

**IN THE UNITED STATE DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE**

<b>S.E. by his legal guardian J.I., J.H. by his legal guardian C.D., on behalf of a class of those similarly situated</b>	)	
	)	
	)	
	)	
<b>Plaintiffs.</b>	)	<b>Civil Action No. 1:22-cv-00428-UNA</b>
	)	
<b>v.</b>	)	<b>Class Action Complaint</b>
	)	
<b>Delaware Department of Education,</b>	)	
	)	
<b>Respondent.</b>	)	

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**MUTUAL SETTLEMENT AGREEMENT AND RELEASE**

COMES NOW, Plaintiffs S.E. and J.H., on their own behalf and on behalf of a class of those similarly situated, and the Defendant Delaware Department of Education (“DDOE”) (collectively, the “Parties”) representing as follows:

**WHEREAS**, on March 31, 2022, the above captioned Plaintiffs filed a class action complaint against the above captioned Respondent alleging violations of the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (“IDEA”); and related Delaware law, 14 Del. Admin. C. §900 *et seq.* (“Delaware Regulations”);

**WHEREAS**, on July 22, 2022, House Bill 454 of the 151<sup>st</sup> General Assembly (“HB 454”), extending the age of eligibility for special education and related services in Delaware public schools from the end of the school year in which a student turns 21 years old to the end of the school year a student turns 22 years old, was enacted into law;

**WHEREAS**, this Settlement Agreement (“Agreement”) concerns special education and related services for students in Delaware public schools between the end of the school year in which they turn 21 years old and the date in which they turn 22 years old;

**WHEREAS**, the entering of this Agreement is not an admission by the DDOE that Plaintiffs did not receive the education or other services required by law; and

**WHEREAS**, the Parties now seek to settle any and all disputes, claims, or causes of action, they have or may have, upon the terms and conditions of this Agreement;

**NOW, THEREFORE**, the Parties, in consideration of their mutual promises stated in this Agreement and other good and valuable consideration, and intending to be legally bound, hereby agree as follows:

I. Relief for the Individual Named Plaintiffs

1. The individual Named Plaintiffs will be provided with the following compensatory education:

- a. S.E. will receive compensatory education in the amount of \$75 per hour, for 3 and ½ hours per school day, for each school day between August 31, 2020 until December 21, 2020, rounded up to the nearest full month plus an additional \$1,500 in compensatory education. All the compensatory education provided will be made available within 60 (sixty) days of the Effective Date and must be used for legitimate education expenses as detailed in numbered paragraph II.8 below.
- b. J.H. will receive \$0.

II. Compensatory Education for Class Members

2. DDOE will make available compensatory education for the class members as described more fully below.
3. Notwithstanding anything to the contrary in this Agreement, any class member who otherwise meets the criterion to receive a Delaware High School Diploma is not barred from receiving such diploma, even if such criteria are only met during the school year that

the student turns 22 years of age.

4. Due to the passage of HB 454, any class member who had not yet reached 21 years of age before the enactment of that bill suffered no harm from the previous age-out provision and is not entitled to any compensatory education pursuant to the settlement contemplated by this Agreement.
5. Class members may request compensatory education until four (4) years after the effective date of this Agreement. All compensatory education contemplated by this Agreement must be used within four (4) years of the effective date of this Agreement.
6. Class members may apply to receive compensatory education in the amount of \$75 per hour for 3 and ½ hours per school day for each school day between the date they exited services, after the end of the school year in which the class member turned 21, and the date on which the class member turned 22, rounded up to the nearest month. School days are determined by the calendar of the class members' District of Residence and include Extended School Year ("ESY") or a 12-month school year if the student qualified for ESY or a 12-month school year in his/her previous IEP.
7. This compensatory education available to class members shall be limited and can only be used for Legitimate Educational Expenses.
8. Legitimate Educational Expenses shall be those expenses class members have paid or incurred the obligation to pay for the sole benefit of class members and shall be limited to expenses incurred, and for which class members have not received reimbursement through insurance or other third party sources, or for which insurance coverage is unavailable, for (i) primary, secondary or special education instruction or remedial tutoring provided by certified or licensed (non-familial) teachers or tutors or in licensed facilities or programs;

