The University of the State of New York

The State Education Department
State Review Officer
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No. 12-054

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Buffalo City School District

Appearances:
Goldstein, Ackerhalt & Pletcher, LLP, attorneys for petitioner, Jay C. Pletcher, Esq., of counsel

Christopher M. Putrino, Esq., Legal Counsel, attorney 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 respondent's (the district's) implementation of the student's individualized education program (IEP) for the 2011-12 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 IEP, 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 school 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As relevant to the issues in this appeal, the CSE convened on May 19, 2011 to develop the student's IEP for the 2011-12 school year when she would be in the sixth grade (Dist. Ex. 3 at pp. 1-2). Among other things, the May 2011 CSE determined that the student would continue to be eligible to receive special education and related services as a student with a learning disability (Dist. Ex. 3 at p. 3).[1] The resultant May 2011 IEP recommended that the student be placed in an integrated co-teaching (ICT) classroom and receive speech-language therapy in a small group in a therapy room, twice in a six day cycle for 30 minutes per session, as well as speech-language

[1] I note that the student's eligibility for special education and related services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][10]).

therapy in her classroom once in a six day cycle for 30 minutes (Dist. Ex. 3 at pp. 1, 7).[2] The May 2011 CSE considered the results of a January 2011 district occupational therapy (OT) evaluation and a March 2011 independent OT evaluation, and determined that OT consultation services should be provided once per month for 30 minutes (Tr. pp. 35, 36-37, 44, 52; see Dist. Exs. 7; 8).[3] With respect to the OT consultation services, the hearing record reflects that the chairperson of the CSE inadvertently neglected to reflect the recommended OT consultation services on the student's IEP form (Tr. p. 36; see Dist. Ex. 3 at p. 7).[4] Further, among the accommodations and modifications recommended by the May 2011 CSE was that in her academic classes the student would "receive a copy of class notes at the beginning of class" (Dist. Ex. 3 at p. 7). The IEP reflected that the recommended programs and services would begin on September 7, 2011 (Dist. Ex. 3 at pp. 1, 7). The student attended the public school for the 2011-12 school year (see Tr. pp. 89, 97-100, 108-13, 148-66; Dist. Exs. 5; 6; 10; 11; 13; 14; Parent Exs. C; D; E).

By prior written notice to the parent dated September 22, 2011, the district proposed to have the CSE amend the IEP to "correct . . . clerical errors on the IEP" including the start dates of the student's speech-language therapy and OT services, reflect the speech-language and OT "reports/recommendations," and update the speech-language goals to reflect progress the student made during the 2010-11 school year (Parent Ex. B at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated October 3, 2011, the parent asserted that the district failed to implement the May 2011 IEP and denied the student a FAPE (Dist. Ex. 1 at pp. 1, 2). Specifically, the parent asserted that the district had failed to provide the student with the recommended speech-language therapy services at the beginning of the 2011-12 school year and that "upon information and belief" such services did not begin until September 22, 2011 (id. at p. 2). The parent also contended that the district had not "consistently provided" the student with class notes "in any of her academic classes" and that "in at least some of her academic classes [class notes] had not been provided to her at all" (id.). Finally, the parent alleged that the May 2011 CSE had failed to recommend OT services consistent with the recommendations of the two OT evaluations and that the student's needs were therefore not being appropriately met (id.). As a

[2] State regulation defines "integrated co-teaching" as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). Furthermore, school personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (now the Office of Special Education) issued a guidance document in April 2008 entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes Integrated co-teaching services (available at http://www.p12.nysed.gov/specialed/publications/ policy/schoolagecontinuum.pdf). I note also that parts of the hearing record describe an ICT class as a "CT" or "co-teacher" class (see Tr. p. 148). For purposes of this decision, I will refer to this type of class as an ICT class.

[3] The hearing record reflects that these two evaluations as well as the May 2011 CSE's review and consideration of them resulted from the settlement of an earlier impartial hearing request submitted by the parent (Dist. Ex. 1 at p. 2).

