

April 27, 2018

The Honorable Gurbir S. Grewal, Esq.  
Attorney General of New Jersey  
Office of the Attorney General  
Richard J. Hughes Justice Complex  
25 Market Street, Box 080  
Trenton, NJ 08625-0080

Re: Speech-Language Therapy Services in Paterson Public Schools

Dear Attorney General Grewal:

I write regarding Education Law Center's ongoing concerns about the provision of special education and related services, especially speech-language therapy, to students in the Paterson Public Schools ("PPS") district. ELC expressed these concerns to the New Jersey Department of Education's Office of Special Education Policy and Procedure ("OSEPP") in a December 15, 2017 letter (enclosed) but has received no response from OSEPP and has not been apprised of any action taken by OSEPP to address our concerns.<sup>1</sup>

In 2017, ELC filed several complaint investigation requests against PPS regarding widespread failures to provide special education and related services in accordance with state and federal law. Investigation by OSEPP resulted in State findings of systemic deprivations of related services, including speech-language therapy, during the 2016-17 year to school age and preschool children with disabilities, and OSEPP directed PPS to take corrective action. See OSEPP Complaint Investigation Reports #C2017-5648 and #C2017-5758. ELC's efforts to monitor the implementation of corrective action for the 2016-17 violations and the provision of speech-language services in 2017-18 have raised several issues that the State must investigate and address to prevent further violations of the rights of PPS students with disabilities. These issues involve continuing failures to provide speech-language therapy in 2017-18 and improper use of "telepractice" to provide speech therapy via computer.

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<sup>1</sup> As a written, signed complaint alleging special education violations, containing facts and the time period on which the allegations were based, ELC's December 15<sup>th</sup> letter warranted a response from OSEPP not only in fulfillment of its general legal obligations, but also as specifically required by N.J.A.C. 6A:14-9.2.

## Failure to Provide Speech-Language Therapy Services in 2017-18

ELC's December 15<sup>th</sup> letter raised the concern that PPS's failures to provide speech-language services required by students' Individualized Education Programs ("IEPs") may remain unresolved. We have received reports of students—ranging from preschool to high school—who have not been provided some or all of the speech-language services in their IEPs during the 2017-18 school year. A December 2017 letter from ELC to PPS counsel recounting reports of missed services and requesting information on the provision of speech-language therapy during 2017-18 has gone unanswered.

ELC does not have the access necessary to conduct a comprehensive investigation of this issue, but OSEPP has both the ability and the legal obligation to do so. The state educational agency has the ultimate responsibility for ensuring compliance with the Individuals with Disabilities Education Act ("IDEA"), see 20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.600, and this obligation is only heightened by the fact that PPS is State-operated. OSEPP must therefore take immediate action to investigate whether PPS has failed to fully comply with the speech-language therapy requirements of its students' IEPs during the current school year. Additionally, OSEPP must ensure PPS possesses sufficient resources and staff to provide speech-language therapy to all students who require it. To this end, it must examine speech language specialist case loads, PPS hiring practices and salaries, and the appropriateness of contracting with outside therapists, who may only be used if the district is unable to hire sufficient staff, N.J.A.C. 6A:14-5.1(c)(1)(v). OSEPP is also responsible for enacting policy that requires school districts, including PPS, to "take measurable steps to recruit, hire, train, and retain personnel" with appropriate qualifications to provide special education and related services to children with disabilities. 34 C.F.R. § 300.156(d).

OSEPP must work with PPS to ensure immediate implementation of speech-language therapy services for all students who require them and to provide compensatory services for any sessions missed during the 2017-18 school year. Given the widespread violations confirmed by OSEPP during 2016-17, and the information provided in ELC's December 15<sup>th</sup> letter, follow-up investigation and monitoring by the State are more than warranted.

