

**NEW JERSEY DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION PROGRAMS
COMPLAINT FORM**

*Date: April 19, 2022

To: **Kimberly Murray, Director
Office of Special Education
NJ Department of Education
P.O. Box 500
Trenton, NJ 08625-0500**

Beginning December 17, 2018, the Office of Special Education (OSE) will electronically accept requests for special education complaint investigations using an OSE-maintained and monitored email address. The newly created email address will be used exclusively for the submission of requests for special education complaint investigations and will not be used to communicate with the parties or their representatives. Completed requests for complaint investigations must be saved as Adobe PDF documents and emailed to specialeducationcomplaints@doe.nj.gov.

*Relationship to Student(s): (Check One)

 Parent/Guardian Attorney Advocate Other: _____

Name: Elizabeth Athos, Esq.

Address: Education Law Center, 60 Park Place, Suite 300, Newark, NJ 07102

(In the case of a homeless child please provide available contact information)

Phone: (973) 624-1815 ext. 20 Fax: (973) 624-7339 Email: eathos@edlawcenter.org

Provide the name of the student or specify the group of students affected by the alleged violation(s):

Students with disabilities throughout New Jersey whose parents or guardians attempt to vindicate their right to a free appropriate public education using the State's complaint investigation system.

School where the alleged violation(s) occurred: all NJ schools affected

*District: all districts affected *County: all counties affected

The alleged violation has been committed by the State Educational Agency – New Jersey Department of Education (NJDOE), including its Office of Special Education (OSE).

* Items marked with an asterisk are not required; however, providing the requested information will assist in expediting your request.

*1. Please check which statement applies:

I am currently involved in, or have recently requested, a due process hearing. I have enclosed a copy of the request.

I am considering filing for a due process hearing. I will send a copy of the request.

I am not planning on filing for a due process hearing.

Note: Any issues contained in a request for a complaint investigation that are also the subject of a due process hearing will be set aside until the conclusion of the hearing. If the Administrative Law Judge makes a ruling on the issue(s), that ruling is binding.

*2. Briefly state the specific violation(s) of **special education law or regulation** that you believe occurred. If you choose to attach additional information or documentation, **you must nevertheless summarize the alleged violations**, as you see them.

Note: URLs for documents cited in Sections 2 and 5 of this Complaint have been provided, where available, under “Relevant federal and state documents” below.

Incorrect Scope of State Complaint Investigation Procedure: Under federal law, State complaint investigation can be used to address any violation of IDEA Part B - including failure to provide free appropriate public education (FAPE) - by a public agency or to educate the student in the least restrictive environment (LRE). Its scope is in fact broader than that of due process. *Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B)*, United States Department of Education (US ED), Office of Special Education and Rehabilitation Services (July 23, 2013) (hereinafter “IDEA Questions and Answers”) (Q&A B-2). On March 9, 2012, US ED found NJDOE noncompliant in this area and ordered NJDOE to expand its State complaint investigation procedure to address substantive disagreements regarding a particular child’s educational program, in accordance with 34 C.F.R. §§300.151 through 153. On May 8, 2012, Peggy McDonald, then-Director of NJDOE’s OSE, notified US ED that NJDOE had taken the necessary steps to ensure that the State investigated complaints including those that involved disagreements regarding the child’s educational placement.

Ten years after US ED’s finding of noncompliance and NJDOE’s assertion that necessary corrective action had been taken, NJDOE’s website still includes a “Complaint Resolution Procedures for Special Education Pamphlet” stating that “[t]he scope of [a State complaint] investigation is limited to whether the education agency followed the correct procedures, involved the required persons and made a determination in a timely manner with procedural safeguards.” (This document is found on the website by clicking on “Special Education,” “Legal Protections and Responsibilities” and “Complaint Investigation.”) In its July 1, 2020 Complaint Resolution Manual, NJDOE concentrates on how to word issues to emphasize procedures and includes no examples of how to word substantive issues such as investigating the appropriateness of a student’s IEP, placement, services or eligibility determination. In its 2019 Procedural Rights in Special Education handbook (PRISE),

NJDOE does not tell parents that it will investigate both procedural and substantive violations of IDEA Part B.

