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February 21, 2024

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

***RE: Complaint on Behalf of D.H., R.P., and Similarly Situated Children Residing at Pediatric Specialty Care within the School District of Philadelphia Regarding the Failure to Provide a Free Appropriate Public Education***

Dear Bureau of Special Education:

The Education Law Center files this Complaint as an organization<sup>1</sup> and on behalf of individual students [REDACTED] (“D.H.”) and [REDACTED] (“R.P.”) and similarly situated children residing at Pediatric Specialty Care at Philadelphia (“PSC”) against the School District of Philadelphia (“District”) for discrimination on the basis of disability and the failure to provide a free appropriate public education (“FAPE”) to qualified students with disabilities in violation of Part B of the Individuals with Disabilities Education Act (“IDEA”) 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”). Pursuant to 24 P.S. §13-1306(a) & (c)(1)-(2), a host school district (here, the School District of Philadelphia) is required to provide an education to students in residential placements, including providing special education and related services. Host districts have an affirmative responsibility to locate these students and to work with school districts of residence to coordinate and provide appropriate educational programming for these students. The host school district must ensure a FAPE to students with disabilities who are placed in a “children’s institution” within the District’s jurisdiction. *Id. See* Educational Programs for Students in Noneducational Placements available at <https://www.education.pa.gov/Policy-Funding/BECS/PACode/Pages/NonEducationalPlacements.aspx>.

**I. INTRODUCTION**

This Complaint alleges a systemic denial of FAPE and discrimination caused by the ongoing failure of the District to provide an appropriate education to students residing at PSC,

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<sup>1</sup> 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.”).

and their ongoing failure to remedy prior violations of FAPE that occurred and continue to occur. The District has denied multiple students a FAPE by failing to provide related services and reasonable accommodations as specified in multiple students' Individualized Education Programs ("IEP"s) and failing to offer sufficient education to those students and other students with disabilities who reside at the facility. We request that the Bureau of Special Education ("BSE") investigate this matter and issue corrective action as soon as possible as needed to remedy the violations described herein.

PSC is a residential care facility for children located at 3301 Scotts Lane, Philadelphia, PA 19129. PSC provides care for children who are medically complex and technology dependent ranging from birth to 21 years of age, who reside at the facility for transitional, short-term, and sometimes long-term care. The Philadelphia location contains 50 beds and works to support all aspects of their residents' needs, including medical, psychological, educational, and spiritual. Many children placed at PSC remain in this facility for years.

In light of the ongoing and systemic nature of the deprivation, we also assert claims against the Pennsylvania Department of Education ("PDE") for failure to ensure a FAPE for students residing at PSC and the failure to ensure that students are not discriminatorily denied access to education due to their disabilities. We specifically allege that through its lack of oversight and monitoring, PDE failed to ensure that D.H., R.P., and other similarly situated students received general and special education services compliant with federal and state law. We request a finding that the District and PDE violated not only R.P and D.H.'s rights, but the rights of all other similarly situated students at PSC and those living in other residential facilities located in the District who were deprived of their right to education due to their disabilities. We request a remedy for R.P., D.H., and all similarly situated students who are in or were previously in these settings within the District who were not provided a FAPE and whose deprivation remains unaddressed.

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

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]

**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 underserved children, including children with disabilities, children experiencing poverty, children of color, children in the foster care and juvenile justice systems, multilingual learners, LGBTQ+ students, and children experiencing homelessness.

D.H. and R.P. are students with qualifying disabilities under Section 504 and students eligible for special education services under the IDEA who reside at PSC in the School District of Philadelphia. *See* 34 CFR 104.3(j) and 34 CFR § 300.8.

**Respondents**

Respondent District is the LEA for qualified students with disabilities seeking relief. *See* 20 U.S.C. § 1401(19); 34 CFR § 300.28. Respondent District qualifies as a recipient of federal financial assistance within the definition of 34 CFR § 104.3(f).

