



# DEPARTMENT OF EDUCATION

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## DELAWARE DEPARTMENT OF EDUCATION EXCEPTIONAL CHILDREN RESOURCES

### State Complaint Decision

DE SC #22-08

Date Issued: June 10, 2022

On April 11, 2022 REDACTED (Mother) on behalf of her daughter, REDACTED (Student), filed a complaint with the Delaware Department of Education (Department) against REDACTED and REDACTED. The complaint alleges REDACTED violated requirements of Part B of the Individuals with Disabilities in Education Act (IDEA) during the period of April 11, 2021, until April 11, 2022.<sup>1</sup> The complaint has been investigated as required by federal regulations at 34 C.F.R. §§300.151 to 300.153 and according to the Department's regulations at 14 DE Admin Code §§ 923.51.0 to 53.0

REDACTED did not provide a response in writing to the allegations or refute the claims. Upon receipt of the Student's Individualized Education Program (IEP), the Investigator noted that Student was a resident of REDACTED. As a result, DDOE added REDACTED as a party to the Complaint, revised and notified all parties on May 5, 2022, and received appropriate confirmation of receipt and signatures. REDACTED did not provide a formal response to the Complaint.

### COMPLAINT ALLEGATIONS

The Complaint alleges REDACTED violated Part B of the IDEA and corresponding state and federal regulations as follows:

- Due to Covid related staff shortages, technology difficulties, lack of hands-on instruction, reduced program schedules and exposure-related quarantines Student was negatively impacted by a lack of educational opportunities as a student in REDACTED at REDACTED.
- Student's status as a non-mask wearing student negated opportunities to participate in-person in REDACTED vocational program (REDACTED). Student's participation in

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<sup>1</sup> I In accordance with IDEA and corresponding state and federal regulations, the complaint must allege violations that occurred not more than one (1) year prior to the date the DDOE receives the complaint. *See*, 34 C.F.R. § 300.153(c); 14 DE Admin. Code § 923.53.2.4. In this case, the DDOE received the complaint on April 11, 2022. Therefore, the DDOE's findings address violations from April 11, 2021, to April 11, 2022.

REDACTED area of REDACTED was reduced from 2x/week for 4 hours in- person to 1x/week for 45 minutes virtual.

- Student has experienced regression due to the pandemic. REDACTED has made REDACTED concerns known to IEP team since prior to the timeline of this complaint. REDACTED requested an additional year of in-person education within the REDACTED and REDACTED. According to REDACTED the IEP team indicated there were not enough resources, coupled with the fact that Student’s age dictates Student will graduate in August 2022.

### FINDING OF FACTS

1. Student is a REDACTED -year-old student, residing in REDACTED (District 1). Student has attended REDACTED in REDACTED (District 2) since Student was 2 years old, as reported by REDACTED.
2. Student has an IEP classification of autism. Student is eligible to participate in a 12-month educational program.
3. Student’s last triennial evaluation was conducted in 2020. Specific to this complaint, the Psychologist noted in the Cognitive Aptitude section... “(Student’s) current performance was significantly lower when compared with REDACTED last two cognitive assessments with the Leiter International Performance Scale- Third Edition (Leiter 3) in 2017 and Leiter (Revised) in 2014.”
4. On March 27, 2020, DDOE issued a document entitled Further Guidance Related to COVID-19: IDEA, Part B Provision of FAPE. On July 9, 2020, DDOE issued a document entitled: A Successful Launch of the 2020-2021 School Year Recovery Efforts and the Provision of FAPE for Students with Disabilities during the Re-Opening of Schools from Covid-19. These documents addressed the provision of special education and related services during the COVID-19 pandemic. Specifically, the guidance addressed “unfinished learning” and encouraged local education agencies to proactively consider whether Recovery Services/Compensatory Education needed to be provided to students to address unfinished learning
5. Student participated in remote learning throughout 2020-21 school year, including through Summer of 2021. Technology and connectivity issues, resulted in reduced or missed remote educational or therapy sessions; reduced school schedules and Student behavioral changes at home occurred during this period of remote learning prior to April 11, 2021.
6. Prior Written Notice (PWN) dated February 17, 2021, included the following relevant information to this complaint:

- Related Services:

Service	Type	Frequency	Duration	Setting	Start	End Date
Speech/Language Pathology	Group	2 sessions/ week	30 minutes	Spec Ed	02/19/21	02/17/22
Physical Therapy	Consultive	1 time /month	15 minutes/month	Spec Ed	02/19/21	02/17/22

Psychological Services	Consultive	2 times/month	30 minutes	Spec Ed	02/19/21	02/17/22
Occupational Therapy	Consultive	2 times/week	30 minutes	Spec Ed	02/19/21	02/17/22
Speech/Language Pathology	Individual	1 time/month	20 minutes	Spec Ed	02/19/21	02/17/22
Speech/Language Pathology	Consultive	1 times/month	30 minutes	Spec Ed	02/19/21	02/17/22

- **Description of the Action the School district Proposes or Refuses to Take:**

...

