

**DELAWARE DEPARTMENT OF EDUCATION  
EXCEPTIONAL CHILDREN RESOURCES**

**STATE COMPLAINT DECISION DE SC #21-05**

**Date Issued: June 17, 2021**

On April 20, 2021, Parent filed a complaint with the Delaware Department of Education (Department) alleging the REDACTED charter school violated Part B of the Individuals with Disabilities Education Act (IDEA) and implementation of state and federal regulations with respect to Student. The complaint has been investigated as required by federal regulations at 34 C.F.R. § 300.151 to 300.153 and Department regulations at 14 DE Admin. Code §§ 923.51.0 to 923.53.0. The investigation included a review of Student’s educational records, staff correspondence, and documents provided by Parent and School related to the issues in the complaint. Interviews were also conducted with Parent and relevant School staff.

**COMPLAINT ALLEGATIONS**

The complaint alleges the School violated the Individuals with Disabilities Education Act (IDEA) and implementing regulations by failing to provide Student with related services, specifically speech and language therapy services, during the 2020-2021 school year as required by Student’s Individualized Education Program (IEP).

**FINDINGS OF FACT**

1. Student is REDACTED years of age and currently enrolled in the REDACTED grade. Student has been identified as a student with a disability under the educational classification of “Developmental Delay” as defined in 14 DE Admin. Code § 925.6.7. Student received special education and related services at the School pursuant to the IDEA and 14 Del. C. § 3101 *et seq.*
2. On May 21, 2020, the IEP team meeting was held and included all members required by 34 C.F.R. § 300.306 and 14 DE Admin. Code § 925.21.0.
3. Pursuant to the IEP, Student’s educational needs for which Student has goals include early reading skills, expressive language, and fine motor skills. Student also requires supports and services to address Student’s behavioral needs of attending to tasks and persevering through difficult tasks.
4. The May 21, 2020 prior written notice (PWN) states, in relevant part:
  - a. Student continues to be eligible to receive special education and related services under the classification of Developmental Delay.
  - b. Student requires continued services in reading foundational skills and behavior supports.

5. The IEP team determined Student's educational needs could be met in the general education setting, or the A setting. Student participates in the regular education setting greater than eighty percent (80%) of the day.
6. The IEP dated May 21, 2020 contains an annual speech goal for expressive language. This goal is to be addressed in a group session beginning August 31, 2020 and ending May 20, 2021. The sessions meet once per week for 30 minutes per session.
7. On April 24, 2020, the Governor of Delaware directed all schools to be closed for the remainder of the 2019-2020 school year due to the COVID-19 pandemic. This closure extended into the 2020-2021 school year, requiring all districts to create remote instruction plans so students could continue learning during the pandemic. Remote learning occurs when the learner and instructor are separated by distance, therefore not being able to meet in a traditional classroom setting.
8. Student continued to receive FAPE during the 2019-2020 school year via remote instruction.
9. On August 31, 2020, School began remote instruction for all students.
10. Remote instruction was provided via Zoom. Zoom is a video communication system that School used for visual and audio conferencing, chats and webinars for instruction.
11. In addition to Zoom instruction for academics, Special Education Teacher, (Teacher), stated that Parent brought Student into School one time per week for one hour. During this time, Teacher worked on IEP phonics and decoding goals.
12. On October 28, 2020, Parent sent a text message to Teacher inquiring about the start date for speech therapy services.
13. Teacher responded that the Speech Therapist, (Therapist), would be in contact with Parent.
14. Therapist began offering speech services via Zoom in October 2020.
15. On October 29, 2020, Therapist E-mailed Parent an introductory letter and consent form. The consent form gave permission for Therapist to provide speech services via teletherapy.
16. Teletherapy is defined by the American Speech-Language-Hearing Association, (ASHA), as an appropriate model of service delivery for the professions of speech-language pathology. Teletherapy occurs in real time and face-to-face with a therapist via online videoconferencing, e.g., Zoom.
17. On November 2, 2020, Parent responded to Therapist via E-mail inquiring as to whether teletherapy will continue for the entire school year.