Respondent PDE is the SEA charged with responsibility to ensure that all eligible children receive a free appropriate public education. *See* 20 U.S.C. § 1412(a)(11)(A) (SEA responsible for ensuring the requirements of the IDEA are met); 34 C.F.R. § 300.149 (delineating SEA responsibilities for general supervision). Respondent PDE qualifies as a recipient of federal financial assistance within the definition of 34 CFR § 104.3(f).

**II. FACTUAL BACKGROUND**

**D.H., DOB: 6/27/2013**

D.H. is a student with multiple disabilities, including Spastic Cerebral Palsy, Intellectual Disability, Other Health Impairment, and Speech-language impairment. D.H. has resided at PSC since May 29, 2014. The District has denied D.H. a FAPE and all access to education for years.

Pursuant to D.H.’s September 18, 2019 IEP, he was entitled to receive 1500 minutes per week in a multiple disabilities support program at his local neighborhood school, Thomas Mifflin School. He also was to receive Occupational Therapy (“OT”) and Physical Therapy (“PT”). D.H.’s IEP included the same placement and related services through December 12, 2022.

[REDACTED], D.H.’s father, and [REDACTED], a social worker at PSC who works with D.H., report that prior to this school year, D.H. had not been in school since before the COVID-19

Pandemic. This is because, as consistently noted across his IEPs, “[D.H.] will require the medical supervision of a nurse while transitioning to and from school and in the learning environment.” Prior to the COVID-19 Pandemic, although PSC is not an LEA and does not have any obligation to provide a FAPE for D.H., PSC was able to locate and secure a nurse to attend school with D.H. Unfortunately, since that time, PSC has not been able to provide a nurse. Due to a lack of nursing, D.H. was out of school and received no education whatsoever for years.

Per D.H.’s IEP, the District was aware that D.H. was not in school throughout the 2021-2022 school year and the District did not have a plan to get him back in school. ██████ reported to the District that PSC was not able to locate a nurse for D.H. Instead of responding to the need for a nurse as required by D.H.’s IEP, the District informed ██████ that she should apply for temporary homebound instruction for D.H., which she did. D.H.’s father did not participate in this discussion. On December 12, 2022, the District issued a new IEP with “60 minutes per week” of Multiple Disabilities Support for D.H. to take place outside of the regular education classroom. This is D.H.’s most recent IEP, though a re-evaluation was completed and a re-evaluation report was issued on January 23, 2024. According to ██████, D.H.’s mother was largely in communication with the District at the time of the change in placement. According to ██████, D.H.’s mother, she recalls speaking with the school about providing D.H. some support at the facility. She does not recall discussing changing his placement to instruction in the home. ██████ stated that she believed that D.H. was not able to attend school because he did not have a nurse. The District encouraged her to speak with PSC about securing a nurse. At no point did the District offer to provide a nurse for D.H. to attend school.

The District did not begin to provide the one hour of instruction as required by D.H.’s December 12, 2022 IEP until the beginning of the 2023-2024 school year. The District never offered to provide a nurse for D.H., and D.H. received no education for the 2021-2022 school year through the end of the 2022-2023 school year. Since the beginning of the 2023-2024 school year, ELC has requested that the District provide a nurse for D.H. so that he may attend school. The District never provided a nurse. However, in November 2023, PSC was able to locate a nurse, and D.H. began attending school part time on November 28, 2023, 2-3 days per week. PSC believes he will be able to attend full-time soon, as they have located another nurse for him, but for now he remains in school part-time. As a result, D.H.’s education is dependent on PSC staff’s ability to provide a nurse.

D.H.’s IEPs throughout 2021-2022 and 2022-2023 school year were essentially a copy and paste of his prior IEPs from before the pandemic. It is noted throughout his IEPs and progress monitoring documents that he has not been in school due to lack of nursing. It is also noted in his IEPs that “D.H. is significantly delayed in overall development. However, (he) seems more alert when given the opportunity to be in the presence of other active children and adults.” Despite this knowledge, the District did nothing to ensure D.H. was back in school for more than two years, and provided him with no education whatsoever until the implementation of his latest IEP, providing a minimal 60 minutes per week of at home instruction at the beginning of the 2023-2024 school year which is insufficient to meet his needs and deprives him of any meaningful educational benefit. Further, according to Professional Services Logs

provided from the District, D.H. did not receive PT or OT services since he previously received them via telehealth during the 2020-2021 school year. The logs indicate that D.H. was “absent from school,” and he therefore never received those services from the 2021-2022 school year at least until he returned to school part-time this fall.