[4] Although the hearing record is not entirely clear, on appeal the parties clarify that the CSE had intended to include OT consultation services on the IEP (Pet. ¶12; Answer ¶6).

proposed solution, the parent requested that the district: (1) implement the student's speech-language therapy according to the terms of the May 2011 IEP; (2) ensure that the student is provided with class notes at the beginning of all of her academic classes according to the terms of the May 2011 IEP; (3) implement the OT services recommended in the two OT evaluations; and (4) provide the student with "additional services" to compensate for the district's failure to provide the student with a FAPE (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 12, 2011 (see Tr. pp. 1, 191-93). In a decision dated February 4, 2012, the IHO found that the district had not denied the student a FAPE and dismissed the parent's due process complaint notice (IHO Decision at p. 14). Specifically, the IHO found that the issues raised in the parent's due process complaint notice constituted "minor flaws" in the district's special education program and that those flaws failed to establish that the student was denied a FAPE (id.). The IHO also determined that he would not address additional issues raised by the parent at the impartial hearing or in her post hearing brief, such as the alleged improper composition of the May 2011 CSE and the absence of updated speech-language annual goals in the May 2011 IEP, because those issues were outside the scope of the due process complaint notice (id.).

With respect to the student's speech-language therapy, the IHO concluded that the May 2011 IEP provided that the student's speech-language therapy was to begin on September 7, 2011, that a district memorandum indicated that related services were to begin on September 21, 2011, that the earlier date for the commencement of the student's related services had been placed on the IEP in error, and that notwithstanding that error, the services should have started on the date reflected on the IEP (IHO Decision at pp. 7, 9). The IHO also concluded that the hearing record showed that the student did not begin receiving speech-language therapy on the "delayed" start date of September 22, 2011 because the student was unavailable due to a change in her schedule (id. at pp. 8-9). The IHO further concluded in light of the student's unavailability for speech-language services at the beginning of the third week in school, that it was "simply conjecture" to estimate the number of speech-language therapy sessions, if any, that the student had missed (id. at p. 9). The IHO found that while "technically" the speech-language services should have been provided for as mandated in the IEP, the failure to provide such services did not rise to the level of a denial of a FAPE (id.). The IHO also stated that he would not order the provision of compensatory services to the student for the "at best" two week delay because there was no indication in the hearing record that the student needed compensatory services "in order to catch-up to where she would have been" had she received the services as recommended in the May 2011 IEP (id.).

With respect to the issue of class notes, the IHO concluded that the May 2011 IEP's requirement that the student be provided with copies of class notes at the beginning of all academic classes "presumes that there are in existence class notes that can be copied" and that this "apparently" was not the case (IHO Decision at p. 11). The IHO further found that "to the extent that class notes existed prior to the beginning of class so that copies might be made and provided to [the student]," the student's special education teacher's testimony "was sufficient to establish compliance" with the IEP (id.). The IHO indicated that even if there were "only sporadic

compliance" with the IEP requirement regarding class notes, he would not find that such compliance resulted in a denial of FAPE to the student (id.).

Regarding OT, the IHO found that the May 2011 CSE appeared to have adopted the recommendation in the January 2011 district OT evaluation that consultation services be provided once per month, that the CSE chairperson "forgot to add that service to the [IEP]," and that this was a clerical error (IHO Decision at p. 12). The IHO further found that this error did not deny the student a FAPE (id. at pp. 12-13). The IHO also concluded that the district appeared to have "appropriately attempted to rectify the error by seeking to revise and amend the IEP" to include the recommendation for an OT consult (id. at p. 12; see Tr. pp. 63-64, 67, 71-72, 77; Parent Ex. B at p. 1). However, the IHO "accept[ed]" the parent's testimony that she did not receive the September 2011 notice which the district's special education chairperson testified she sent, and which asked the parent's consent to amend the May 2011 IEP to include information relating to OT (IHO Decision at p. 12; see Tr. pp. 63-64, 67, 71-72, 77, 181; Parent Ex. B at p. 1). The IHO also found that the district acted appropriately in not initiating the recommended OT services during the impartial hearing without the consent of the parent to do so (id. at p. 13).

