redacted] the District wrongly denied being the local educational agency ("LEA") for [redacted] and failed to issue a NOREP to modify [redacted]'s IEP.[8] As a result, [redacted]'s IEP went unchanged and the District continued to provide educational services that were inappropriate and insufficient to afford [redacted] a FAPE.

[redacted] meeting two months later on May 9, 2022. [redacted] again voiced concerns that the [redacted] was regressing academically, that [redacted] was not receiving adequate educational services, that the District failed to conduct a functional behavior assessment to create a positive behavior support plan and that the District failed to conduct an occupational therapy evaluation. When concerns were raised by [redacted] staff that [redacted] was not participating in [redacted] educational services, the EDM requested that the team add specific, measurable goals to address her participation and that the District conduct a functional behavior assessment to ascertain the underlying reasons for [redacted]'s nonengagement. However, the District responded by decreasing the amount of time [redacted] was to be provided with special education services, proposing to provide merely three, twenty-minute sessions of education per day. The District did not conduct an occupational therapy evaluation until November 2022 and despite it being determined that [redacted] was in need of occupational therapy services, the District failed to ever implement those services. Further, the District failed to conduct a functional behavior assessment, despite requests by [redacted], the IEP team's determination that [redacted] was in need of a functional behavior assessment and [redacted]'s behavior impeding [redacted] ability to engage in [redacted] educational programming. As a result, [redacted] continued to be without the supports and services that [redacted] was entitled to and [redacted] continued to make little to no academic or behavioral progress.

[6] [redacted] Individualized Education Program (IEP), p. 14-15, Feb. 15, 2022.
[7] Email Exchange Between [redacted] and [redacted], Mar. 2022.
[8] Id.

The Education Law Center is aware that there are many other students in hospital settings in the District who are not being provided special education and related supports while in hospital settings. It is clear that the District does not have a system in place in which they identify these eligible students and provide them with the proper support and services as required by law. As such, [redacted], as well as other similarly situated students in hospitals located in the District, continue to be denied their rights as a result of the District's actions and inactions in violation of federal and state disability laws.

In 2022, [redacted], a private academic school that provides academic programming to youth hospitalized at [redacted] opened on [redacted]'s campus. However, [redacted] serves only students in grades 5-12.[9] [redacted] teachers participate in the development and delivery of IEPs for students who qualify for services.[10] Because [redacted] was in [redacted] and [redacted] grade at the time of [redacted] hospitalization, [redacted] was deprived of the opportunity to receive educational services at [redacted]. Instead, [redacted] was provided minimal "homebound instruction" on the unit with seven other students of various ages and abilities. Upon information and belief, PDE was not monitoring [redacted] or [redacted] to ensure that FAPE was being provided to students. A school district may provide homebound instruction to a student for a period not to exceed three months. 22 Pa. Code § 11.25(b). If a school district is to provide homebound instruction for a period exceeding three months, the district must seek approval from PDE. Id. Upon information and belief, the District does not seek approval from PDE before providing "homebound instruction" to students in hospital settings for longer than three months.

Upon information and belief, PDE fails to monitor the provision or delivery of educational services at [redacted] and other hospital placements across the Commonwealth to ensure that students in hospital settings are receiving the educational services that they are entitled to. Through its lack of oversight and monitoring, PDE failed to ensure that [redacted] and others similarly situated received general and special education compliant with federal and state law.

II. Legal Analysis

The District and PDE violated the IDEA and Section 504 by failing to provide [redacted] and other similarly situated students in hospital settings with special education and related services. As a result, [redacted] and similarly situated students were denied their right to a FAPE. [redacted] and students in hospital settings within the District are regularly denied education services and are not provided with special education and supports as is required under the IDEA and Section 504. The District and PDE have also failed to rectify past violations on behalf of [redacted] and other students in hospital settings, as further discussed below.

[9] [redacted], [redacted], (last visited Jan. 12, 2024).
[10] Id.

A. The District Violated its Child Find Obligation Under the IDEA by Failing to Have a System in Place to Identify Students in Hospital Settings Who Are Entitled to Special Education Services.