**R.P., DOB: 10/05/2006**

R.P. is a student with multiple disabilities who has resided at PSC since October 26, 2019. He has been diagnosed with cerebral palsy (spastic quadriplegia), an intellectual disability, and a language impairment (nonverbal). R.P. is also deaf or hard of hearing and has vision loss. He has a tracheostomy, is fed through a G-tube, uses oxygen as needed and is fully dependent on others for all self-care needs. According to his January 25, 2023 IEP, he is to receive “Full Time Multiple Disabilities Support” and his “needs will best be met through Instruction Conducted in the Home (ICH).” The instruction is to be conducted as follows: “In the Home 3 hours a week; Related Services: Occupational Therapy: 30 minutes/month; Physical Therapy: 30 minutes/month; Hearing Support: 20 minutes/month; Speech/Language Therapy: 45 minutes/month; Vision Therapy: 20 minutes/month.” As discussed in more detail below, R.P. has not received even the minimal hours of instruction as required by his IEP, nor has he received the related services he is entitled to.

Prior to the COVID-19 Pandemic, R.P. attended the Widener School within the School District of Philadelphia full-time in a multiple disabilities support classroom with a nurse. His IEP required 1500 minutes of Multiple Disabilities Support. According to his 8/26/2020 IEP, “.....[R.P.] requires full assistance from an adult in the classroom and has a full-time private duty school nurse.... [R.P.] is able to participate in the special education curriculum with the use of adapted materials, specially designed instruction and physical assistance.... [R.P.] participates with his same-aged peers through laughing, smiling and gazing. He enjoys music, visual stimulation, toys and videos on the computer. [R.P.] engages in recreation/leisure activities such as; watching videos, television, bubbles, playing with balls, interactive toys, music and instruments. He appears to be a friendly child and enjoys interacting with others. This is evidenced by him smiling often when toys/items are placed within close proximity and/or when adults/staff members interact with him.”

Like all other students within the District, in March 2020, R.P. was not able to attend school in-person due to the COVID-19 pandemic. On October 10, 2020 a Notice of Recommended Educational Placement/Prior Written Notice (“NOREP”) was issued, proposing a change in R.P.’s placement. The NOREP states: “At this time, [R.P.]’s needs must be met through Instruction Conducted in the Home (ICH)... The LEA has proposed Instruction Conducted in the Home (ICH) due to a medical condition. [R.P.] will receive instruction for 2 hours per week by an SDP ICH Teacher. Related Services were to include: Occupational Therapy: 30 minutes/month Physical Therapy: 30 minutes/month Speech/Language Therapy: 45 minutes/month Hearing Therapy: 30 minutes/month.” It is unclear exactly why this change occurred. His 2021 IEP indicates: “Virtual Instruction in the Home services began for [R.P.] in November of 2020 after a hospital stay at CHOP. [R.P.] receives Instruction in the Home services and does not participate in the general education curriculum due to the severity of his disabilities.” R.P.’s mother does not recall why this change happened. She believed it was due to COVID-19 and hoped R.P. would be able to return in person once pandemic restrictions were

lifted. She remembers R.P. “thriving more” when he was able to leave and go to school every day.