- F. Parent requested an extra year of educational services after Student’s graduation due to lost time because of pandemic.
- G. The School District proposed that Student needs to complete a 30 day in-person trial at Networks. If REDACTED passes REDACTED in-person trial and is accepted to REDACTED, the IEP team will reconvene as needed to discuss adding a REDACTED goal.” ...

- **Explanation of Why the School District is Proposing or Refusing to Take Action**

...

- F) Per Delaware regulations students are entitled to educational services through the end of summer school in the year of their 21<sup>st</sup> birthday. Therefore, (Student) is entitled to educational services through the end of Brennen School summer school 2022. The School district proposed, per Delaware Department of Education, that upon return to in-school learning for all students, all students will be assessed for any needed recovery to determine if they are needed and in which area (s) of need. The Department of Education and the school district recognize that some students will need opportunities for recovery educational services due to possible regression during the COVID-19 pandemic school closing and remote/hybrid learning.
- G) (Student) is currently attending Networks virtually. When (Student) begins in-person learning, REDACTED 30-day trial may begin at REDACTED.”...

- **Description of any other choices the IEP Team Considered and the Reasons Why Those Choices Were Rejected:**

- The IEP team considered implementing the IEP as written, but consistent in-person learning is currently not available due to COVID-19 school closure. Instead, the services outlined in (Student)’s IEP will be (sic) adapted in a manner consistent with remote/hybrid learning. This includes weekly practice and instruction using live sessions, recorded sessions, printed material, parent coaching and parent consult. In addition, some elements of the IEP (e.g., community-based activities, implementation of goals related to peer interactions, goals requiring hands - on instruction,

etc.) may be modified or deferred until classroom based learning is considered safe for all students.”...

7. On February 18, 2021, an IEP meeting was held via Zoom, with Supervisor 1 (District 1) in attendance. In the Transition Section of the IEP document, it is stated “(Student) is entitled to educational services through the end of REDACTED summer school 2022.” Parent requested form for Consent to Release Information to Division of Vocational Rehabilitation and Division of Developmental Disabilities Services,

8. On May 14, 2021, the Assistant Principal at REDACTED sent a letter entitled “2021 Extended School Year Programs” to Parent. The letter stated...

“...changes to our typical summer processes and programming. On top of the COVID protocols and mitigating strategies, we are faced with a staffing shortage...”

... Given the number of summer instructional days, the IEP team will address as many of your child’s goals as are possible this session. Please be aware that service times may be reduced for related services.”

9. Parent had a choice for Student to participate in Summer School 2021 in-person or remotely. Parent chose the remote option. Student had a different teacher for Summer School than Classroom Teacher at REDACTED School. REDACTED Principal acknowledged severe staff shortages impacted Summer School 2021. REDACTED Principal requested assistance from District 2 Director of Student Services, who attempted to assist in recruitment. However, District 2 did not provide any “incentives” for recruiting summer staff, as has been done in other districts statewide.

10. On May 14, 2021, a second letter from REDACTED 2021 Summer Program Coordinators was sent to Mother. The letter indicated a Summer Program start date of June 29, 2021. As a “REDACTED Glasgow/Remote” student, Student was assigned to a Cohort that would meet Wednesday and Thursday. Letter stated student day for REDACTED would be 7:15am -1:45pm. However, the schedule reflects a start time of 9:00 am. Student’s Cohort would attend Summer School for 9 days on the following days: “6/30, 7/1, 7/14, 7/15, 7/21, 7/22 7/28, 7/29, 8/4; No School (Students) included 7/2, 7/5-7/9, 7/16, 7/23, 7/30, 8/6.”