Under the IDEA, local educational agencies ("LEAs") are responsible for locating and identifying students for special education generally, regardless of where they are located within the jurisdiction. 22 Pa. Code § 14.121; 34 C.F.R. § 300.11.1 Pursuant to 24 P.S. §13-1306(a), a host school district (here, the School District of Philadelphia) is required to provide an education to students who are placed in children's institutions, including hospitals. See, e.g., N.M. v Wyoming Valley West Sch. Dist., ODR Case # 16242-1415KE (PA SEA 2015), https://odr-pa.org/download-pdf/16242-14-15/real-name/16242-14-15.pdf. In addition, children in hospitals are entitled to special education services. Specifically, 34 CFR § 300.39 defines special education as: "Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings." Moreover, the Office of Special Education and Rehabilitative Services ("OSERS") has issued guidance on implementing IDEA requirements for children with disabilities who reside in nursing homes, which should also be applicable to children in hospital settings. See U.S. Dep't. of Educ. Off. of Spec. Educ. and Rehabilitative Serv., Dear Colleague: Children Residing in Nursing Homes, Apr. 26, 2016, https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/dcl-children-in-nursing-homes-04-28-2016.pdf.

Under Pennsylvania law, the host school district must ensure a FAPE to students with disabilities who are placed in these settings within the District's jurisdiction. See 24 P.S. §13-1306(c). Hospitals have been found to be children's institutions for purposes of 24 P.S. §13-1306. See, e.g., N.M. v Wyoming Valley West Sch. Dist., ODR Case # 16242-1415KE (PA SEA 2015), https://odr-pa.org/download-pdf/16242-14-15/real-name/16242-14-15.pdf. In N.M. v Wyoming Valley West School District, when determining that a hospital setting was a children's institution, the Hearing Officer explained "A fair reading of the thrust of Section 1306 is: Students who find themselves in a facility away from their home school districts must look to the school district where the facility is located for their educational services." Id. Host districts have an affirmative responsibility to "locate" and provide special education services to students who are placed in children's facilities. R.T. v. Tunkhannock Area Sch. Dist., ODR Case #10171-08-09-LS (PA SEA 2010), https://odr-pa.org/download-pdf/10171-08-09/real-name/10171-08-09.pdf.

Federal and Pennsylvania law permit the parent of a student with a disability to initiate due process if the "parent disagrees with the school district's . . . identification, evaluation, placement of or provision of free appropriate public education to the student." 34 C.F.R. § 300.507(a)(1); 22 Pa. Code § 14.162(b).

Here, the District violated its Child Find obligation under the IDEA by failing to identify [redacted] as a student entitled to special education services when [redacted] was admitted at [redacted] and by failing to provide [redacted] with appropriate special education services and supports while [redacted] was hospitalized from [redacted]. Similarly, the District has failed to implement a system through which the District actively identifies, locates and evaluates students in hospital settings who are entitled to special education and related services.

In addition to violating [redacted]'s right to a FAPE while [redacted] was at [redacted], upon information and belief, the District's policies, procedures and/or practices systemically violate the rights of similarly situated students in similar settings. Upon information and belief, the District does not have a system in place through which it actively identifies, locates, and evaluates students with disabilities in hospital settings who are in need of a special education and related services. Other similarly situated students within the District in these settings are not identified and provided with legally required education and services and are denied a FAPE, and we therefore request systemic relief on behalf of similarly situated students at [redacted] and other hospitals within the District's jurisdiction, including, but not limited to [redacted].

B. The District Violated its Child Find Obligation Under Section 504 by Failing to Have a System in Place to Identify Students in Hospital Settings Who Are Entitled to Special Education Services.

The District similarly violated Section 504 by failing to locate and identify [redacted] and other students with qualifying disabilities and by failing to have a system in place generally for locating and identifying students with disabilities in hospital settings. Pursuant to 34 C.F.R. § 104.32, a recipient that operates a public elementary or secondary education program or activity shall annually "[u]ndertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education." Here, the District did not and does not have a system in which they identify and locate students in hospital settings to ensure they are receiving a FAPE. They did not do so for [redacted], and upon information and belief, they have not done so for other students. As such, the District is in violation of its Child Find obligation under Section 504.