Even if at-home instruction is medically necessary for R.P., he is often not receiving the services to which he is entitled. While he is entitled to Hearing Therapy of 30 minutes per month, it does not appear he received this service at all since the implementation of his 2020 IEP. While it is also noted that it was difficult for R.P. to receive education virtually due to his disabilities, it does not appear that he received any related services until at least December 2020. Even after that point, his services remained inconsistent. Oftentimes, the provider indicated they could not provide a service due to the facility being under “Code Yellow” COVID procedures. Sometimes the student was unavailable due to illness, napping, or school holidays. Some services, such as physical therapy, were not noted as taking place for many months at a time – as an example, the only physical therapy bill for the 2020-21 school year occurred in March 2021. Services also ceased in December 2023 and January 2024 due to COVID “Code Yellow” procedures. It appears no services happened over the summers, despite R.P. being eligible for ESY. It is noted in progress reports from 2022 that “the student did not attend ESY in 2022.”

In addition to not receiving services that are required by R.P.’s IEP, it is clear that he is also not making progress. Nearly all of his progress reports from 2020 to the present have a baseline of “0,” and the vast majority of reporting dates also indicate 0% progress. Many of the goals from his IEPs from year to year are similar or the same. As an example, his speech language goal from his 4/27/2021 IEP: “Given structured therapy activities, [REDACTED] will make choices with both real objects and object symbols with an average of 60 percent accuracy in 3 out of 5 data probes by 04/25/2022,” is repeated on both his 1/2023 and his 12/2023 IEPs. Much of the other language in his IEPs is identical from year to year. For example, the following excerpt is found in R.P.’s 2021, 2022, January 2023, and December 2023 IEPs:

- April 2021: Due to the Novel Coronavirus (COVID-19) face-to-face learning is suspended and students are receiving digital education online for the 2020-21 School Year. The information gathered is from informal observation during online student therapy sessions, record review, and progress monitoring on current therapy goals. Due to scheduling challenges at the Pediatric Specialty Care facility there were only a few online TeleTherapy Zoom sessions with [REDACTED] this IEP Cycle.
- GOAL: Given structured therapy activities, [R.P.] will make choices with both real objects and object symbols with an average of 70 percent accuracy or better in 3 out of 4 data probes
- PROGRESS: Nursing staff facilitated online connection for TeleTherapy but were unable to facilitate during therapy activities; therefore, no progress was made on [REDACTED] goals this IEP cycle.
- Progress: There is no progress to report, as [R.P.] did not attend school after this IEP was developed, and he has not attended school this school year.
- There is no update due to [R.P.] not being able to attend school this year due to serious health issues and the closure of schools due to COVID. April 2019: [R.P.]'s favorite visual activity is playing an adapted form of basketball using the hoop in the little cafeteria. He tolerates other visual activities, but his smiles are most plentiful when participating in basketball. He remains neutral for most other tasks. Hopefully, he will be able to attend school on a more regular basis this coming school year.

R.P.'s mother has raised concerns regarding lack of education for her son, and has noted that she feels like his IEP is always the same, and that he is not getting the services they say he is getting. She also would like him to be back in school, where he can have more peer interaction and make progress.

### **Similarly Situated Students**

In addition to D.H. and R.P., ELC is aware of multiple students with disabilities at PSC who have not been receiving special education and related services required by their IEPs, as well as others whose IEPs are inadequate and do not provide them with a FAPE. There are at least three identified students similar to D.H. residing at PSC who require a nurse to attend school, and who are not in school due to lack of nursing. The school has not offered to provide a nurse and has not provided any alternate instruction for these students. There are total of 16 school-age students who currently reside at PSC.

According to staff at PSC, there are 5 students at the facility who are currently placed on homebound instruction, including R.P. Those students received little to no homebound instruction from the District prior to this school year. For the 2022-2023 school year, an instructor named [REDACTED] was responsible for conducting homebound instruction at PSC. According to [REDACTED], she did not even meet [REDACTED] until the middle of March 2023, and had never seen her or anyone else from the District prior to this time. She requested a schedule from [REDACTED] so that PSC could be aware of when she was coming and they could make sure the children were prepared. [REDACTED] never provided such a schedule. According to staff, [REDACTED] came to PSC approximately 2-3 times per week, and spent 1-3 hours at the facility, with no set schedule. Staff did not witness her bringing any materials for the students and she would move on if a child was asleep or would sometimes read to them from her phone. [REDACTED] indicated that she does not believe her son is getting the OT or PT he is entitled to, stating he does not appear to be getting any stronger or making any progress.