18. On November 4, 2020, Therapist responded via E-mail that the return date of in-person therapy was uncertain. Therefore, speech therapy would be provided via teletherapy until in-person therapy could begin.
19. Parent responded that speech therapy via teletherapy would be difficult for Student. Parent commented that Student has difficulty on Zoom due to a short attention span. Nonetheless, Parent agreed to sign the consent form.
20. On November 16, 2020, Therapist E-mailed Parent to request the signed consent form be returned to School.
21. On November 18, 2020, Parent sent Therapist E-mail inquiring when in-person speech therapy sessions will begin.
22. On the same day, Therapist sent E-mail to Director of Educational Enrichment, (Director), sharing that Parent was requesting in-person speech therapy.
23. Director responded to Therapist via E-mail that at this time, School was only providing speech therapy via Zoom. PWN was not sent to Parent.
24. Therapist reported to the investigator that School did not receive the consent form from Parent, therefore Student did not receive speech therapy during the first semester, i.e., August 2020 through December 2020.
25. In January 2021, School transitioned to hybrid instruction. Hybrid instruction, as defined by Delaware's Governor, allows schools to use a combination of in-person and remote instruction.
26. On January 19, 2021, Student began hybrid instruction. Student received in-person instruction for academics four days per week. On the fifth day, Student completed assignments at home utilizing Schoology.<sup>1</sup>
27. While at School, Student participated in Response to Intervention, (RTI), groups with the Teacher. RTI groups met via Zoom for 30 minutes, four days per week.
28. On April 15, 2021, the Education Enrichment Coordinator, (Coordinator), E-mailed Therapist requesting Therapist to contact Parent to again offer teletherapy.
29. On April 16, 2021, Therapist E-mailed Parent stating that in-person speech therapy was not being provided for the 2020-2021 school year. School was providing teletherapy and Student can receive teletherapy on Tuesdays or Wednesdays from 2:00 to 2:30 P.M. while at School.
30. Parent responded via E-mail that since Student was in School during those times, Student should receive in-person therapy.

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<sup>1</sup> Schoology is a platform that allows teachers and students to work digitally and communicate with each other.

31. Therapist responded via E-mail that in-person speech therapy was not being provided. Therapist stated that all students receiving speech services as indicated in their IEP were receiving these services via teletherapy. A PWN was not sent to Parent.
32. Therapist told Parent that Teacher would assist Student to log into Zoom.
33. Teacher offered to sit with Student during teletherapy.
34. Therapist requested Parent to sign and return consent form to School for Student to participate in teletherapy.
35. On April 20, 2021, Director sent E-mail to Parent acknowledging Parent's concerns about Student receiving teletherapy. Parent stated concerns regarding Student's inability to focus while on the computer.
36. Director responded by offering individual virtual speech therapy sessions with in-school Teacher support, in addition to assistance logging into Zoom. PWN was not sent to Parent.
37. Parent refused this proposal. Parent only wanted in-person speech therapy.
38. Director offered to contact Parent if in-person speech therapy resumed.
39. On April 20, 2021, Parent filed State Complaint.
40. On April 30, 2021, Parent E-mailed Director to inquire as to whether in-person speech therapy was being offered.
41. Director confirmed that School was not able to provide in-person speech therapy services for the 2020-2021 school year. PWN was not sent to Parent.
42. Director responded that the agencies the School contracts speech services with have declined to provide in-person therapy.
43. School currently has contracts with Hope Services for two full time speech therapists and The Speech Clinic for two full time speech therapists.
44. The four speech therapists from the two agencies have not provided any in-person therapy the entire school year. Speech services were only provided via teletherapy.
45. Hope Services told the Director that they would be able to offer in-person therapy during the 2021 summer months.
46. The Speech Clinic told Director that they might have a therapist who could provide in-person therapy after School in May 2021.

47. Director proposed to Parent that an agency can provide speech therapy at the agency's site, after School hours, if Parent would be willing to provide transportation to the agency.
48. Parent agreed to provide transportation to the agency.
49. On May 3, 2021, Director sent E-mail to Parent indicating that the Speech Clinic may have a speech therapist willing to provided therapy to Student after the school day. Therapy would be provided after school hours for 60 minutes one day per week.
50. Student's annual IEP meeting was scheduled for May 17, 2021.

## CONCLUSIONS

### **Denial of FAPE and Failure to Provide Speech and Language Therapy Services Listed in IEP**

The IDEA and implementing state and federal regulations require an IEP to include the anticipated frequency, location, and duration of related services to be provided to the student. *See*, 34 C.F.R. § 300.320(a)(b)(4); 14 DE Admin. Code § 925.20.1.7. The related service page of Student's May 21, 2020 IEP clearly states speech therapy would be provided in a group session beginning August 31, 2020 and ending May 20, 2021. The sessions meet once per week for 30 minutes per session.