Regrettably, as illustrated also in recent complaint investigation reports, NJDOE in fact still fails to address substantive violations through complaint investigation.

The relevant statutes and regulations with regard to this issue include the following:

20 U.S.C. §1411(e)(2)(B)(i); 20 U.S.C. §1412; 20 U.S.C. §1413; 20 U.S.C. §1415 (f)(3)(F); 34 C.F.R. §300.149; 34 C.F.R. §300.150; 34 C.F.R. §§300.151 through 153; 34 C.F.R. §300.504(c); 34 C.F.R. §300.509; 34 C.F.R. §300.600; N.J.A.C. 6A:14-9.2; N.J.A.C. 6A:14-2.3(g)(7).

Relevant federal and state documents:

Letter of March 9, 2012 from federal OSEP to NJDOE (including Enclosure); NJDOE response dated May 8, 2012 (both letters and enclosure are submitted by facsimile transmission in support of this complaint form)

Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B), United States Department of Education, Office of Special Education and Rehabilitation Services (July 23, 2013), <https://sites.ed.gov/idea/idea-files/osep-memo-and-qa-on-dispute-resolution/>

Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final regulations, Federal Register/ Vol. 71, No. 156 (August 14, 2006), <https://www.govinfo.gov/content/pkg/FR-2006-08-14/pdf/06-6656.pdf>, page 46540

Complaint Resolution Procedures for Special Education Pamphlet, <https://www.nj.gov/education/specialed/complaint/pamphlet.pdf>

NJDOE Complaint Resolution Manual (reviewed/update July 1, 2020)

Letter to Mark McWilliams (July 16, 2015), <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/14-016945r-mi-mcwilliams-bip-6-19-15.pdf>

Parental Rights in Special Education (2019), [https://www.nj.gov/education/specialed/form/prise/RevisedParentalRights\(PRISE\).pdf](https://www.nj.gov/education/specialed/form/prise/RevisedParentalRights(PRISE).pdf)

NJDOE Complaint Investigation Reports: C2021-6468 (Clifton School Dist., Sept. 22, 2021); C2021-6392 (Clifton Sch. Dist., Feb. 22, 2021); C2021-6359 (Old Bridge Sch. Dist., Sept. 29, 2020); C2021-6372 (Willingboro Sch. Dist., Dec. 7, 2020); C2021-6397 (Wanaque Sch. Dist., April 4, 2021); C2021-6456 (Tewksbury Sch. Dist., July 19, 2021); C2022-6480 (Burlington Twp. Sch. Dist. Oct. 25, 2021); C2022-6479 (Burlington Twp.

Sch. Dist. Oct. 25, 2021); C2022-6498 (Freehold Regional High School Dist. Dec. 20, 2021); C2022-6488 (Middletown Twp. Sch. Dist. Nov. 15, 2021)

3. **Specify the period of time or dates when the alleged violation(s) occurred.** At least as far back as 2013 and continuing through the present.

Note: The complainant must allege a violation that occurred not more than one year prior to the date that the complaint is received.

4. **Is/Are the alleged violation(s) continuing at present?** Yes No

5. **State the relevant facts**, including any claim that the district has failed to provide services required by the IEP of a student with disabilities. If you are claiming that the district has failed to implement the IEP, *please include a copy of the entire IEP*. (Attach additional pages, if necessary. If you have other written documentation from the school that you believe would assist in verifying the violation, please submit them with this request).

Federal Standards for State Complaint Investigation

Under federal law, State complaint investigations must substantively address claims that a school district failed to provide FAPE to a given student or group of students, failed to educate the student in the LRE, or did not correctly decide an eligibility decision. The scope of complaint investigation overlaps that of due process and is in fact broader than that of due process. IDEA Questions and Answers (Q&A B-2).