C. [redacted] and Other Similarly Situated Students were Denied a FAPE under the IDEA and Section 504 as a Result of the District's Failure.

Under the IDEA, every eligible student with a disability is entitled to a FAPE. 20 U.S.C. § 1400(d)(1)(A). A student also has a right to a FAPE under Section 504. 34 C.F.R. § 104.33. To provide a FAPE, an LEA must implement an IEP that affords the student the necessary and requisite services to enable the student to make progress and to access the general education curriculum to the greatest extent possible. 20 U.S.C. § 1412(a)(1)(A); Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 203 (1982). An appropriate education for a student with a disability includes specialized instruction and related services that are provided in conformity with the IEP. 20 U.S.C. § 1400(d)(1)(A); Rowley, 458 U.S. at 203. The notion of "appropriate" cannot be distilled to a single standard, but "'must be gauged in relation to a particular child's potential.'" Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 239 (3d Cir. 1999) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 185 (3d Cir. 1988). To this end, the IEP must provide "significant learning . . . and confer meaningful benefit," beyond a "trivial educational benefit." Ridgewood, 172 F.3d 238, 239 (3d Cir. 1999) (citing Polk, 853 F.2d at 182-84).

Here, the District failed to provide any of the services or supports in [redacted]'s IEP for the first ten months of [redacted] hospitalization. After eventually holding an IEP meeting ten months after [redacted]s admission to [redacted], the District implemented an IEP that was insufficient

and inappropriate to enable [redacted] to make academic or behavioral progress. Additionally, despite concerns raised by [redacted]'s EDM that [redacted] was regressing academically, was not receiving the special education supports [redacted] was entitled to, was in need of an occupational therapy evaluation and a functional behavior assessment and needed specific, measurable goals and supports to increase [redacted]'s engagement with [redacted] educational programming, the District offered an IEP nearly identical to [redacted] 2020 IEP and provided a mere 1.5 hours of instruction daily. Further, the District failed to conduct an occupational therapy evaluation until November 22, 2022 and failed to conduct a functional behavior assessment. Despite the team recommending occupational therapy services after the November 22, 2022 evaluation, the District failed to provide any occupational therapy services. [redacted] was denied appropriate special education services and supports to which [redacted] was legally entitled. Similarly, upon information and belief, other students in hospital settings are not properly receiving special education and services while in hospital settings. As such, the District has denied these students' their right to a FAPE under the IDEA and Section 504.

D. The District Discriminated Against [redacted] and Similarly Situated Students Based on Disability in Violation of Section 504.

Section 504 of the Rehabilitation Act of 1973 states that "[n]o otherwise qualified individual with a disability in the United States, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a). Under Section 504, disability means (1) having "a physical or mental impairment that substantially limits one or more major life activities . . . ; (2) having "a record of such an impairment"; or (3) "being regarded as having such an impairment." 42 U.S.C.A. § 12102(1). A person is regarded as having an impairment "if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C.A. § 12102(3)(A).

A student with a disability who is otherwise qualified to participate in a school program and was denied the benefits of the program or otherwise discriminated against, has been discriminated against in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion Sch. Dist., 729 F. 3d 248 (3d Cir. 2013)). To establish that the District violated Section 504, a plaintiff must prove that (1) Student is "disabled" as defined by the Act; (2) Student is "otherwise qualified" to participate in school activities; (3) the District receives federal assistance; and (4) Student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. A.C. v. Owen J. Roberts Sch. Dist., 554 F.Supp.3d 620, 624 (E.D. Pa. 2021). Where, like here, a plaintiff seeks compensatory damages on a Section 504 claim, the plaintiff must also prove that the discrimination or denial of benefits at issue was intentional, or at least that Defendants exhibited deliberate indifference to the underlying discrimination. Shadie v. Hazleton Area Sch. Dist., 580 Fed.Appx. 67, 70 (3d Cir.2014). To satisfy the deliberate indifference standard, plaintiffs must present evidence that shows both: (1) knowledge that a federally protected right is substantially likely to be violated and (2) failure to act despite that knowledge. S.H. ex. Rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 265 (3d. Cir. 2013).

i. [redacted] is Disabled as Defined by Section 504 and Otherwise Qualified to Participate in School.