(ii) educational programs, services, equipment, technology, technological hardware, software, peripherals and supplies, including the purchase of no more than one (1) computer or laptop computer, and one (1) iPad, tablet, or similar device; (iii) related services, as defined in IDEA/IDEIA and its implementing regulations provided by certified or licensed (non-familial) professionals; (iv) secondary and post-secondary vocational training or education provided by a licensed school or program; (v) planned courses of instruction offered through internet providers with primary, secondary, or special education accreditation or licensing in the state or country in which they are physically located; (vi) educational evaluations conducted by certified or licensed (non-familial) professionals; (vii) behavioral therapy and social skills training, conducted at the direction and under the supervision of appropriately trained and certified (non-familial) personnel or in certified or licensed affiliated programs; and (viii) any classes, credits, or other services required for the obtainment of a regular high school diploma; (ix) reimbursement for reasonable transportation costs contemplated by this Agreement, excluding reimbursement for reasonable travel expenses where there is otherwise transportation provided by the educational program or service, and excluding the purchase or lease of a vehicle, but including the actual costs incurred for use of public transportation or reimbursement for mileage at the standard State of Delaware mileage reimbursement rate to meet the class member's transportation needs to and from educational/training programs and services, and reimbursement for time and travel costs for service providers to and from class member's home at the standard State of Delaware mileage reimbursement rate. The Parties agree that the forgoing shall not obligate the DDOE to provide payment for anything related to postsecondary/college education (outside of remedial, non-credit carrying,

educational supports); related to personal enrichment, leisure, or recreational activities (aside from recreational services covered under the definition of related services referenced in section (iii) of this Paragraph above); of an exclusively religious and non-special education nature; or which the DDOE itself would be prohibited from purchasing or providing by law.

9. Requests for compensatory education may be made to the Finance Director of the Delaware Department of Education in a form prescribed by the DDOE.
10. Payment or reimbursement requests that qualify as legitimate education expenses will be reviewed and submitted for payment within the State Accounting System within 10 business days of receipt of the written requests, unless the State Accounting System is closed or offline or the individual or entity to whom the payment or reimbursement is directed has not taken the necessary steps to receive it through the State Accounting System by registering as a vendor, in which case the payment or reimbursement request will be submitted to the State Accounting System for payment within 10 business days after the system is operable or the individual/entity has become authorized to receive payments through the system by registering as a vendor

### III. Procedure for Class Settlement

11. The Parties hereby stipulate to certification of a Settlement Class as:
  - a. All students eligible to receive special education and related services pursuant to the IDEA from a Delaware Public Agency as defined by 14 *Del. Admin. C.* §922.3.0; and
    - (a) who were not parentally placed in a private school or home school; and
    - (b) who reached the age of 21 during the 2019-2020 school year; and

(c) exited services at the end of the 2019-2020 school year because of their age without a regular high school diploma.

b. All students eligible to receive special education and related services pursuant to the IDEA from a Delaware Public Agency as defined by 14 *Del. Admin. C.* §922.3.0; and

(a) who were not parentally placed in a private school or home school; and

(b) who reached the age of 21 during the 2020-2021 school year; and

(c) who exited services at the end of the 2020-2021 school year because of their age, without a regular high school diploma, but excluding such students who:

(i) did not receive services pursuant to 14 *Del. C.* § 3101(2)(c) as approved June 3, 2021 and in effect through August 1, 2022, because the students' IEP teams determined that they did not require an additional year of services or the student refused additional services or was unresponsive to the offer of additional services; or

(ii) participated in Project SEARCH.

12. Plaintiffs will move for the certification of the Settlement Class as part of Plaintiff's Unopposed Motion for Preliminary Approval of the Settlement Agreement. DDOE will draft the motion and will not oppose certification of the Settlement Class.

13. The Parties hereby stipulate to the following: As class representatives, Named Plaintiffs can adequately represent the interests of the class. Plaintiffs may replace class representatives from time to time as needed upon notice to DDOE and approval of the Court.

14. Preliminary Approval by the Court of the Settlement Agreement

15. Counsel for the Parties agree that they will take all reasonable steps to ensure that this Agreement is approved by the Court and becomes effective. Specifically, within ten (10) business days of Defendant's drafting of the brief in support of the Motion for Preliminary Approval of this Agreement and its delivery to Plaintiff's counsel, Plaintiffs' Counsel will, through unopposed motion (1) file the Agreement with the Court, (2) move for Preliminary Approval of this Agreement in the Court, and (3) request entry by the Court, on the earliest date acceptable to the Court, of the Proposed Order Granting Motion for Preliminary Approval of Class Settlement, Certifying Settlement Class, Directing Issuance of Settlement Notice and Scheduling Hearing on Final Approval.

16. Notice to Plaintiff Settlement Class Members

17. The Parties will jointly request that the Court approve the Full Notice Package which will include the following: Notice of Proposed Settlement of Class Action Lawsuit ("Notice"), and Compensatory Education Form.