“[A]n SEA may not refuse to resolve a State complaint alleging a denial of FAPE. This is true even if the SEA believes that the parent should file a due process complaint against the LEA or that the due process hearing process is a more appropriate mechanism to resolve such disputes.” IDEA Questions and Answers (Q&A B-7).

In addressing State complaints asserting individual FAPE violations, SEAs must examine “not only whether the public agency has followed the required Part B procedures to reach its determination” but also whether the school district’s determinations were reasonable given the child’s specific abilities and needs and appropriate for the student in question. IDEA Questions and Answers (Q&A B-8).

In comments made in connection with the issuance of final regulations under IDEA in 2006, US ED clarified that “[w]e believe that an SEA, in resolving a complaint challenging the appropriateness of a child’s educational program or services or the provision of FAPE, should not only determine whether the public agency has followed the required procedures to reach that determination, but also whether the public agency has reached a decision that is consistent with the requirements in Part B of the Act in light of the individual child’s abilities and needs.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final regulations*, Federal Register/ Vol. 71, No. 156 (August 14, 2006), page 46601.

In response to a letter of inquiry suggesting a State could limit its complaint investigation review to whether a behavior intervention plan (BIP) was actually provided and not to

whether the BIP was appropriate, US ED's Office of Special Education Programs (OSEP) responded that the State "is incorrectly applying the State complaint procedures...by not resolving complaints alleging that BIPs that are included in IEPs or developed as part of a manifestation determination were inappropriate." *Letter to Mark McWilliams* (July 16, 2015) (SEA must consider appropriateness of BIPs).

Underscoring the substantive nature of the SEA's complaint investigation responsibilities is the fact that compensatory services or monetary reimbursement may be awarded by the SEA as a remedy for denial of appropriate services to the child. 34 C.F.R. §300.151(b).

Corrective Action and NJDOE Response

On March 9, 2012, federal OSEP notified NJDOE of its noncompliance in the area of State complaint investigations and ordered corrective action to ensure that "the State investigates complaints in accordance with 34 C.F.R. §§300.151 through 153, including those that involve disagreements regarding the child's educational placement." Notably, OSEP, in an Enclosure to the March 9 letter, clarified that "[t]he SEA, in resolving a complaint challenging the appropriateness of a child's educational program or services or the provision of a free appropriate public education should determine whether the public agency has followed the required procedures to reach that determination and also whether the public agency has reached a decision that is consistent with the requirements in Part B of the *IDEA in light of the individual child's abilities and needs*" (emphasis added).

NJDOE replied to federal OSEP on May 8, 2012 with a letter asserting that NJDOE had taken the necessary steps to ensure the State investigated complaints including those that involved disagreements regarding the child's educational placement. (The March 9, 2012 letter and Enclosure, and the May 8, 2012 response are submitted in support of this Complaint via facsimile transmission as directed on NJDOE's website).

Continuing Noncompliance by NJDOE

NJDOE's assertion of compliance with federal OSEP's directive is belied by the facts. NJDOE's website includes only one document specific to complaint investigation, a document labeled "Complaint Resolution Procedures for Special Education Pamphlet." The document includes the following passage directly contradicting federal OSEP's 2012 order: "The scope of an investigation is limited to whether the education agency followed the correct procedures, involved the required persons and made a determination in a timely manner with procedural safeguards." To this date, ten years after OSEP's directive, there is nothing on NJDOE's website, in its 2019 PRISE, or in its state regulations that says that NJDOE will investigate and make findings with respect to complaints alleging both procedural and substantive violations of IDEA.

A Complaint Resolution Manual (reviewed/update July 1, 2020) issued by NJDOE for use by investigators moreover fails to tell investigators that they must investigate the appropriateness of a student's IEP or placement or of the particular special education and related services provided to the student; the Manual instead concentrates on how to word issues to emphasize procedures and implementation of IEPs.