These services were to start on August 31, 2020 and end on May 20, 2021. Parent agreed with these services as written in the IEP.

On September 28, 2020, the Office of Special Education Programs, (OSEP) issued a document concerning implementation of the IDEA Part B provision of services in the current COVID-19 environment. OSEP stated that no matter what primary instructional delivery approach is chosen, IEP teams remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities. In this case, regardless of whether in-person or remote instruction was provided to Student, the IEP team was not relieved of its obligation to provide FAPE to the Student under IDEA. *Part B Implementation of IDEA Provision of Services in the Current COVID-19 Environment Q&A Document (Sept. 28, 2020)*

The U.S. Department of Education stated that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities and that the provision of FAPE may include, as appropriate, special education and related services through distance instruction provided virtually, online, or telephonically. *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elem., and Secondary Schools. While Serving Children with Disabilities*, 76 IDELR 104 (OSERS/OCR 2020). In this case, School provided academic instruction remotely from August 31, 2020 and hybrid instruction from January 19, 2021 through present.

In March 2020, the Center for Disease Control, (CDC), issued interim guidance to help schools plan for and prevent the spread of COVID-19 amongst students and staff. The document states that, during a school's selective closure due to a COVID-19 outbreak, contingent provisions to

meet student's IEP goals can be implemented. These provisions of special education and related services may be at an alternate location or the provision of online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, and may identify which special education and related services, if any, could be provided at the child's home.

*Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease 2019 Outbreak March 2020*

In this case, when the School instituted remote instruction on August 31, 2020 and began hybrid instruction on January 19, 2021, School was not relieved from its duty to implement the services outlined in Student's IEP and ensure that Student continued to receive FAPE. *See Porter Township School Corporation, Indiana State Education Agency, August 31, 2020, CP-004-2021.* Student's May 21, 2020 IEP required speech therapy services to begin on August 31, 2020. School did not provide student with speech therapy services, nor did School communicate with Parent regarding speech therapy services until October 29, 2020. ***For these reasons, I find School failed to provide Student with FAPE from August 31, 2020 through October 29, 2020 by not providing Student any speech therapy services during that time.***

On October 29, 2020, Therapist informed Parent that speech therapy services were going to be delivered through teletherapy. Parent responded that speech therapy via teletherapy would be difficult for Student and that Student has difficulty on Zoom due to a short attention span. Parent never signed the teletherapy consent form and instead requested in-person speech therapy. School never specifically responded to Parent's request. The IDEA does not require that the IEP specify the methods by which services are provided. Nor, do Parents "have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student." *W.H. v. Schuylkill Valley Sch. Dist.*, 954 F. Supp. 2d 315, 324 (E.D. Pa. 2013) (internal citations omitted).

The Delaware Department of Education reiterated in a March 27, 2020 guidance memo that although federal law requires remote instruction be accessible to students with disabilities, it does not mandate specific instructional methodologies. It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency. *DDOE March 27, 2020 further guidance Related to COVID-19: IDEA, Part B Provisions of FAPE.*

"The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP." *IDEA Federal Regulations, Vol. 71, No. 156, p. 46665 (2006).*

The School listed speech therapy as 1 session per school week for 30 minutes. This was what was proposed to Parent. The methodology of in-person or teletherapy was not listed in the IEP, and thus does not require a PWN when changing from one instructional method to another. However, the IDEA does require a PWN be sent to parents whenever the LEA "proposes to initiate or change; or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 20 U.S.C.A. § 1415(b)(3). Parent communicated concerns about teletherapy to School and made a request for in-person speech therapy based on those concerns. At that point, Parent was calling into question the

provision of FAPE for her child and asking for a change. School was obligated to provide Parent with a PWN to inform the Parent of its refusal to provide the requested in-person speech therapy and failed to do so.