IV. Appeal for State-Level Review

The parent appeals the IHO's finding that the district offered the student a FAPE. The parent asserts that the student was denied a FAPE because, among other things: (1) based on an "across-the-board" policy, the district did not timely implement the student's speech-language therapy services at the beginning of the 2011-12 school year as required by the May 2011 IEP; (2) the district did not provide the student with class notes at the beginning of all of her academic classes as mandated by the May 2011 IEP; and (3) the district did not provide the student with OT consultation services as recommended by the two OT evaluators and by the CSE. The parent further alleges that the evidence did not show the student was making meaningful educational progress toward her IEP goals and identified deficits. The parent also asserts that the district led her to believe that OT consultation services were being provided notwithstanding the absence of such service from the May 2011 IEP, and that the parent learned for the first time at the impartial hearing that the OT consultation services were not being provided. With regard to the attempt to rectify the CSE chairperson's error related to the provision of OT consultation services to the May 2011 IEP, the parent alleges that she did not receive the CSE's "'Proposed Amendment to IEP . . . '" form allegedly sent to her by the district. The parent also contends that the district failed to include the required members at the May 2011 CSE and that the May 2011 IEP's speech-language annual goals had not been updated to reflect the progress the student had made during the 2010-11 school year. As relief, the parent requests, among other things, that the district: (1) provide the student with monthly OT consultation services for 30 minutes each month for the remainder of the 2011-12 school year; (2) ensure the student is provided with class notes at the beginning of all of her academic classes each day; (3) provide the student with six speech-language therapy sessions in a small group for 30 minutes per session as "additional services;" and (4) provide the student with five OT consultation services for 30 minutes per session as "additional services."

The district answers the parent's petition, alleging that the IHO properly determined the three issues raised by the parent in her due process complaint notice: (1) that the district failed to provide speech-language therapy at the beginning of the 2011-12 school year; (2) that the district failed to provide a copy of class notes to the student in conformance with her IEP; and (3) that the

district failed to implement appropriate OT services. The district further asserts that the IHO appropriately precluded the parent from raising new issues that were outside of the scope of her due process complaint notice.

In a reply, the parent contends that she could not have raised certain allegations in her due process complaint notice because those allegations were unknown to her until the impartial hearing.[5]

V. Applicable Standards – FAPE and IEP implementation

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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR

[5] In a footnote, the parent alleges that the district's answer was not timely served; however, she does not ask that the answer be dismissed on these grounds (see Reply n.1).

300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs 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., 2010 WL 1049297, at *2 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821-22 [9th Cir. 2007]; Houston Indep. School District v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Sumter Co. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 [4th Cir. 2011; Fisher v. Stafford Township 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]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing claims challenging the implementation of an IEP under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

VI. Discussion

A. Scope of Review

I now turn to the allegations in the petition that neither a special education teacher of the student nor a regular education teacher of the student attended the May 2011 CSE meeting; that the student's annual speech-language goals on the May 2011 IEP should have been updated; and that the decision to delay the start of the student's speech-language services during the 2011-12 school year was made outside of the CSE process and without the involvement of the parent. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to

the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). In this case, the parent's October 2011 due process complaint notice does not assert any claims that may be reasonably read to set forth any of the above assertions. Additionally, while the hearing record contains some testimony relating to these issues, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include these issues. Further, the hearing record does not reflect that the parent submitted, or that the impartial hearing officer authorized, an amendment of the parent's October 2011 due process complaint notice to include these issues. Moreover, I note that the IHO correctly determined that he was precluded from addressing issues relating to the composition of the May 2011 CSE and whether the May 2011 IEP's speech-language goals should have been updated.

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include the issues noted above or file an amended due process complaint notice, I decline to review these issues.[6] To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]). Therefore, the only issues properly before me on appeal concern the implementation of the IEP.

B. Implementation of May 2011 IEP

I will now address the parent's contentions relating to the implementation of the student's 2011-12 IEP. Specifically, the parent contends that (1) the student's speech-language services did not begin on September 7, 2011 as provided for in the May 2011 IEP, (2) the district did not implement the provision in the May 2011 IEP that required the student be provided with copies of class notes at the beginning of her academic classes, and (3) the once per month OT consultation services recommended by the May 2011 CSE were mistakenly omitted from the student's May 2011 IEP and were therefore not implemented. For the reasons set forth below, I find no material failure in the district's implementation of the May 2011 IEP (see A.P., 2010 WL 1049297 at *2).

[6] To the extent that the parent alleges in her petition that the district failure to implement certain provisions in the May 2011 IEP resulted in an IEP not being in place for the student prior to the start of the 2011-12 school year, that issue was also not raised in her due process complaint notice and I will not address it (see Dist. Ex. 1).