These errors and omissions are compounded by the fact that NJDOE's 2019 PRISE does not provide a full explanation in understandable language of "[t]he difference between the due process complaint and the State complaint procedures, including ... what issues may be raised." 34 C.F.R. §300.504(c)(5)(iii). The 2019 PRISE also states that personnel matters will not be investigated without clarifying that parents may raise concerns about staff qualifications in State complaints. See 20 U.S.C. §1412(a)(14)(E).

Not only do NJDOE's documents regarding complaint investigations dissuade parents from using this process in cases involving FAPE and fail to provide proper guidance to investigators, our review of complaint investigation reports (obtained through Open Public Record Act (OPRA) requests) demonstrates that NJDOE in fact continues to limit the scope of its investigations to whether a district followed the proper procedures. A recent report involving the Clifton School District, C2021-6468 (Sept. 22, 2021), is illustrative. In this complaint, the parent asserted that the student, who was placed in an approved private school for students with disabilities, was not in the LRE and should be returned to the public school setting rather than having to "earn a place in the least restrictive environment." The parent also claimed that the student was denied an individual behavior plan and differentiated instruction in the out-of-district setting and lacked appropriate activities to transition the student to an in-district placement.

In addressing the parent's LRE claim, NJDOE framed the issue in purely procedural terms, specifically, "whether the district followed proper procedures to develop the Individualized Education Program (IEP) of a student with disabilities with respect to consideration of placement in the least restrictive environment." Having framed the issue as such, NJDOE failed to address the parent's substantive LRE claim. Even assuming all the proper procedures were followed, and the student made progress in the private school, a correct substantive LRE analysis required NJDOE to determine whether the academic and behavior supports necessary for the student to receive an appropriate education could not be provided in the less restrictive environment of the student's district of residence or another nearby public school. NJDOE did not conduct this substantive analysis.

As for the parent's claim that the student needed an individual behavior plan rather than the school-wide behavior plan offered by the approved private school, NJDOE also failed to decide whether the school-wide plan was appropriate for the student. Evidence was introduced that there were several significant behavioral incidents between October 20, 2020 and May 5, 2021, but, without any specifics, the district claimed the school-wide plan was appropriate. However, as the parent expressed concerns about the school-wide plan and said that an individual behavior plan was needed, it was NJDOE's responsibility to investigate and make a determination as to whether the school-wide plan was appropriate for the student and an individual plan was not needed. It failed to do this.

NJDOE's continuing failure to investigate parent claims concerning the appropriateness of their child's IEP or special education and related services was demonstrated in its response to complaints arising out of school closure during the COVID-19 pandemic. Our OPRA requests revealed at least three complaint investigation reports in which the families alleged that the student was not doing well with virtual instruction and

requested changes. Instead of making an independent determination as to whether virtual instruction was appropriate for the individual student, NJDOE ruled out ever investigating the appropriateness of virtual instruction for individual students, saying in one report:

“Without an individual assessment of the student’s progress, which is beyond the scope of this investigation, conclusions cannot be drawn about the relative efficacy of the student’s programming or the student’s ability to benefit from the delivery of special education and related services in a remote setting.”

See C2021-6392 Clifton Sch. Dist. (Feb. 22, 2021). See also C2021-6359 Old Bridge Sch. Dist. (Sept. 29, 2020); C2021-6372 Willingboro Sch. Dist. (Dec. 7, 2020).

NJDOE’s most recent response to our OPRA requests shows that it is continuing to focus on whether districts followed procedural requirements and failing to reach conclusions with regard to parents’ substantive allegations, as shown in the following reports:

C2021-6397 Wanaque School District (April 20, 2021) (parent alleged that physical and occupational therapy provided through virtual model was not effective, but NJDOE phrased issue only as “whether the school district implemented the IEP of a student with disabilities”). In its conclusion to the Wanaque report, NJDOE found that physical and occupational therapy that was provided virtually “met the requirements of the student’s IEP and therefore, the district was compliant.” NJDOE did not address the parent’s allegation that the virtual model was not effective.

