



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-110

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of an hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

Goldstein, Ackerhalt and Pletcher, LLP, attorneys for petitioner, Jay C. Pletcher, Esq., of counsel

Rashonda M. Martin, Esq., General Counsel, attorneys for respondent, Gary A. Wilson, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which found that an individualized education program (IEP) developed by respondent (the district) which recommended the provision of speech-language-therapy beginning eight days after the start of the 2012-13 school year did not deny the student a free appropriate public education (FAPE). The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program, which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20

U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

By way of background, this matter is similar to a previous appeal filed by the parent against the school district regarding the 2011-12 school year. In that matter (Application of a Student with a Disability, Appeal No. 12-054), the parent challenged, among other things, implementation of the student's May 19, 2011 IEP as it related to speech-language therapy services. Specifically, the parent alleged that the district failed to provide the student with speech-language therapy services on September 11, 2011, the date provided for in the May 2011 IEP. Instead, the district delayed speech-language therapy until September 22, 2011, resulting in the student not receiving six 30-minute group speech-language therapy sessions. In a decision

dated June 18, 2012, an SRO dismissed the parent's appeal, finding that based on the hearing record, the student was "progressing gradually" toward her speech-language goals and that six missed speech-language sessions did not constitute a material failure to implement the student's IEP (see generally id.).

As relevant to this appeal, a CSE convened on May 22, 2012, to develop the student's IEP for the 2012-13 school year (Joint Ex. 4). Finding that the student remained eligible for special education services as a student with a learning disability, the CSE recommended among other things, integrated co-teaching services and group speech-language therapy services three times per six day cycle for thirty minutes each on a ten-month basis (id. at p. 14). While all of the student's other services recommended on the May 2012 IEP were scheduled to begin on September 5, 2012, the May 2012 IEP provided that the student's speech-language therapy services were to commence on September 13, 2012 (id.). It is from the commencement of speech-language therapy services on September 13, 2012 (as opposed to the date that all other services were to begin) that the instant appeal arises.

A. Due Process Complaint Notice

In a due process complaint notice dated August 12, 2013, the parent challenged the May 2012 IEP's commencement of speech-language therapy on September 13, 2012. Specifically, the parent alleged that the district's "delay" in providing the student with speech-language therapy at the beginning of the school year was "the result of the [district's] implementing an unlawful policy and/or practice which delays the provision of related services" (Joint Ex. 1 at p. 4). As a result, the parent argued that the district's "implementation of its unlawful policy and/or practice" denied the student a FAPE "by systemically violating the procedures in the IDEA" in a number of ways, including (1) violating the student's right to related services "to begin at the start of the school year," (2) violation of the student's right "to the provision of those services as determined by the CSE," (3) violation of the parent's right to meaningfully participate in the decision making process, and (4) violating the student's right "to a determination based on her individual needs rather than a determination made by an across the board policy or practice of [d]istrict administrators" (id.). As relief, the parent requested, among other things, a ruling that the district's "implementation of its unlawful policy and/or practice violates Federal law and denies the student a FAPE," an order "directing the [d]istrict to rescind and discontinue its unlawful policy and/or practice, and "additional services to compensate for [the district's] failure to provide [the student] with a FAPE (id.).

B. Impartial Hearing Officer Decision

Several prehearing conferences were held in this matter, and on November 25, 2013, an IHO issued an interim order dismissing the parent's allegations regarding the district's alleged unlawful "policy and/or practice" on the basis that he lacked authority to grant systemic relief (IHO Ex. III). Thereafter, on April 9, 2014, the parties proceeded to an impartial hearing with regard to the parent's remaining claims where, according to the IHO, the parties stipulated to the following: (1) that the May 2012 IEP mandated that the student receive speech-language therapy three times in a six day cycle; (2) that the 2012-13 school year began on September 5, 2012; (3) that the May 2012 IEP states that speech-language therapy is to commence on September 13, 2012; (4) that if the "IEP mandated" speech-language therapy was to start on September 5, 2012, that the student would have received three speech-language therapy sessions between September