School's failure to provide Parent a PWN was 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). In this case, Parent requested in-person speech therapy services. Therapist relayed the Parent's request to the Director. There is no evidence in the record that any further communication was made by either the Director or the Therapist until April 15, 2021. By failing to send a PWN or communicate with the Parent in any way, the School deprived the Parent of their participation rights and student lost an educational opportunity. ***For these reasons, I find that School's failure to provide Parent with a PWN was a procedural violation of the IDEA that resulted in a substantive harm to the Student denying Student FAPE from October 29, 2020 through April 16, 2021.***

On April 16, 2021, Therapist contacted Parent, again offering speech therapy services through teletherapy. Parent again requested in-person speech therapy. School again failed to send Parent a PWN documenting its refusal to provide in-person speech therapy. But, this time, School offered accommodations to assist the Student in receiving teletherapy via Zoom due to Parent's concern with Student's attention. These accommodations included the Teacher assisting the Student to log onto Zoom, teletherapy being administered individually, and Teacher sitting with the Student to focus and attend to Zoom. The Parent declined these supports. During this same time when Student was in School, Student was receiving RTI instruction on Zoom without assistance or support.

As discussed above, the IDEA does not require that the IEP specify the methods by which services are provided, nor does a change in instructional methodologies require the School to provide Parent with a PWN if the IEP does not specify an instructional methodology. However, when Parent requested in-person speech therapy because of concerns about whether Student could be provided FAPE by teletherapy, School was required to document its refusal to provide in-person therapy in a PWN. School did not and thus committed a procedural violation of the IDEA.

A procedural violation of the IDEA will not rise to the level of a denial of FAPE unless there is substantive harm. *C.H.* 606 F.3d at 66–67. Substantive harm may be found when the 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.* at 696 F.3d 249. Although failing to provide a PWN, School maintained communication with the Parent and School problem-solved additional accommodations that could be provided in order for Student to receive teletherapy services. Parent was not deprived their participation rights and student was given every educational opportunity. Unfortunately, Parent refused to try teletherapy, with or without supports. ***For these reasons, I find School's failure to provide Parent with a PWN in April 2021***

*was a procedural violation of the IDEA that did not result in a substantive harm to the Student. Student was not denied a FAPE from April 16, 2021 onward.*

### **CORRECTION ACTION**

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

#### **Student Level Correction Actions**

1. On or before **July 30, 2021**, the School shall develop a written plan of compensatory speech therapy services to be provided to Student for the denial of FAPE between August 31, 2020 and April 15, 2021. The School shall submit a written explanation of how the amount of compensatory services were calculated. The School shall also submit a specific plan for delivering the compensatory services to Student, including a timeline for service delivery and how the services will be provided, in consultation with Parent. The compensatory services must be based on Student's identified needs described in the IEP. The written plan, calculation, and timeline shall be provided to the Department's Director of Exceptional Children Resources Work Group on or before **July 30, 2021**.
2. On or before **July 30, 2021**, the School shall convene an IEP Team meeting to:
  - A. Review and revise Student's IEP as needed and to discuss implementation of compensatory services.
  - B. Identify steps to address Student's unfinished learning and learning loss that may have occurred in the wake of the pandemic. A July 9, 2020 Delaware Department of Education memo anticipates 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 have been introduced to, but not yet had the chance to master at grade level. The Student in this complaint may have experienced unfinished learning of speech goals, as well as other elements of the IEP as written in the May 21, 2020 IEP. 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.

A copy of the IEP and prior written notice that contains all of these elements shall be provided to the Department's Director of Exceptional Children Resources Work Group on or before **July 30, 2021**.



### School Level Corrective Action

1. On or before **August 1, 2021**, the School shall review its policies, procedures and practices and revise as necessary, to ensure related services are provided as written in students' IEPs. Particular attention should be given to the start and end date of therapy services. As necessary, the School shall develop written procedures to ensure that:
  - a. All therapists, employed or contracted by the School, adhere to providing therapy services as stated in students' IEPs. These procedures would apply to services provided remotely, hybrid, or in-person.
  - b. The School shall provide professional development to all therapists providing related services to students in the School, regarding the responsibility to deliver services pursuant to IEP team decisions.
  - c. The professional development shall be completed and the related documentation (sign in sheet, agenda, copy of handouts and/or PowerPoint, etc.) provided to the Department's Director of Exceptional Children Resource Workgroup on or before **August 30, 2021**.
2. On or before **August 30, 2021**, the School shall review the regulations related to prior written notice and provide professional development to all special education staff and related service providers. 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 on or before **August 30, 2021**.
3. The School shall develop a written plan to ensure communication between contracted related service providers and parents is shared in a timely manner with the Director of Education Enrichment. This plan shall be provided to the Department's Director of Exceptional Children Resources Workgroup on or before **August 30, 2021**.

By: REDACTED  
Assigned Investigator