In this case, it is clear that [redacted] is a student with mental impairments that substantially limit one of more major life activities, yet the District failed to offer [redacted] aids, services and accommodations in violation of Section 504. Specifically, [redacted] has been identified as a student with Emotional Disturbance and Attention Deficient Hyperactivity Disorder. These impairments, well known to the District, substantially limit [redacted] life activities in a variety of ways. For example, in [redacted] September 2022 Reevaluation Report, [redacted] is reported to struggle daily to regulate [redacted] emotions and behaviors. [redacted] needs support communicating what [redacted] needs and how [redacted] is feeling without engaging in physical aggression.[11] As a student with disabilities, the District must provide [redacted] with a FAPE pursuant to Section 504, which includes reasonable "aids, services and accommodations that are designed to meet the educational needs of the protected handicapped student as adequately as the needs of nonhandicapped students are met." 22 Pa. Code § 15.1(b).

ii. The District Exhibited Deliberate Indifference by Failing to Timely Implement and Modify an IEP That Properly Addressed [redacted]'s Disabilities and Needs.

Deliberate indifference "does not require a showing of personal ill will or animosity", but rather the plaintiff must show that "the defendant knew that harm to a federally protected right was substantially likely and that the defendant failed to act on that likelihood." S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 268 (3d. Cir. 2013) (quoting Barber v. Colo. Dep't of Revenue, 562 F.3d 1222, 1228–29 (10th Cir. 2009); T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty., Fla., 610 F.3d 588, 604 (11th Cir. 2010)).

Courts have held that a school district's failure to implement a proper educational plan when the district has knowledge of the student's disability constitutes deliberate indifference. For example, in L.T. ex rel. B.T. v. Mansfield Tp. Sch. Dist., 2009 WL 737108, at *6-7 (Mar. 17, 2009), a parent alleged that the school district discriminated against [redacted] son under Section 504 when the district failed to modify the student's 504 plan to include transportation to and from school. The Court held that the school district had knowledge that the student could not attend school without transportation given that the parent and parent advocate reached out to the school district four months before the start of the subsequent school year and that if the student no longer could attend school in person, the school district would still have an obligation to provide the student with a FAPE. L.T. ex rel. B.T. v. Mansfield Tp. Sch. Dist., 2009 WL 737108, at *6. The Court in L.T. held further that the school district failed to act to address the violation of the student's right to his education and its actions constituted deliberate indifference:

> "Having an obligation to provide [student] with an education, and knowing for months that his current educational placement was untenable, yet waiting until after the start of the school year to even contemplate the development of an educational plan, constitutes reckless disregard of the school district's duty to provide [student] with a free appropriate education. Moreover, the fact that the development of his educational plan was not undertaken until after the school year began, and only after the parent advocate contacted [school administrator] and insisted on a meeting, as well as [student]'s father's in person

[11] See School District of Philadelphia Evaluation Report, Sept. 8, 2022.

> appearance, demonstrates that Defendant acted with deliberate indifference to [student]'s right to his education." L.T. ex rel. B.T. v. Mansfield Tp. Sch. Dist., 2009 WL 737108, at *7.

See also Beam v. West. Wayne Sch. Dist., 165 F.Supp.3d 200, 211-12 (M.D. Pa. 2016) (holding that the school district exhibited deliberate indifference when it failed to provide an appropriate educational plan that accommodated the student's disability because the district was aware of the student's educational and mental health issues and failed to implement a more appropriate educational plan).