5 and September 13, 2012, and that (5) the issue presented was "[d]oes starting speech-language therapy eight days after the start of the 2012/13 school year, resulting in three missed sessions, constitute a denial of FAPE?" (IHO Decision at pp. 5-6). In a decision dated June 20, 2014, the IHO answered this latter question in the negative and denied the parent's application for relief (id. at pp. 10-11). Specifically, the IHO found that the parent was afforded a full opportunity to participate in the decision making process, and that the failure of the district to provide speech-language therapy services on the first day of school, resulting in the student missing three sessions, was a de minimis deprivation of services and "had little impact on [the student's] progress" (id. at pp. 9-10).¹ In support of this finding the IHO noted, among other things, that the facts of this case, though not related to an alleged defective implementation of an IEP, were "almost identical" to those in Application of a Student with a Disability, Appeal No. 12-054, where both an IHO and SRO held that six missed speech-language therapy sessions did not amount to a denial of a FAPE to this student (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that her allegations of "systemic violations" which were dismissed by the IHO are not at issue on this appeal.² Rather, the parent contends that her claims on appeal relate to the "individual denial of FAPE," and she asserts that the only issue on appeal, as stipulated by the parties, is "[d]oes starting speech-language therapy eight days after the start of the 2012-13 school year resulting in three missed sessions, constitute a denial of FAPE" for the student. In this regard the parent contends that (1) the IHO erroneously determined that depriving the student of three sessions of speech-language therapy was de minimis and not a material deprivation of benefits, and (2) the IHO erroneously found that the deprivation of services to the student had little impact on the student's progress.³ As relief the parent requests that I provide the student with "additional speech-language therapy sessions."

The district responds by generally denying the parent's allegations. In addition, the district alleges that the student was offered a FAPE as the alleged deprivation, three missed sessions of speech- language therapy, was de minimis, and the parent "failed to provide evidence or testimony that the delay in the start of services impacted [the s]tudent at all." The district also contends that as a result of the speech-language therapy offered to the student, she is "progressing satisfactorily towards the goals . . . on [the] May 22, 2012 IEP."

¹ The IHO also noted his belief that the start date of the student's speech-language therapy as reflected on the May 2012 IEP was the result of a district-wide "systemic" policy, but again reiterated that he did not have the authority to rule "on such policy determinations" (IHO Decision at p. 10).

² I note that the parent has commenced an action in district court alleging that the district's policy of not providing related services during the first two weeks of the school year is a denial of a FAPE (Pet. Exs. A; B). The parent has also sought and received class certification, on behalf of all district students between the ages of 5 and 21 who are classified as students with disabilities under the IDEA and receive related services (id.).

³ The parent does not challenge the IHO's finding that she was afforded a full opportunity to meaningfully participate in the decision making process. Accordingly, this issue is final and binding on the parties and need not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 8 NYCRR 279.4[a]).

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379;

Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

As noted above, the issue on this appeal, as framed by the parent, is whether starting speech-language therapy eight days after the start of the 2012-13 school year, resulting in three missed sessions, denied the student a FAPE. In this regard, unlike the situation in Application of a Student with a Disability, Appeal No. 12-054, the May 2012 IEP at issue here actually recommends that speech-language therapy begin eight days after the start of the 2012-13 school year (i.e., on September 13, 2012) (Joint Ex. 4 at p.1). Accordingly, rather than assessing the effect, if any, of an improperly implemented IEP as was done in Application of a Student with a Disability, Appeal No. 12-054, this case requires that the sufficiency of the IEP itself be reviewed. Put another way, the proper inquiry in this case is whether the speech-language therapy services contained in the May 2012 IEP, as written, are reasonably calculated to provide some meaningful benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). As noted by the Second Circuit Court of Appeals, such a review requires that the IEP be reviewed "prospectively as of the time it was created" (R.E., 694 F.3d at 188).⁴