1. Speech-language Services

With respect to the delay in the commencement of the student's speech-language services, the hearing record shows that during a two week period of time from September 7, 2011 through September 22, 2011, the student did not receive the six 30 minute speech-language therapy small group sessions provided for in the May 2011 IEP.[7] The student's speech-language therapist testified as of the December 12, 2011 impartial hearing date that the student was "definitely" making progress "towards improving her speech and language skills to function in a class" (Tr. p. 99). The speech-language therapist also testified that the student had shown progress both in the speech-language goals in the May 2011 IEP as well as in other appropriate areas of instruction which were targeted by the speech-language therapist (Tr. p. 97).[8] Further, the November 18, 2011 progress report for the student's IEP goals and objectives indicate that the student was "progressing gradually" with respect to the two speech-language goals on the May 2011 IEP (Dist. Ex. 5 at p. 5). In light of the relatively few number of sessions missed, the short period of time during which the sessions would have otherwise been provided, and the information in the hearing record regarding the student's progress in this deficit area during the 2011-12 school year, I find that the delay in the commencement of the student's speech-language therapy from the date set forth in the May 2011 IEP did not constitute a material failure to implement the student's IEP.[9]

2. Copy of Class Notes

Turning next to the parties' dispute regarding class notes in all academic classes, I find that the evidence in the hearing record supports the IHO's conclusion that when class notes were prepared, copies were provided to the student and that "a lot of times" such copies were provided to the student at the beginning of the class (see Tr. pp. 151-52, 157; see also IHO Decision at p. 10). Additionally, when class notes were not available at the beginning of the class, the student's special education teacher testified that the student had a hard copy of notes by the time she left class and that the student "ended up leaving every single day with everything she needed, all of the notes" and that the student did "get everything" (Tr. pp. 157, 163-64). The thrust of the parent's argument is that the IEP mandates that class notes must be prepared for every session of each academic class, presumably without regard to whether activities during a particular class session include note taking. However, I am not persuaded that the district staff was required to abide by the parent's interpretation of the language in the IEP because the IEP indicates that the student is to receive class notes "at the beginning of class" in all academic "areas," but the IEP does not

[7] I note that the IHO's decision indicates that the student's speech-language therapy did not begin until September 22, 2011 (see IHO Decision at p. 7). However, the hearing record shows that the student's first day of speech-language therapy during the 2011-12 school year was on September 23, 2011 (see Tr. p. 111; Dist. Ex. 10).

[8] The speech-language therapist also indicated that because new speech-language goals for the student had not yet been formalized, she did not know exactly where the student stood with respect to those goals (Tr. pp. 98-99).

[9] I note that while "the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail" on a claim of a violation of the IDEA on the basis of a failure to implement a student's IEP, a lack of progress may be probative of whether a district's failure to implement particular provisions of an IEP were material (Van Duyn, 502 F.3d at 822; Dep't of Educ. v. T.F., 2011 WL 4381740 at *7 [D. Haw. Aug. 31, 2011; Shaun M. v. Hamamoto, 2009 WL 3415308 at *6 [D. Haw. Oct. 22, 2009]; P.K. v. Middleton Sch. Dis., 2011 WL 839711 at *2 [D. N.H. Mar. 9, 2011). Similarly, a student's progress may be probative that the failure to implement the student's IEP was not material (id.).

include language such as "every" session or "each" class period (Dist. Ex. 3 at p. 7). Accordingly, some flexibility attendant to the particular circumstances of each class session would be reasonable. Supplementary aids and services and/or program modifications such as a copy of class notes are provided for the purpose of "enabl[ing] students with disabilities to be educated with nondisabled students to the maximum extent appropriate in the [LRE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). Once more, evidence of the student's progress, while not dispositive, nevertheless does not support the conclusion that the district had materially deviated from this provision of the student's IEP when it was implemented. At the time of the impartial hearing, the student was performing well in her ICT class where she was being educated along side regular education students. For the 2011-12 school year, the student's first marking period report card dated December 2011 reflected grades in her academic subjects including an 88 in English, a 93 in math, and an 86 in science (Dist. Ex. 6). Additionally, during her testimony, the special education teacher who co-taught the student's ICT classes with the regular education teacher testified that the student was "doing really well" and "fantastic" (Tr. pp. 155, 156, 164). In light of this evidence, I find that even if I were to adopt the parent's interpretation of the language in the May IEP, the district did not deviate from the class notes provision of the IEP in a material or substantial way.