C2021-6456 Tewksbury School District (July 19, 2021) (parent alleged that district improperly determined student was not in need of special education and related services by “failing to utilize functional data, including, ‘many areas where progress monitoring, assessment and the district’s own evaluation show [the student] years behind in areas related to a specific learning disability’”). In accordance with the emphasis in its July 2020 Complaint Resolution Manual on compliance with procedural requirements, NJDOE phrased the issue only as “[w]hether the district followed proper procedures for the initial evaluation of a student with a suspected disability.” In its conclusion, NJDOE found “that with respect to the procedures related to the December 1, 2020 eligibility determination, the district is determined compliant, and no further action is required.” NJDOE did not address the parent’s substantive allegation that the district improperly determined the student was not in need of special education and related services. Instead, in a footnote, NJDOE said, “To the extent the complainants contend the documentation is an incomplete assessment of the student, the complainants could have filed a request for mediation and/or for a due process hearing.”

C2022-6480 Burlington Township School District (Oct. 25, 2021) (parent alleged that student should be placed in pull-out resource room for Science and Social Studies rather than in general education class and needed assistive technology to adjust text to student’s appropriate reading level). In line with its Complaint Resolution Manual, NJDOE described the issue only in terms of whether the district “followed proper procedures” in developing the IEP. Regarding assistive technology, NJDOE found that the district was compliant because it followed proper procedures with respect to the

consideration of the student's assistive technology needs. As to pull-out resource room for Science and Social Studies, the district was found noncompliant because it appeared to have a policy prohibiting consideration of this form of instruction for middle school students, in violation of special education regulations. NJDOE failed to address the parent's substantive allegations with respect to whether assistive technology and/or pull-out resource were needed in order for the student to receive a FAPE.

C2022-6479 Burlington Township School District (Oct. 25, 2021) (parent alleged that district did not sufficiently address student's behavioral needs; student was engaging in certain behaviors due to frustration from academic pressures that were not being appropriately addressed and did not understand expectations under the current behavioral intervention plan (BIP)). Again, NJDOE described the issue only in terms of whether the district followed proper procedures to develop the student's IEP with respect to behavioral needs. In its conclusion, NJDOE found the district compliant because it had "documented substantial strategies to address the student's behavior needs, including positive behavioral interventions and support." NJDOE did not address the appropriateness of the BIP for the student.

C2022-6498 Freehold Regional High School District (Dec. 20, 2021) (fourth issue raised by parent concerned 2021-2022 school during which student was educated through commercial computer-based program, Educere). The parent asserted that the Educere program did not include any accommodations/modifications required by the student's IEP and that the student did not have any special educators providing instruction. According to the parent, the student's IEP should have addressed the appropriate setting for her child, and she had to hire tutors to assist the student with accessing the Educere program. NJDOE limited its investigation to "whether the district board of education followed proper procedures to provide a free appropriate public education consistent with the student's IEP during the period of home instruction in the 2021-2022 school year." In its conclusion, NJDOE found that the district was noncompliant because it did not convene an IEP meeting within 30 days of the commencement of medical home instruction. NJDOE did not address the parent's substantive allegations concerning the appropriateness of the Educere program for her child.

C2022-6488 Middletown Township School District (Nov. 15, 2021) (parent alleged that the district was offering related services like occupational therapy during the student's lunch which, among other things, meant that the student couldn't eat lunch with peers and if the student wanted to eat lunch, had to bring their lunch to occupational therapy sessions). The parent requested that related services be offered outside of the regular school day. The director of special services responded by saying, "[we] would not be providing services outside of the school day." NJDOE formulated the issue only as "whether the district fully implemented the IEP of a student with a disability with respect to the provision of speech-language and occupational therapy services." NJDOE found the district noncompliant because the implementation of related services was delayed at the beginning of the school year, but it did not address whether providing related services during a student's lunch period was appropriate or would interfere with the student's education in the LRE.