Staff at PSC have indicated that things improved somewhat for the students receiving homebound services this school year. A new teacher named [REDACTED] was assigned to PSC, and she was present more consistently and was in regular communication with PSC. However, in December 2023, several students at PSC tested positive for COVID-19, causing the facility to be in what they describe as the "yellow zone." PSC's protocol when an individual tests positive for COVID-19 is to isolate them to their rooms. When there are multiple positive cases and the facility is in a "yellow zone," individuals are still permitted to come to the facility, but they are required to wear personal protective equipment ("PPE"). Mandatory masking is in place and staff also wear gowns when they enter the children's rooms. According to staff at PSC, [REDACTED] came to the facility on December 1, 2023, and when she was informed of the situation, she refused to wear PPE and she left and has not been back since that date. This is despite only one homebound student having tested positive. The students remained without education through some time in January 2024, when the yellow zone ended.

Other students residing at PSC have similarly inadequate IEPs which fail to provide sufficient instruction hours, levels of support, and related services or which are not updated to reflect current assessments or needs. As an example, ELC is aware of another student with multiple disabilities who resides at PSC whose 2023 IEP provides for 60 minutes of homebound instruction per week, 30 minutes of speech/language therapy per IEP term, and physical therapy for 30 minutes per IEP term. The student’s IEP has two goals, each of which have a baseline of 0 from 2020. Additionally, staff at PSC report that evaluations and re-evaluations are not conducted timely. As an example, a student attends school with a nurse, but does not have an IEP. Repeated requests have been made to evaluate the student and to provide her with an IEP, yet no evaluation has occurred, and she remains in the regular education classroom without supports, despite staffs’ assertions that she is in need of them.

Staff also indicate that communication with the District is challenging. They often have to reach out repeatedly and send multiple emails to receive any sort of response. They are also not included on correspondence, often not provided documents, and not invited to attend IEP meetings, so they frequently feel as though they are not in the loop or informing the IEP process despite their knowledge of current student needs. When issues are brought to the attention of the District, there is no response or they are shrugged off, being told that “it is difficult to provide itinerant supports.” Staff at PSC also do not believe that any of the students at the facility are getting the related services they are entitled to or need to obtain meaningful educational benefits.

### 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 the District discriminated against qualified students on the basis of their disabilities and denied them a FAPE,<sup>2</sup> in violation of Part B of the IDEA, Section 504, Chapter 14, and Chapter 15, all of which BSE enforces.<sup>3</sup>

This Complaint is timely because the alleged FAPE violations and discriminatory events occurred within one year of the filing of this Complaint and are continuing. Specifically, the District has discriminated against students with disabilities in the past year by failing to provide education and/or appropriate education to students residing at the facility, failing to remedy prior violations of FAPE that occurred and which continue to occur at the facility, failing to timely evaluate, hold timely IEP meetings, and provide related services, among other things.

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<sup>2</sup> 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 RA. *See, e.g., Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 489 (E.D. Pa. 2011).

<sup>3</sup> *See* 22 Pa. Code § 14.107; 22 Pa. Code § 15.8(a) and 22 Pa. Code § 15.10.



**b. The District Discriminated Against Students with Disabilities by Failing to Provide a FAPE in Violation of the IDEA and Section 504.**

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.<sup>4</sup> Section 504 of the Rehabilitation Act prohibits discrimination against persons on the basis of their disabilities. School children who are deemed to have a qualifying impairment under Section 504 are entitled to a FAPE. A FAPE under Section 504 is 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). The failure of an LEA to ensure a FAPE to a qualifying student constitutes a violation of Part B of the IDEA, as well as discrimination under Section 504.<sup>5</sup> When a student is denied FAPE, this constitutes a violation of Part B of the IDEA.<sup>6</sup> 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).