Like in L.T. and Beam the District exhibited deliberate indifference to [redacted]'s right to a FAPE when it failed to develop an appropriate education plan for [redacted] despite being on notice that the current plan was not meeting [redacted]'s needs. In the IEP meeting on February 15, 2022, [redacted] raised concerns that the goals in [redacted]'s 2022 IEP were essentially unchanged from [redacted] IEP dated September 9, 2020, that [redacted] was not receiving the services that [redacted] was entitled to and that [redacted] behavior goals did not adequately address skills needed to improve [redacted]'s engagement or tolerance of increasing instructional time.[12] [redacted] made clear requests to the IEP team to revise [redacted]'s IEP to add a goal to increase [redacted]'s engagement and tolerance of instructional time, to conduct a functional behavioral assessment to address behaviors interfering with instructional engagement and to conduct an occupational therapy evaluation.[13] However, the District failed to address any of [redacted]s concerns or implement any of the requested changes to [redacted]'s programming in the IEP meeting. When [redacted] sent emails to [redacted] from the District on March 3, 2022 and March 8, 2022 to request that District issue a NOREP to address the concerns raised in the February 15, 2022 IEP meeting and implement the requested changes, [redacted] wrongly denied the District being the LEA for the District and failed to issue a NOREP accordingly.[14] [redacted] subsequently requested that the team reconvene and an IEP meeting was held on May 9, 2022. [redacted] again raised his concerns that [redacted] was making little to no academic and behavioral progress and that [redacted] current programming was inappropriate. The IEP team responded to [redacted]'s concerns by increasing [redacted]'s educational services, despite clear evidence that [redacted] was making little to no progress on [redacted] IEP goals.

The District issued a NOREP following this meeting, over two months after [redacted] requested that the District issue a NOREP to modify [redacted]'s IEP services, which [redacted] signed with an addendum that the NOREP was an incomplete documentation of [redacted] requests and that an updated NOREP should be issued accordingly.[15] A revised NOREP was never issued.

In the May 9, 2022 IEP meeting, the District agreed to issue a Permission to Evaluate to complete a functional behavior assessment and occupational therapy evaluation[16]. The District never completed a functional behavior assessment for [redacted] and did not complete an occupational therapy evaluation until November 2022. While it was recommended that [redacted]

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[12] [redacted] Individualized Education Program (IEP), p. 16-17, Feb. 15, 2022.
[13] Id. at 17.
[14] Email Exchange Between [redacted] and [redacted], Mar. 2022.
[15] Notice of Recommended Educational Placement (NOREP), p. 4, May 10, 2022.
[16] See [redacted] Individualized Education Program, May 9, 2022.

be provided educational-based occupational therapy services, the District failed to provide any occupational therapy services to [redacted] for the remainder of her hospitalization.

The District's failure to take action to implement an appropriate educational plan for [redacted] despite being on notice that [redacted]'s current IEP was not meeting [redacted] needs, failure to offer occupational services and failure conduct a functional behavior assessment and implement an appropriate positive behavior support plan despite the team's determination that [redacted] was in need of a functional behavior assessment and appropriate supports constitutes deliberate indifference to [redacted]'s right to a FAPE.

E. PDE Failed to Ensure that [redacted] and Similarly Situated Students Received Special Education Services Resulting in Denial of a FAPE and discrimination on the basis of disability.

PDE, as the State Education Agency ("SEA"), is ultimately responsible for ensuring the provision of a FAPE to all Pennsylvania children eligible for special education services under the IDEA. 20 U.S.C. §1412(a)(11). Although the LEA is the entity that provides services to children under the IDEA, it is the SEA that "retains primary responsibility to ensure that all children with disabilities receive the education that is their right under the IDEA." Charlene R. v. Solomon Charter Sch., 63 F. Supp. 3d 510, 513 (E.D. Pa. 2014); see also 20 U.S.C. § 1412(a)(11)(A), § 1413(g)(1); Kruelle v. New Castle Cty. Sch. Dist., 642 F.2d 687, 696 (3d Cir. 1981). The SEA may be held responsible for violations of the IDEA. Price v. Commonwealth Charter Acad. Cyber Sch., No. CV 17-1922, 2018 WL 1693352, at *7 (E.D. Pa. Apr. 6, 2018). PDE has "an overarching responsibility" to ensure that the rights protecting students with disabilities are ensured, regardless of the local school's actions. *Cordero by Bates v. Pennsylvania Dep't of Educ*., 795 F. Supp. 1352, 1360 (M.D. Pa. 1992) ("the fact that local agencies are not performing up to par…becomes irrelevant…[i]t is the state's obligation to ensure that the systems it put in place are running properly and that if they are not, to correct them"). When PDE fails to ensure a FAPE it violates Section 504 because "the denial of an education that is guaranteed to all children [] forms the basis of the claim." Andrew M. v. Delaware Cnty. Off. of Mental Health & Mental Retardation, 490 F.3d 337, 350 (3d Cir. 2007); see also CG v. Pennsylvania Dep't of Educ., 734 F.3d 229, 235 (3d Cir. 2013) (viable claims may exist against PDE under Section 504).