The record reflects that at the time that the May 2012 CSE meeting, the student was passing her academic classes and got along well with peers and had friends (Joint Exs. 6 at p. 1; 7 at pp. 2-5; Dist. Ex. 1). In addition, the evaluative information available to the district's CSE (the sufficiency of which is not in dispute) indicates that the student demonstrated delays in language development, both in receptive and expressive language, and indicates that the student

⁴ The IHO appears to have recognized the distinction between this case and Application of a Student with a Disability, Appeal No. 12-054, noting that the previous proceeding involved the alleged "defective implementation" of an IEP rather than the "development of a defective IEP" (IHO Decision at p. 10). However, the IHO's analysis, which included a retrospective assessment of the student's progress during the 2012-13 school year, was not limited to a prospective review of the IEP.

continued to require speech language service "to increase her speech intelligibility, develop increased independence in applying resources/strategies for comprehension and use of age-appropriate vocabulary and language skills, and to further develop pragmatic skills to maximize intake of both verbal and non-verbal information during instruction" (Joint Ex. 6 at p. 1). Consistent with this evaluative information, the May 2012 IEP identified the student's developmental and functional speech service needs (Joint Exs. 4 at pp. 2-3), and noted that the student demonstrated difficulty organizing and combining sentences to formulate paragraphs/essays, using appropriate grammar skills and age level vocabulary, and understanding syntax (Joint Exs. 4 at p. 2; 6 at p. 1).⁵ The May 2012 IEP also notes, again consistent with evaluative data, that the student had shown improvement in applying behaviors that maximize[d] her speech intelligibility with varying degrees of consistency (Joint Exs. 4 at p. 2; 6 at p. 1), that the student was most successful in a comfortable environment and speaking situations with low emotional content (*id.*), that the student was least intelligible when upset, in a large group, or when making inquiries (*id.*), and that the use of verbal prompts helped to increase the student's intelligibility (*id.*) Consistent with the student's need for speech-language services, the May 2012 IEP included strategies to address the student's speech language deficits, including the inclusion of two speech-language goals aligned to the student's needs which were to be measured monthly (Joint Ex. 4 at p. 13),⁶ as well as the provision of speech-language therapy. The May 2012 IEP, therefore, reflects the results of the evaluative data provided to the CSE, describes the needs of the student, and sets forth a program of speech-therapy services for the student.

The parent, however, suggests that in order to receive a FAPE, the student required speech-language therapy to begin eight days before the May 2012 IEP required it to, which would have resulted in the provision of three additional 30-minute group sessions in the 2012-13 school year. However, the parent does not point to any evidence in the hearing record indicating that the student required these additional sessions, or that the "delay" in commencement of these services precluded the student from receiving an educational benefit.⁷ Additionally, I note that the hearing record does not reflect that the student had any health-related or other condition that

⁵ The IEP also notes, consistent with evaluative data, that the student's syntax in math word problems was improving with direct practice of discerning operation/order through increasing associative, direction, and question vocabulary (Joint Exs. 4 at p. 2; 6 at p. 1).

⁶ One of these goals targeted the student's application of learned techniques to maximize her speech intelligibility with minimal prompts (Joint Ex. 4 at p. 13; Tr. p. 85), while the other addressed the student's application of strategies and supplemental resources to comprehend and use grade-level vocabulary and language skills with minimal cues (*id.*).