Here, the students residing at PSC have disabilities as defined by the Act, as the District has already determined that they have impairments that “substantially limit one or more major life activities,” and require an IEP or a Section 504 plan. The students are qualified to participate in school activities, and the District receives federal financial assistance. Finally, the students were excluded from participation in, denied the benefits of, or subject to discrimination at school, when the services required by their IEPs were not implemented, and further because many of their IEPs were not adequate and sufficient to meet their needs, and the deprivation of those services was not remedied by the District.

**c. The District has Failed and Continues to Fail to Provide Educational Access to Students at PSC Due to Lack of Nursing, in Violation of their Right to a FAPE.**

The IDEA requires LEAs to provide a FAPE to students with disabilities in the least restrictive environment. The LRE principle mandates that, “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled.” 34 C.F.R. § 300.114(a)(2)(i). Relatedly, the IDEA states that “[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii).

Full-time nursing services that are necessary for a student with a disability to access his school must be provided as a related service in order for the student to receive a FAPE. *Cedar*

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<sup>4</sup> 34 CFR § 300.101.

<sup>5</sup> *CG*, 734 F.3d at 235.

<sup>6</sup> 34 CFR § 300.101.

*Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999). The failure to provide a nurse, which is required for the student to access the required services in his IEP, denies the student a FAPE. *E.I.H. v. Fair Lawn Bd. of Educ.*, No. 17-2596, 2018 WL 4214309, at \*4 (3d Cir., Sept. 5, 2018). Further, denying access to school and changing a student's placement due to a failure to provide a required nurse is a denial of the student's right to a FAPE in the least restrictive environment. See *Dep't of Educ., State of Hawaii v. Katherine D.*, 727 F.2d 809, 816 (9th Cir. 1983) (finding that a school district denied a medically-fragile student a FAPE when it required her to receive educational services in the school due to the purported severity of her needs, when it could have provided necessary support with a nurse).

The District has deprived D.H., R.P. and other similarly situated students of their right to a FAPE in the LRE. Here, the District never offered to provide D.H. a nurse so he could attend school. Instead, they offered to place him on homebound, in violation of his rights, which they did not even provide until the beginning of the school year, and only for one hour per week. The school confirms throughout D.H.'s IEPs and various other documents that D.H. requires a nurse to attend school, and that he has not been able to attend school due to lack of nursing, yet they failed to remedy this known issue. As a result of the District's failure, D.H. missed years of school. This is the case for at least three other students residing at PSC, who could have and should have been in school, but for the school not providing them with a nurse. The school also cannot unilaterally change these students' IEPs to homebound instruction which they appear to have done in this case. The District has violated D.H. and similarly situated students' right to a FAPE in the LRE by not providing them with a nurse to attend school, and they must promptly remedy their violations.

**d. The District has Failed and Continues to Fail to Provide Appropriate Homebound Instruction and Appropriate IEPs for Students at PSC in Violation of their Right to a FAPE.**

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, a local educational agency ("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).

Based on the above-referenced students' IEPs alone, they are being denied a FAPE. A student with multiple disabilities receiving only 1-3 hours of instruction per week, plus the limited services they are getting and the clear lack of goals and progress monitoring, cannot be

providing them with an opportunity to make progress and to “access the general education curriculum to the greatest extent possible.” Most of the students are not even receiving that many hours. Additionally, it is unclear what actual education these students previously received and are currently receiving from the District. The teacher that was attending the facility this school year did not show up for over a month. Further, it is unlikely that the students are receiving the related services to which they are entitled.

According to staff at PSC, most of the children at the facility had attended Thomas Mifflin School, while some were at Widener. Their primary contact at the District is aware of all of these issues, but has not properly addressed them, is often non-communicative, and has been unwilling or unable to answer to most of PSC’s concerns. Further, staff at PSC have noted there has been a lack of communication with the District generally. For example, they are not provided with IEPs and are not invited to IEP meetings. Despite some improvements this year with a new teacher, that teacher stopped showing up and students’ IEPs remain inadequate. In addition, students still are not receiving the related services they are entitled to, students remain out of school due to lack of nursing, there is lack of progress monitoring and delays in completing evaluations and issuing documents, and homebound services remain inconsistent. These students deserve and are legally entitled to a FAPE, even though they are living at a facility and may require complex care. The District must immediately rectify these issues and provide these students with the education to which they are entitled.