Here, the SEA has not met its obligation under the IDEA to ensure that [redacted] and other students similarly situated were evaluated and received a FAPE. PDE failed to ensure that the District as the LEA had a system in place to serve students in hospital settings across the District. The District failed to provide [redacted] with a FAPE from [redacted]. In addition, upon information and belief, the District failed to locate and identify similarly situated students in hospital settings and failed to provide them with a FAPE. PDE is ultimately responsible for ensuring that this violation is corrected, whether by the District or through its own intervention. See Charlene R. v. Solomon Charter Sch., 63 F. Supp. 3d 510, 512 (E.D. Pa. 2014) (holding that a state's department of education must step in where a local education agency cannot or will not provide a child with a FAPE).

F. [redacted], as Well as All Similarly Situated Students, are Entitled to Significant Compensatory Education Services to Make Them Whole for the District's Child Find and FAPE Violations.

Compensatory education is a crucial remedy available to courts to make whole a child who was denied FAPE. G.L. v. Ligonier Valley Sch. Dist., 802 F.3d 601, 626 (3d Cir. 2015). The purpose of the compensatory education remedy is to place students with disabilities in the same position they would have been but for the school district's violation of IDEA. Id. (citing Reid v. Dist. of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005)). Although parents must file for due process within two years of when they knew or should have known that the school district violated the IDEA (20 U.S.C. § 1415(f)(3)(c)), courts have broad remedial authority to award compensatory education "to whatever extent necessary to 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." Id. at 626.

In this case, the relief that the EDM seeks is to place [redacted] in the place [redacted] would have been but for the District's violation of IDEA. To do so, the District must provide [redacted] with compensatory education services to make up for the District's failure to provide special education and related services and missed educational opportunities from [redacted].

G. The Discovery Rule for the IDEA's Statute of Limitations Was Triggered When the District Issued an Invitation to Participate in an IEP Meeting on January 31, 2022.

In G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015), the U.S. Court of Appeals for the Third Circuit clarified that IDEA parents have two years from the date they "knew or should have known ("KOSHK")" of a school's violation of the IDEA to file a complaint, unless a statutory exception applies. G.L., 802 F.3d at 626; 20 U.S.C. §§ 1415(f)(3)(C), (b)(6)(B). Subsequently, courts have determined that the "application of the of the IDEA statute of limitations is a highly factual determination that a court must make on a case-by-case basis." Brady P. by Beth v. Central York Sch. Dist., Civ. No. 1:16-CV-2395, WL 1367325 at *7 (M.D. Pa. Mar. 16, 2018) (citing J.L. ex rel. J.L. v. Ambridge Area Sch. Dist., 622 F.Supp.2d 257, 266 (W.D. Pa. 2008) (citing 71 Fed. Reg. 46540–01 at 46704–06 (August 14, 2006) (codified at 34 C.F.R. § 300.511))). The Court in Brady stated that the discovery rule for the IDEA statute of limitations "concerns the moment in time when a reasonably diligent plaintiff discovers facts that provide notice of an existing or ongoing injury." Brady P. by Beth, WL 1367325, at *8. In Estate of S.B. by & through Bacon v. Trenton Bd. of Educ., Civ. No. 12-07158, 2018 WL 3158820 (D.N.J. June 28, 2018), the court found that the statute of limitations began running when "[P]arents understood BOE's obligations to provide [Child] with a FAPE, and were on notice that that BOE had allegedly not fulfilled these duties." Courts within the Third Circuit "have generally focused on clear action or inaction by a school district sufficient to alert a reasonable parent that the child would not be appropriately accommodated" in determining the KOSHK date. Brady P., WL 1367325, at *7.