⁷ In fact, and although not dispositive, I note that the student's speech-language therapist testified that commencing the student's speech-language sessions for the 2012-13 school year on September 13, 2012 was actually beneficial to the student, as it provided the therapist with an opportunity to conference with the student's teachers regarding speech and language needs and to develop a schedule for pull-out services that would be most appropriate for the student (Tr. pp. 90-91). Specifically, the hearing record indicates that during the period of time between the first day of school and the day when speech therapy services were to commence as per the May 2012 IEP, the speech-language pathologist met with the student's English-language arts (ELA) teacher as well as the student's social studies, science, and mathematics teachers to discuss the student's speech-language classroom needs and the provision of push-in speech-language therapy (Tr. pp. 76, 79). According to the speech-language pathologist, if the student had started receiving speech-language services without the speech-language pathologist having conferenced with her teachers, the student would have missed "a lot of initial stuff in the classroom," and the speech-pathologist would not have been able to discuss the student's needs with her teachers or develop a schedule best suited to the student's needs, including groupings with other students most appropriate for her (Tr. pp. 81, 90, 92-94).

created a circumstance that required life-saving speech-language therapy services (e.g., therapeutic feeding to prevent aspiration and/or choking) or that without such services for a limited amount of time, the student was in any imminent danger. Nor is there anything in the hearing record to indicate that the student displayed such substantial regression at the start of the school year that she was in need of speech-language therapy sessions on the first day of school. In fact, the May 2012 IEP did not recommend 12 month speech-language therapy services for the student (which may have been an indicator that the student was at risk of regression), and the parent does not suggest that such services were necessary (Joint Exs. 1 at p. 4; 4).⁸ Accordingly, I am unable to find that the May 2012 IEP, when viewed prospectively, denied the student a FAPE by starting speech-language therapy services eight days after the start of the school year.

Moreover, even if I were to review this case the same way that the IHO did (i.e., as an "implementation" case), I would agree with the IHO and reach the same result as above. In particular, a denial of a FAPE for failure to implement an IEP occurs only if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821-22 [9th Cir. 2007]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see Sumter Co. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 [4th Cir. 2011]; Fisher v. Stafford Twp. Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; see also V.M. v. North Colonic Cent. Sch. Dist., 954 F. Supp. 2d 102, 118-19 [N.D.N.Y. 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 271 [S.D.N.Y. 2012]; T.L. v. Dep't of Educ., 2012 WL 1107652, at *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007]). As noted above, the parent does not present any evidence which would demonstrate that three additional sessions of speech language therapy were necessary for the student to make educational progress. Accordingly, as in the prior appeal involving this student, in light of the relatively few number of sessions missed, the short period of time during which the sessions would have been provided, and the evidence in the hearing record regarding the student's slow but gradual progress toward her annual goals in this area during the 2012-13 school year (Tr. pp. 86-91), the commencement of the student's speech-language therapy services would not have constituted a material failure to implement the student's IEP.⁹ This is especially true since, according to the student's speech-language therapist, any variability of the student's progress with respect to the speech-language goals contained on the May 2012 IEP was likely a result of the student's non-compliance during therapy sessions (Tr. pp. 87-89).¹⁰

⁸ The parent does not challenge the lack of 12 month speech-language therapy services in the IEP on appeal, and has not challenged this at any point in these proceedings (Joint Exs. 1 at p. 4; 4).

⁹ The record reflects that the student was "progressing gradually" or "progressing satisfactorily" toward her IEP goals (Tr. pp. 86-87). According to the speech-language therapist, progressing gradually indicates that the progress was "slower than I like it to be" and that "she's making less anticipated progress but may still achieve the goal," while progressing satisfactorily "means she's making good progress towards the goals" (Tr. p. 86).

¹⁰ For example, the speech-language therapist testified that "[h]er progress is very dependent on where she is and who she's with. In the classroom, that push-in session was the least effective part of her day, in her services. When [the student] is with her peers, and she's in with a large group of her peers especially, she is not very compliant. In fact, she's actually non-compliant many times and actually disrespectful and refuses to benefit from any services" (Tr. p. 87).

VII. Conclusion

In light of the above, I find that the May 2012 IEP was sufficient to enable the student to make educational progress and that the failure of the district to provide the student with speech-language therapy services sessions during the first eight days of the 2012-13 school year does not amount to a denial of a FAPE.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 15, 2014**

**HOWARD BEYER
STATE REVIEW OFFICER**