**e. PDE Failed to Ensure that students at PSC received consistent nursing and education services resulting in denial of a FAPE.**

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) (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); *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 students residing

at PSC received a FAPE, including the provision of nursing services, as well as the provision of appropriate IEPs, ensuring students received related services, among other things. The District has been unable or unwilling to provide consistent nursing services for D.H. and others and, as a result, D.H. has not been able to access educational services. Further, students including R.P. and others at PSC have not received an adequate education or services in violation of their right to a FAPE. PDE is ultimately responsible for ensuring that this violation is corrected, whether by the District or through its own intervention.

### **Conclusion**

As a result of these failures on the part of the District and PDE, students with disabilities residing at PSC have been denied their right to a FAPE in violation of Part B of the IDEA, Section 504, and the ADA, and are entitled to relief to remedy these violations.

### **IV. SUMMARY OF ISSUES**

Complainants seek resolution from the BSE of the following issues, as described in this Complaint:

1. The District denied Named Complainants and similarly situated students at PSC their right to a FAPE in the LRE in violation of the IDEA and Chapter 14 by not providing special education and related services necessary to access school;
2. The District denied Named Complainants and similarly situated students at PSC their right to a FAPE by not being provided an IEP that enables them to make progress and to access the general education curriculum consistent with the IDEA and Chapter 14;
3. The District denied Named Complainants and similarly situated students at PSC a FAPE by not completing reevaluations, annual reviews of IEPs, and progress monitoring within the required timelines under the IDEA and Chapter 14;
4. The District discriminated against Named Complainants and similarly situated students at PSC on the basis of their disabilities in violation of Section 504 and Chapter 15 by denying them equal access to education;
5. PDE failed to ensure that the District maintained a system to provide Named Complainants and similarly situated students at PSC with a FAPE, in violation of the IDEA; and
6. PDE failed to ensure that the District maintained a system to ensure equal access to education for Named Complainants and similarly situated students at PSC, in violation of Section 504.

## V. REQUESTED RELIEF

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

We ask that PDE conduct an investigation of the allegations contained herein and issue findings that the District has deprived students of a FAPE and engaged in discrimination in violation of students' rights under the IDEA and Section 504. We further request that PDE order the District to cease continuous and ongoing violations of the IDEA and Section 504 that have the effect of discriminating against students with disabilities and depriving them of their right to a FAPE. Specifically, we request the following remedies be implemented:

1. Investigate the allegations contained herein pertaining to the Named Complainants, D.H. and R.P. and similarly situated students at PSC.
2. Direct the District to immediately provide D.H. and any similarly situated students at PSC with a one-to-one nurse, as required by their IEPs, and a back-up nurse.
  - In the event that the District cannot locate a nurse within 10 days, that the Pennsylvania Department of Education be directed to provide D.H. and similarly situated students with a one-to-one nurse.
  - Direct the District to develop a plan for meaningful homebound instruction with related services in accordance with their individual educational needs in the event that both D.H. and similarly situated students' full-time nurse and back-up nurse are unavailable.
3. Direct the District to revise R.P. and similarly situated students' IEPs to ensure they are appropriate with sufficient specialized instruction and related services to meet their needs.
4. Direct the District to identify similarly situated students residing at PSC who have been or are being deprived of a FAPE.
5. Direct the District to provide sufficient meaningful homebound education to students at PSC who require such services.
6. Direct the District to conduct evaluations and re-evaluations and issue NOREPs as necessary to comply with all federal and state timelines for students whose evaluations are overdue.
  - Complete all evaluations which remain outstanding in excess of 60 days in no more than 30 days from the date of this Complaint.
  - Complete evaluations of all students identified as a result of this complaint ("newly identified students") within the requisite 60-day time frame.
7. Direct the District to provide compensatory education services to D.H., R.P., and other

similarly situated students for each hour of each day that they were denied a FAPE.