11. A document entitled REDACTED Schedule – Virtual Summer verified the Student’s Summer School 2021 schedule as follows. Student attended on this schedule:

- One half hour of 1:1 teacher instruction 2 days a week
- One half hour of Speech Therapy / 2 days a week for

- Two and a half hours of independent work /2 days per week. This included web-based programs. Student performance was reported either in-person by caregiver or online within the software.
  - Two hours of vocational training per week
  - Thirty minutes of Music Therapy
12. Summer School Teacher instructed on modified and targeted IEP goals, based on the reduced schedule.
  13. Summer progress data from online independent work was not available for review by Investigator.
  14. Classroom Teacher stated progress was assessed when Student returned to in-person learning in the fall to determine present levels of performance to continue instruction, etc.
  15. REDACTED Principal stated REDACTED Program was adequately staffed for Summer School and offered to provide in-person services for REDACTED students, to help relieve program schedule reductions. REDACTED did not choose to access the opportunity for Student.
  16. On or after August 20, 2021, Parent provided District 2 with a note from Student's doctor stating that Student could not reliably wear a mask.
  17. On September 8, 2021, Student began in-person learning full time at REDACTED. Assistant Principal and Classroom Teacher reported Student self-selected to wear a mask at school.
  18. Student began attending 2 half-days per week at REDACTED (REDACTED) because Student chose to wear a mask.
  19. On September 17, 2021, REDACTED observed Student exiting school building with a mask on.
  20. On September 29, 2021, Parents submitted to REDACTED Principal REDACTED a second, more detailed doctor's note stating that Student could not wear a mask because it could cause sensory overload, feelings of panic and extreme anxiety.
  21. In response to the second doctor's note, Student's classroom environment and schedule were altered, to allow 6 ft social distancing within the classroom in a manner that could still provide adequate participation in class activities and instruction.
  22. Student's participation on-site at REDACTED stopped because REDACTED required masking of all students participating in the program, due to limited space in different areas, proximity of students and staff for instructional purposes and tasks completion. Student's participation in-person at REDACTED on a trial basis

(30 days, 10 consecutive days of data for determination) transitioned to virtual learning. Student had been attending in-person at REDACTED, 2 days per week from 10:40 am- 1:45 pm. Virtual class was two days per week for 45 minutes – 1 hour of instruction and observation and no hands-on instruction. Classroom Teacher and REDACTED Assistant Principal stated that Student’s vocational goals continued to be addressed by Classroom Teacher, despite the change in access to REDACTED. Student continued to work in the classroom, as well as jobsites in the school and community that could be accessed by Student without a mask. Student remained on this schedule until February 22, 2022.

23. Student’s REDACTED REDACTED assignment was reduced to 1x/week for 45 minute-1hour remote instruction and observation. However, no hands-on instruction in this vocational area was available.
24. On December 14, 2021, Student was quarantined due to exposure to COVID at school.
25. Student was exposed again to COVID during holiday break, which ran from January 5, 2022, to January 17, 2022.
26. Student received a schoolwork packet that included written materials and online activities.
27. On January 18, 2022, Student returned to in-person school.
28. On February 15, 2022, Student’s annual IEP meeting was held with District 1 representative and District 2 Director of Special Services. The PWN states:

“... ”

**2. Explanation of Why the School District is Proposing or Refusing to Take Action**

“... ”

I) Per Delaware regulations students are entitled to educational services at the end of summer school in the year of their 21<sup>st</sup> birthday. Therefore, (Student) is entitled to educational services until the end of REDACTED summer school 2022.

J) The school team will work with the family to identify vocational opportunities that (Student) may be interested in exploring (e.g. REDACTED, community-based vocational opportunities). (Student) will continue to receive in school vocational opportunities across a variety of school staff and settings.

**4. Description of any other choices the IEP Team Considered and the Reasons Why Those Choices Were Rejected:**

A) ...parent has considered and rejected the IEP in its entirety and has indicated REDACTED will not be signing the IEP documents as

REDACTED is not in agreement with the related services changes and (Student's) indicated exit date (8/4/2022).

...

C) the parent requested an additional year of schooling past (Student's) graduation year (2022). The IEP team considered and rejected this request and the decision to extend past student's eligibility for special education and related services is a state law and only the state legislature can make any changes to the end of entitlement. "...

29. On March 7, 2022, Student returned to REDACTED because the mask mandate at REDACTED was lifted. Student began attending REDACTED two days a week from 10:40 am -1:45 pm.

30. On March 29, 2022, Marking Period 3 Progress Report indicates Student "Not Making Satisfactory Progress" ...

- Math Goal; Graphing; Benchmark 1.
- Vocational goal: Time Management and Independent Choices; Benchmark 1.

31. On April 11, 2022, an IEP meeting was held at the request of REDACTED. The PWN indicates the IEP team included the current Supervisor of Student Services of District 1 and the current Director of Special Services of District 2. The PWN also noted:

### **1. Description of Action the School Proposes or Refuses to Take:**

"... C) The district refuses the parents request to provide (Student) with compensatory services in the form of an additional year of school.

D) The School District proposes that (Student) continues to make progress and continues to receive a Free and Appropriate Education (FAPE) based on quarterly reviewed documents (progress reports) as well as continued staff input and observation ahead of the end of the each marking period.