18. The Notice will include, in plain language: (1) A summary of the substantive relief included in this Agreement; (2) the date of the hearing on the Final Approval of the Agreement with a clear statement that the date may change without further notice to the Class; (3) the deadline for submitting objections to the Agreement; (4) contact information for Plaintiffs' Counsel to answer questions; (5) the address for Plaintiffs' Counsel's websites with links to relevant documents in the case; (6) instructions on how to access the case docket via PACER or in person at the Court's locations; and (7) a procedure for class members to opt out of the class if they do not want to participate in the settlement contemplated by this Agreement.. The DDOE will provide a translation of the Notice into Spanish. Upon the Court's approval of the Full Notice Package, the DDOE will provide the Full Notice

Package in paper form along with a return envelope to the last known address of every identified class member.

19. Upon the Court's approval of the Full Notice Package, DDOE will post the Agreement, links to the Full Notice Package, and links to the relevant documents in this case, on DDOE's website and provide notice of the same to the Governor's Advisory Council for Exceptional Citizens and Delaware Public Agencies.
20. At least 14 days before the Fairness Hearing, counsel for Defendants and Plaintiffs' Counsel will each provide a declaration to the Court attesting to the manner in which they disseminated the Full Notice Package and components thereof consistent with the Agreement.

#### V. Fairness Hearing

21. The Parties will jointly request that the Court schedule and conduct a Fairness Hearing to address the fairness of this Agreement settling Plaintiffs' claims against Defendants and to decide whether there will be Final Approval of the settlement embodied in this Agreement. At the Fairness Hearing, the Parties will jointly move for Final Approval of this Agreement. The Fairness Hearing will take place at dates allowing for such period of Notice to the Class as the Court may direct, and in accordance with 28 U.S.C. § 1715.

#### VIII. Dispute Resolution

22. Any class member who disputes the Defendant's interpretation of this Agreement as it pertains to their claim for compensatory education under this Agreement may engage SPARC for resolution or mediation. Defendant agrees to cooperate with any such mediation. If SPARC is unable to resolve the dispute successfully, the class member may proceed to the Dispute Resolution Process delineated in paragraph 23 *supra*.



23. Dispute Resolution Process: All disputes concerning the interpretation, implementation, monitoring, and compliance with this Agreement, will be resolved as follows:

- a. Notification in Writing: Counsel for a Party will notify counsel for the other Parties in writing of any perceived non-compliance with the terms of this Agreement by any Party.
- b. Meet and Confer: Unless otherwise agreed to by the Parties, with respect to any particular dispute, the Parties agree to meet and confer in good faith, within ten (10) business days after receipt of a written notification of a dispute pursuant to the previous paragraph. The Parties may agree to engage the Special Education Partnership for the Amicable Resolution of Conflict (“SPARC”) to facilitate or mediate the meeting.
- c. Application for Further Relief: If the meet-and-confer does not lead to a resolution of the dispute, then, no sooner than fifteen (15) business days after providing the other Parties with written notice of an intent to terminate the meet and confer process, any Party may apply to the Court for further relief with respect to the dispute to the extent it involves compliance with this Agreement. The Parties acknowledge the Court retains jurisdiction over relief as appropriate.
- d. Immediate Judicial Relief: Notwithstanding the dispute resolution described above, in the event of an emergency threatening to cause immediate or irreparable harm to any of the Parties, class or any portion thereof, any Party may seek immediate judicial relief.
- e. Notice of Exigent Circumstances: Should exigent circumstances exist that require a Party to take action that makes them non-compliant with this Agreement, that

Party shall notify the other Parties of the exigent circumstances, the action taken, the expected duration of such circumstances, and the steps taken to limit the duration of such circumstances. Receipt by a Party of such notification does not preclude them from seeking judicial relief.

- f. Attorney's Fees: The Court, in its discretion, may award fees for disputes under this section to the prevailing party in accordance with the standard set forth in *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978).

#### IX. Release of Claims

24. Effective upon the entry of judgment by the Court, in consideration of the relief set forth herein, the sufficiency of which is expressly acknowledged, the following claims against DDOE are released:

- a. The Class Members and Named Plaintiffs release any claims for systemic injunctive relief under IDEA, Section 504 of the Rehabilitation Act ("Section 504") and related Delaware state law and regulations regarding age eligibility for special education and related services in Delaware at issue in the Lawsuit which arose on or before the Effective Date of this Agreement;
- b. The Class Members and Named Plaintiffs release any claims for compensatory education against DDOE under the IDEA or Section 504 and related Delaware state law and regulations at issue in the Lawsuit which arose on or before the Effective Date of this Agreement;
- c. Except as set forth in the above paragraphs, nothing in this Agreement shall be construed to release any additional claims by any of the Named Plaintiffs, class members, or any other person for claims arising under the IDEA, Section 504, or

the Americans with Disabilities Act (“ADA”) or Delaware State law and regulations that are not at issue in this Lawsuit. Nothing in this Agreement shall be construed to release any claims to enforce the terms of this Agreement.