- For D.H. and similarly situated students who were denied all access to education, direct the District to provide 5 hours per day of compensatory education for each day they were denied education.
  - For R.P. and similarly situated students who were denied appropriate homebound instruction, direct the District to provide 4 hours per day of compensatory education for each day they were denied appropriate homebound instruction.
8. Issue corrective action requiring the District to develop a sufficient procedure or protocol to ensure they are providing students residing at PSC and similar facilities with a FAPE.
9. Direct PDE to monitor the District to ensure they are providing students at PSC with a FAPE, including conducting timely evaluations and re-evaluations, engaging in progress monitoring, providing required services, among other things.
- We request that the Department issue a letter to all IDEA Parents<sup>7</sup> of students at PSC identified through this process apprising them in a language they understand of PDE's corrective action, award of compensatory education or their child's potential eligibility for compensatory education services due to the District's failure to provide a FAPE.
  - The Department shall investigate and evaluate all of the District's practices or procedures, or lack thereof, for ensuring that all students residing at PSC and similar facilities are being provided with a FAPE.
10. That PDE assist to develop a district improvement plan:
- With input from the Complainants herein, appoint a "Special Master" independent of the District to create a District created Department-approved improvement plan within 90 days of the Bureau of Special Education's decision in this matter to rectify the District's systemic failure to promptly identify and provide a FAPE to children at PSC and similar facilities. This person shall have the expertise and state authority to act in this role and to order and compel any district or state official as needed to ensure rigorous present and future compliance in this matter.
  - Designate a District administrative leader to oversee and implement this corrective action plan. This person shall have the authority to ensure compliance by District Principals and staff.
  - Together with the Special Master, the District, including the Office of Diverse Learners, classroom teachers, ESL teachers and Complainants herein, develop and effectively implement an Improvement Plan which shall include, at a minimum:
    - Communication from PDE to all principals and teachers across the District apprising them of PDE's corrective action and the importance of ensuring that all children residing at PSC and similar facilities are promptly identified and provided a FAPE in accordance with federal and state laws and new policies and procedures adopted by the District.

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<sup>7</sup> 34 C.F.R. Part 300.30.

- Development of a comprehensive monitoring and assessment system to ensure the timely identification and provision of a FAPE to students residing at PSC and similar facilities.

11. Three Year Monitoring of the District

- Direct the District to provide a narrative description of its improvement plan to the State, the Special Master, and Complainants herein within 30 days of issuing corrective action.
- Direct the District to collect, record, and submit data elements to the State, the Special Master, and Complainants herein on a quarterly basis over a three-year period to ensure compliance with legal obligations and accurately assess the effectiveness of the Plan, including:
  - A list of students residing at PSC and similar facilities;
  - Documents issued to these students, including PTEs, PTREs, IEPs, NOREPs, service logs, and progress monitoring documents.

12. PDE shall issue Guidance to all local educational agencies regarding the importance of timely identifying and providing a FAPE to students residing at facilities similar to PSC.

13. PDE shall provide resource and technical assistance to the District to ensure compliance with its obligations to promptly identify and provide a FAPE to students at PSC and similar facilities.

14. PDE shall revise its monitoring procedures to ensure that all students in PSC and similar facilities are promptly identified and provided a FAPE.

15. PDE shall assess and identify the District's need for additional state financial resources to enable the District to meet its obligations to students with disabilities. PDE, as the SEA for the District shall consider and if necessary expend state funds under Part B in accordance with 34 CFR § 300.162 (supplementation of State, local, and other Federal funds) to supplement not supplant the level of funding available to the District (including funds that are not under the direct control of the SEA or LEAs) to provide special education and related services to children with disabilities in the District.

16. Issue any other corrective action they believe is necessary to remedy these violations.

Thank you for your consideration of this systemic complaint.

Respectfully submitted,

*/s/ Rebecca Preuss*

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