Here, the statute of limitations was triggered when the District issued an Invitation to Participate in an IEP meeting to [redacted] on January 31, 2022. Before this date, [redacted] was

unaware that the District was obligated to provide [redacted] special education services while hospitalized, as the District had no contact with [redacted] during the first ten months of [redacted]'s hospitalization and failed to communicate or acknowledge its obligations. Accordingly, [redacted] raised [redacted] concerns about [redacted] not receiving services to staff at [redacted] before [redacted] was put on notice that the District was responsible for providing services to [redacted]. Before this date, there was no "clear action or inaction" by the District "sufficient to alert a reasonable parent that the child would not be appropriately accommodated" up until this point. [redacted] could not or would not have known that the District failed to provide services during the first ten months of [redacted] admission.

III. Violations of FAPE Requiring Relief

The District has denied [redacted] a FAPE by:

(1) Failing to provide special education and related services to [redacted] while [redacted] was hospitalized from [redacted] to [redacted] in violation of [redacted] right to a FAPE under the IDEA and Section 504;
(2) Discriminating against [redacted] while [redacted] was hospitalized;
(3) Failing to remedy violations of [redacted]'s rights under the IDEA and Section 504.

The District has denied similarly situated students with a FAPE:

(1) Failing to identify students entitled to special education services pursuant to the IDEA and Section 504;
(2) Failing to provide special education and related services to students in hospital settings, in violation of their right to a FAPE under the IDEA and Section 504;
(3) Failing to have a system in place for identifying and providing special education and services to students in hospital settings;
(4) Discriminating against students with disabilities residing in hospital settings;
(5) Failing to remedy violations of these students' rights under the IDEA and Section 504.

PDE has denied [redacted] and similarly situated students a FAPE by:

(1) Failing to provide oversight over local educational agencies ("LEAs") to ensure that they identify students entitled to special education services pursuant to the IDEA and Section 504;
(2) Failing to provide oversight over LEAs to ensure they provide special education and related services to students in hospital settings, in violation of their right to a FAPE under the IDEA and Section 504;
(3) Failing to have a system in place for identifying and providing special education services in hospital settings;
(4) Discriminating against students with disabilities who reside in hospital settings;
(5) Failing to ensure LEAs remedy violations of these students' rights under the IDEA and Section 504.

IV. Request for Relief

In light of the foregoing, we seek the following relief to remedy the past and ongoing violations on the part of the District who failed to identify and provide [redacted] and other similarly situated students with special education and related services:

(1) That the District be directed to provide compensatory education in a third-party trust for each hour of each day that [redacted] was denied a FAPE beginning in [redacted] and continuing to [redacted];

(2) That the District be directed to develop and implement a system that:
   a. Ensures all students suspected of being students with disabilities in hospital settings within the jurisdiction of Philadelphia are identified in accordance with the IDEA and Section 504;
   b. Ensures that all students in hospital settings receive an appropriate education in the least restrictive environment;
   c. Ensures all students in hospital settings are provided with special education and related services designed to meet their needs under the IDEA;
   d. Ensures that all students in hospital settings are provided timely evaluations and reevaluations and ensuring their IEPs are properly implemented;
   e. Ensures that the District has a procedure for implementing special education and services in the least restrictive environment going forward for students in hospital settings;
   f. Ensures that the District adopts a procedure for notifying IDEA Parents of their child's right to a FAPE while in a hospital setting;
   g. Ensures parent participation and input in the IEP process;
   h. Provide compensatory education to students whose rights were violated while in hospital settings.

(3) That PDE be directed to monitor and oversee the District to ensure the creation of a legally compliant system which effectively ensures that students with disabilities in hospitals across the District are properly and promptly identified and receive special education and related services, as well as aids, services and accommodations that are designed to meet the educational needs students with disabilities as adequately as the needs of students without disabilities are met.

(4) That reasonable attorneys' fees be awarded.

Sincerely,



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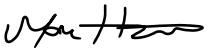

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