### **2. Explanation of Why the School District is Proposing or Refusing to Take Action:**

"...

C) Per Delaware regulation, students are entitled to educational services through the end of summer school in the year of their 21<sup>st</sup> birthday. Therefore, (Student) is entitled to educational services through the end of Brennen School summer school 2022.

D) The School district agrees that (Student) continues to make progress on REDACTED IEP goals with the supports and services in place as listed on REDACTED IEP of 2/15/2022."



#### **4. Description of Any Other choices the IEP Team Considered and the Reasons why those Choices Were Rejected:**

A) The REDACTED requested an additional year of schooling past (Student's) graduation year (August 2022). The school IEP team considered and rejected this request as the decision to extend past the student's eligibility for special education and related services is a state law and only the state legislature can make any changes to the ending of entitlement.

32. On May 17, 2022, Student began attending REDACTED 3 days/week 10:40am - 1:45pm.

### **CONCLUSIONS OF LAW**

#### **1. District 2 denied Student a FAPE**

The IDEA and implementing state and federal regulations require school districts to provide a free appropriate public education (FAPE) to students with disabilities. See, 20 U.S.C. § 1401(9): 34 C.F.R. § 300.101(a): 14 DE Admin Code § 923.1.2. FAPE is special education that is specialty designed instruction, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions, and related services, as defined by the DDOE rules and regulations approved by the State Board of Education, and as may be required to assist a child with a disability to benefit from an education that:

- (a) Is provided at public expense, under public supervision and direction and without charge in the public school system;
- (b) Meets the standards of the Delaware Department of Education;
- (c) Includes elementary, secondary or vocational education in the State;
- (d) Is individualized to meet the unique needs of the child with a disability;
- (e) Provides significant learning to the child with a disability; and
- (f) Confers meaningful benefit on the child with a disability that is gauged to the child with a disability potential.

14 Del. C. § 3101(5).

On July 9, 2020, the DDOE provided districts, charter schools and families in Delaware with guidance on serving Delaware students with disabilities considering the extraordinary circumstances imposed by the COVID-19 pandemic and resulting public health crisis. [A Successful Launch of the 2020-2021 School Year Recovery Efforts and the Provision of FAPE for Students with Disabilities during the Re-Opening of Schools from Covid-19 \(Jul. 9, 2020\), https://www.doe.k12.de.us/cms/lib/DE01922744/Centricity/Domain/600/7-9-20%20FINAL%20Successful%20Launch%20to%20the%20New%20School%20Year.pdf](https://www.doe.k12.de.us/cms/lib/DE01922744/Centricity/Domain/600/7-9-20%20FINAL%20Successful%20Launch%20to%20the%20New%20School%20Year.pdf)

This DDOE guidance document affirmed that districts' obligations under the IDEA, federal and state regulations were not excused due to the pandemic, it further explained "unfinished learning" that resulted and how best to provide for it as follows:



## “...Unfinished Learning

“It is anticipated that all students, both general and special education, will return to school with some level of unfinished learning. Unfinished learning can be described as portions of education missed by individual students due to school closure. Ongoing disruptions mean students will struggle with content and skills they’ve been introduced to, but not yet had the chance to master at grade level. (Achievement Network). A student with unfinished learning has not necessarily been denied a FAPE. However, it is vital for LEAs to act proactively to address unfinished learning in order to avoid a future denial of FAPE.

When school is back in session, LEAs will need to convene IEP teams to collaborate with families and students to assess individual needs, progress, and/or loss of skills and ultimately determine if each IEP should be revised to reflect appropriate changes to services and supports. The sudden and unexpected shift to remote learning at the end of the 2019-2020 school year may have impacted some of the special education and related services provided to students with disabilities and, as a result, may require a revision to the IEP to ensure the student continues to access the general education curriculum and receives FAPE.” ...

Student suffered from unfinished learning as a result of the COVID-19 pandemic as evidenced by Student’s “significantly lower scores” in Cognitive Aptitude on Leiter 3 in 2020, as compared to 2017 (Leiter-3) and 2014 (Leiter-Revised); a significantly reduced Summer School 2021 schedule (due to COVID-related staff shortages) that required modified instruction specific to targeted IEP goals, reduced instructional and therapy services and Student’s extended time out of school due to quarantine (5 weeks). No IEP meeting was convened upon return to in-person learning to assess and address Student’s “unfinished learning” As such **Student was denied a FAPE.**