## Use of "Telepractice" Speech Therapy without Appropriate Regulation and Consent

In December 2017, PPS entered into a \$429,900 contract with DotCom Therapy of Missouri to provide speech-language therapy and evaluation services via computer, using staff at sites remote from the students. It is ELC's understanding that PPS has begun implementing such teletherapy for many students whose IEPs require speech-language services. Large-scale use of telepractice speech-language therapy and the process by which it is being implemented in PPS raise serious concerns.

First, the New Jersey Department of Education ("NJDOE") has failed to promulgate regulations to govern the use of teletherapy as required by the Administrative Procedure Act. Under Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984), and its progeny,

broad policy changes must be implemented in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., through the promulgation of administrative regulations with opportunity for public notice and comment. Instead of following this important process, OSEPP merely issued a September 26, 2017, guidance document with minimal direction regarding “Related Services and Home Instruction Provided via Telepractice.” (Copy enclosed.) Unless and until the NJDOE institutes duly promulgated regulations governing the use of telepractice speech-language therapy, PPS must not be allowed to continue use of such services.

Second, ELC has received reports that teletherapy services are being substituted for in-person speech-language therapy without proper procedural safeguards and informed consent by parents, as required under federal and state law.<sup>2</sup> It appears, based on draft procedures circulated by the district (see enclosed) and reports from staff, that the district may not be holding an IEP meeting with each student’s parents before amending their IEPs to use telepractice instead of in-person speech-language services. Furthermore, there is indication that at least one employee of DotCom Therapy, rather than PPS staff, has been delegated the task of communicating with some parents about the switch to telepractice services. OSEPP should immediately investigate both the propriety of the “official” telepractice policies instituted by PPS and what is taking place on the ground in each school where telepractice is being used.

Finally, OSEPP must investigate whether use of outside contractors for telepractice services is proper and warranted in PPS. As acknowledged in the September 2017 guidance, a district may only contract with outside clinics and agencies to provide speech-language services when it is unable to hire sufficient staff, and may only contract with telepractice providers “when it is unable to hire sufficient staff to provide the service in-person.” Additionally, all such staff must possess a speech-language specialist certification issued by NJDOE. OSEPP is obligated to determine whether each of these conditions is met in PPS.

As noted above and in ELC’s December 15<sup>th</sup> letter to OSEPP, under IDEA and the case law interpreting it, OSEPP bears the ultimate responsibility for ensuring that New Jersey students with disabilities receive the free appropriate public education to which they are legally entitled. See, e.g., M.A. v. State-Operated Sch. Dist. of City of Newark, 344 F.3d 335 (3d Cir. 2003). If legal action is required to vindicate the rights of PPS’s students, the State as well as the district can be expected to bear liability. We would be happy to meet with staff from your office to discuss this matter, and stand ready to assist you in any way.

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<sup>2</sup> OSEPP’s clear statement in its September 26, 2017 guidance that the decision to use telepractice must be a decision of the “IEP team, which includes the parent” reflects governing law. In most cases, IEP team decisions are made at an IEP meeting conducted pursuant to N.J.A.C. 6A:14-3.7. IEP amendments without such a meeting are authorized only when the requirements of N.J.A.C. 6A:14-3.7(d) (including a written parental request and parental consent) have been met. Under N.J.A.C. 6A:14-1.3, parental consent to an activity must be “in writing” after the parent is “fully informed . . . in his or her native language or other mode of communication.”

Sincerely,



Jessica Levin, Esq.

Via overnight mail

Enclosures

cc: Donna Arons, Deputy Attorney General (via electronic and regular mail)  
John Worthington, Director of NJDOE OSEPP (via regular mail)  
Dr. Dolores Walther, Coordinator of Complaint Investigations (via regular mail)  
New Jersey State Board of Education (via regular mail)  
Teresa Ruiz, Chair of Senate Education Committee (via regular mail)  
Pamela Lampitt, Chair of Assembly Education Committee (via regular mail)  
Frances Barto, Esq., Attorney for PPS (via electronic and regular mail)  
Eileen Shafer, PPS State District Superintendent (via regular mail)