X. Plaintiffs’ Attorney’s Fees and Costs.

25. Plaintiffs agree to accept and DDOE agrees to pay Plaintiffs’ Counsel the sum of up to \$100,000 in attorney’s fees and costs for work through the Effective Date of this Agreement, as well as anticipated reasonable fees and costs for Plaintiff Counsel’s work performed through the submission of the Agreement to the Court for preliminary and final approval, and also for work performed in conjunction with monitoring Defendants’ compliance with this Agreement. This amount also includes the anticipated fees and costs for Plaintiffs’ Counsel to provide notice to the class, notwithstanding Defendants’ obligation to bear the costs of publication and mailing. As set forth in Section IX, Plaintiffs may also seek future attorney’s fees by motion to the Court in connection with the dispute resolution process.

26. DDOE will make payment of attorney’s fees and costs within 60 days of receipt of an invoice from Plaintiffs’ counsel and such invoice will be submitted as soon as possible after Preliminary Approval and after Final Approval of the settlement in this case, or any decision by the Court. Payment will be made by check in a lump sum to Lawrence Lee Wentz, Esq.

XI. Other Matters

27. Entire Agreement. This Agreement contains all the agreements, conditions, promises, and covenants between the Parties regarding matters set forth in it, and supersedes all prior or contemporaneous agreements, drafts, representations, or understandings, either written or

oral, with respect to the subject matter of the present Agreement.

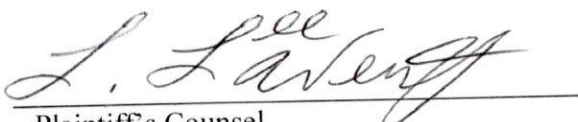
28. **Modification.** The terms and conditions of this Agreement can be amended, changed, or altered only by written agreement of the Parties through their respective counsel or by order of the Court upon motion.
29. **Drafting of this Agreement.** This Agreement is deemed to have been drafted by all Parties hereto, as a result of arm's length negotiations among the Parties. Whereas all Parties have contributed to the preparation of this Agreement, it shall not be construed more strictly against one Party than another.
30. **Execution by Facsimile and in Counterparts.** This Agreement may be executed by the Parties hereto by facsimile and in separate counterparts, and all such counterparts taken together will be deemed to constitute one and the same agreement.
31. **Interpretation.** The language of this Agreement will be construed as a whole according to its fair meaning, and not strictly for or against any of the Parties. The headings in this Agreement are solely for convenience and will not be considered in its interpretation. Where required by context, the plural includes the singular and the singular includes the plural, and the terms "and" and "or" will mean "and/or." This Agreement is the product of negotiations and joint drafting so that any ambiguity will not be construed against any Party. If any provision or provisions of this Agreement are found to be contrary to law, the Parties agree that the remaining provisions will not be affected and will remain in full force and effect.
32. **Computation of Time.** Computation of time or periods of time referenced in any document related to this Settlement Agreement shall be computed pursuant to Federal Rule of Civil Procedure.

33. Additional Document. To the extent any documents are required to be executed by any of the Parties to effectuate this Agreement, each Party hereto agrees to execute and deliver such and further documents as may be required to carry out the terms of this Agreement.
34. Authority to Bind. The undersigned each represent and warrant that they are authorized to sign on behalf of, and to bind, the respective Parties of this Agreement.


[SIGNATURE PAGE TO FOLLOW]

**IN WITNESS WHEREOF**, the Parties execute this Agreement on the dates set forth

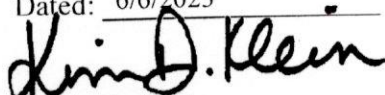
below:

  
\_\_\_\_\_  
Plaintiff's Counsel

Dated: 6/9/2023

 BRD  
\_\_\_\_\_  
Dale Matusevich  
Director, Exceptional Children Resources  
Delaware Department of Education

Dated: 6/6/2023

  
\_\_\_\_\_  
Kimberly Klein  
Associate Secretary, Operations Support  
Delaware Department of Education

Dated: 6/7/2023