## **2.Failure to provide Parents with a PWN when Student’s Summer School schedule was changed.**

Delaware regulations implementing the IDEA require local education agencies to send a PWN to parents whenever a local education agency “proposes to initiate or change the identification, evaluation or educational placement of the child, or the provision of a FAPE to the child.” 14 *DE Admin. C. 926-3.1*. PWN’s must contain all the following information required by regulation:

- 3.2.1 A *written* description of the action proposed or refused by the agency; and
- 3.2.2 A *written* explanation of why the agency proposes or refuses to take action; and
- 3.2.3 A *written* description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and
- 3.2.4 A *written* statement that the parents of a child with a disability have protection under the procedural safeguards of *state and federal* regulations and, if this notice is not an initial referral for evaluation, how a copy of a description of the procedural safeguards can be obtained; and
- 3.2.5 Sources for parents to contact to obtain assistance in understanding the provisions of these regulations, *including contact information for parent assistance programs, legal assistance programs, and the Delaware State Bar Association*; and
- 3.2.6 A *written* description of any other options the IEP Team considered and the reasons why those options were rejected; and

3.2.7 A written description of other factors which are relevant to the agency’s proposal or refusal; and

3.2.8 A written summary of procedural safeguards must be available to the parents under state and federal law and regulations.

14 DE Admin. C. 926-3.2.

The May 14, 2021, letter sent to all parents about REDACTED Summer School did not contain all the information a PWN requires. Parents were not provided a PWN when District 2 proposed to change the provision of FAPE for Student. Failure to provide a PWN constitutes a procedural violation of the IDEA. *See Jalen Z. v. Sch. Dist. Of Philadelphia*, 104 F.Supp. 3d 660, 671 (E.D. Pa. 2015). [A] procedural violation of the IDEA is not a *per se* denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.” *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66–67 (3d Cir. 2010) (internal citations omitted). Substantive harm may be found where a procedural violation “results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits.” *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012) (internal citations omitted). I find that District 2’s failure to provide Parent with a PWN did not result in a loss of education opportunity, seriously deprive parents of their participation rights or cause a deprivation of education benefits in this case, **therefore I find no denial of FAPE.**

### **Corrective Action**

To address the violations noted in this Decision, the Department directs REDACTED, REDACTED and REDACTED to take the following corrective actions:

#### **Student Level Corrective Action**

1. The IEP team will convene an IEP meeting with LEA (District 1) in attendance to address Student’s “unfinished learning” as a result of COVID-related staff shortages; extended quarantine periods with reduced learning and related services; reduced access to “hands-on instruction” in vocational settings due to non-mask wearing status of Student per doctor’s note. Team should assess the Student and utilize the data to determine “unfinished learning” in goals in which Student did not make adequate progress (Math, Vocational) and areas potentially requiring “hands-on” instruction (e.g. therapies, vocational, missed instruction due to reduced summer schedule) and determine a plan to meet the “unfinished learning” needs of Student. REDACTED should identify an adult service agency to attend the IEP meeting on Student’s behalf. The final plan providing the foregoing shall be submitted to the Director of Exceptional Children Resources on or before August 31, 2022.

#### **School Level Corrective Action**

1. District 1, District 2 and REDACTED shall review the guidance documents entitled Further Guidance Related to COVID-19: IDEA, Part B Provision of FAPE and A Successful Launch of the 2020-2021 School Year Recovery Efforts and the Provision of FAPE for Students with Disabilities during the Re-Opening of Schools from Covid-19, related to Covid related impact

on “unfinished learning.” District 1, District 2 and REDACTED shall provide professional development to all special education staff and administrators who work for District 1, District 2 and REDACTED. The related documentation (sign in sheet, agenda, copy of handouts and/or PowerPoint, etc.) shall be provided to the Department’s Director of Exceptional Children Resource Workgroup by August 31, 2022.

### **District Level Corrective Action**

1. District 1, District 2 and REDACTED shall review the guidance documents entitled Further Guidance Related to COVID-19: IDEA, Part B Provision of FAPE and A Successful Launch of the 2020-2021 School Year Recovery Efforts and the Provision of FAPE for Students with Disabilities during the Re-Opening of Schools from Covid-19, related to Covid related impact on “unfinished learning”. District 1, District 2 and REDACTED shall provide professional development to all special education staff and administrators who work for District 1, District 2 and REDACTED. The related documentation (sign in sheet, agenda, copy of handouts and/or PowerPoint, etc.) shall be provided to the Department’s Director of Exceptional Children Resource Workgroup by August 31, 2022.

1. Further Guidance Related to COVID-19: IDEA, Part B Provision of FAPE March 27, 2020

Submitted by:  
**REDACTED**  
Assigned Investigator