6. Please describe how the issue(s) could be resolved. Attach additional pages as necessary.

As noted in comments to IDEA’s federal regulations, the SEA is obligated to “resolve any complaint against the SEA pursuant to the SEA’s adopted State complaint procedures.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final regulations, Federal Register/ Vol. 71, No. 156 (August 14, 2006), page 46602.* In so doing, the SEA may “use an outside party” to resolve the complaint and we ask that OSE do so for this complaint. Id.

This issue can be resolved as follows:

The Complaint Resolution Procedures for Special Education Pamphlet on NJDOE’s website, the 2019 PRISE, NJDOE’s July 2020 Complaint Resolution Manual, and all other documents issued by NJDOE which refer to complaint investigations, must be revised to: (i) remove all language either stating or suggesting that complaint investigations are limited to violations of procedural requirements; (ii) add language clarifying that complaint investigations may be initiated regarding any violation of IDEA and/or the New Jersey special education statute or regulations, including any issue related to the identification, evaluation, or educational placement of a student, or the provision of a FAPE in the LRE; (iii) state that in resolving complaints, NJDOE will investigate whether the determination reached by the school district or other local educational agency (LEA) was reasonable and appropriate in light of the individual child’s abilities and needs pursuant to IDEA Part B; (iv) note that complaint investigations may result in an award of compensatory services or monetary reimbursement as a remedy for denial of appropriate services to the child; and (v) comply with 34 C.F.R. §300.504(c)(5)(iii) by providing a full explanation of the difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures.

In addition:

- (a) A Broadcast memorandum must be issued notifying the following recipients of the above revisions related to the scope of complaint investigations: Chief School Administrators, Charter School and Renaissance School Project Leads, Administrators of Approved Private Schools for Students with Disabilities, Nonpublic School Administrators, Administrative Law Judges, NJDOE Staff, SPAN Parent Advocacy Network, Garden State Coalition of Schools, Office of Administrative Law, Administrators of a Clinic or Agency, Administrators of College-Operated Programs, NJ LEE Group, Executive County Superintendents, Executive Directors for Regional Achievement Centers, Executive County Business Officials, County Supervisors of Child Study Teams, Statewide Special Education Advisory Council, and other agencies or organizations concerned with special education.
- (b) NJDOE must review all complaint investigation requests filed within the past 24 months as well as any corresponding complaint investigation reports. If an individual or organization has raised substantive challenges about the appropriateness of a child’s educational program or services, an eligibility decision, a child’s evaluations, or the provision of a free and appropriate

education in the least restrictive environment, and NJDOE did not investigate and make substantive determinations with respect to these allegations, it must notify the complainants in writing that it will reopen its investigation and make findings as to the appropriateness of the education agency's decisions. This would include, but not be limited to, contacting the complainants discussed in Section 5, above (relevant facts).

- (c) NJDOE must train its investigators on the substantive requirements of IDEA, including the legal standards for eligibility and provision of a free appropriate public education in the least restrictive environment. This training should include not only federal and state statutes and regulations but also controlling case law in the Third Circuit. Investigators should be made aware that compensatory services or monetary reimbursement are available as remedies for the denial of appropriate services to a child and should receive training as to controlling case law in the Third Circuit on awarding compensatory services.

*7. Please list the district personnel you have already talked with to resolve this complaint, along with their response(s) to your request.

Not applicable since violation is being committed by NJDOE, including through its Office of Special Education.

Complainants are required to forward a copy of the complaint to the Chief School Administrator of the district/education agency against which the complaint is directed at the same time the complaint is filed with the Department of Education.

Check below to verify whether:

__X__ A copy of the complaint request, along with attachments, was sent by electronic mail on April 19, 2022 to the following:

Angelica Allen-McMillan, Acting Commissioner, NJDOE
angelica.allen-mcmillan@doe.nj.gov

Kimberly Murray, Director, NJDOE Office of Special Education
kimberly.murray@doe.nj.gov

Pursuant to N.J.A.C. 6A:14-9.2(b), please note that a complaint cannot be processed until the OSEP is notified that a copy was provided to the appropriate education agency.



Signature: _____
(Person(s) Submitting Request)