3. OT Consultation

I turn now to the parent's claim regarding the implementation of the student's OT consultation services during the 2011-12 school year, which were contemplated at the CSE meeting but inadvertently omitted from the IEP (Tr. pp. 36-39, 49; see Dist. Ex. 3 at pp. 7). Upon review of the entire hearing record, and taking into consideration the nature and recommended frequency of this service, I find that the evidence supports the conclusion that the district's failure to implement these services, which was the result of a clerical error in the memorialization of the May 2011 IEP, was not a violation of the IDEA. The hearing record establishes that the recommended OT service was limited to one consultation with the student's teacher for 30 minutes per month as recommended in the district's January 2011 OT evaluation (Dist. Ex. 7 at p. 8; see Tr. p. 36). Further, the district's coordinator for the CSE, who also acted as the chairperson of the May 2011 CSE meeting, testified that the CSE considered both the January 2011 district OT evaluation and the March 2011 independent OT evaluation and determined that the student did not require direct OT services (Tr. pp. 35, 36-37, 44, 52, 54). Neither of the two OT evaluations recommended direct OT services and the independent OT evaluation obtained by the parent recommended only an initial OT consultation for the purpose of providing the student "the opportunity to achieve maximum functional skills in class" (Dist. Ex. 8 at p. 6; see Dist. Ex. 7 at p. 8).[10] Further, the hearing record shows that the student had previously received direct OT services, that the May 2009 CSE had determined that the student had made "excellent progress" toward her OT goals and recommended that those services therefore be discontinued, and that the student's direct OT services had been discontinued for the 2010-11 school year (Tr. pp. 54-55;

[10] As noted above, the IDEA does not require school districts 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).

Dist. Ex. 7 at p. 3).[11] Further, the district's occupational therapist testified that based on her review of documents, she believed that an OT consultation recommendation was an appropriate recommendation and that she did not believe that direct OT services would "best meet [the student's] needs at this point" (Tr. pp. 141, 143). Additionally, I note that no claim is made that that the district did not implement the student's recommended ICT classroom program and the hearing record indicates that it did (see Tr. pp. 148-49). Additionally, the parent has not pointed to any part of the hearing record that would indicate the absence of the recommended once per month OT consultation service affected the student's ability to function in her classroom in any way.

To the extent that the parent is contending that the May 2011 CSE did not include all of the recommendations for the school that were set forth in the independent OT evaluation, I find that the absence of these recommendations from the May 2011 IEP did not result in a denial of a FAPE to the student. As indicated above, the hearing record establishes that the student was performing well in her academic classes and that she was making progress regarding each of her IEP annual goals (see Tr. pp. 155, 156, 164; Dist. Exs. 5; 6). Although there is no basis to disagree with the IHO's finding that the parent did not receive the notice from the district regarding its efforts to correct clerical errors in the IEP (Tr. p. 181), the district special education chairperson testified that the notice was sent, the hearing record includes such a notice and I find that the district's argument that it attempted to correct the IEP persuasive. In light of the evidence described above, I find that the hearing record does not support the conclusion that the district deviated from the student's May 2011 IEP in a material or substantial way or that, under the circumstances of this case, any alleged defects in the process attributed to the district denied the student a FAPE due to a lack of OT consultation services.

VII. Conclusion

In summary, upon my independent review of the entire hearing record, I find no material failure in the district's implementation of the student's IEP for the 2011-12 school year.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 18, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

[11] While the May 2011 IEP indicated that the student needed occupational therapy, the district's central processing center coordinator for the CSE and chairperson of the May 2011 CSE meeting indicated that this was an oversight, that this language described the student's needs when direct OT services had previously been appropriate for the student, that the May 2011 IEP had been prepared from an earlier IEP, and that the May 2011 IEP had not been "checked thoroughly" to ensure that it reflected the student's current needs (Tr. pp. 31, 53-55). I caution the district to carefully check that the student's IEPs accurately reflects her current needs and evaluative information.