



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 17-089

**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 New York City Department of Education**

### **Appearances:**

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail Eckstein, Esq.

## **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 determined that the speech-language therapy services respondent's (the district's) Committee on Special Education (CSE) recommended for her daughter for the 2016-17 school year were appropriate, but awarded compensatory education for speech-language therapy sessions the student missed during the school year and ordered the district to fund an independent educational evaluation (IEE) in the area of speech and language. The appeal must be sustained in part.

### **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 (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 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**

In this case, the student's eligibility for special education and related services is not disputed by the parties.

On January 14, 2016, the CSE convened to conduct the student's annual review and to develop an IEP (Dist. Exs. 7 at pp. 1, 11; 9 at p. 1). Finding the student remained eligible for special education and related services as a student with a learning disability, the January 2016 CSE recommended that the student receive integrated co-teaching (ICT) services for ELA and math, as

well as two 30-minute sessions per week of individual speech-language therapy (*id.* at p. 8). The January 2016 IEP included annual goals which addressed the student's ability to orally share ideas on a topic, orally re-tell key events of a story, answer inferential questions, solve multi-step math word problems, and show flexibility in how she demonstrated understanding of the content of a given text (*id.* at pp. 3-7). The parent signed a consent for the student to receive the services recommended by the January 2016 CSE on January 14, 2016 (Dist. Ex. 8). The district provided the parent with prior written notice of the January 2016 CSE's recommendations on January 19, 2016, which indicated that the recommended services would be put into effect on February 2, 2016 (Dist. Ex. 10 at pp. 1-2).

In May or June 2016, the parent was issued an RSA for ten speech-language therapy sessions to make up for sessions missed during the 2015-16 school year (Tr. pp. 151-52; *see* Dist. Ex. 12 at p. 2).

The CSE convened for an annual review meeting on January 12, 2017; however, the parent requested time to consider the CSE's recommendation and requested a second meeting (Dist. Ex. 5 at p. 2). On January 13, 2017, the parent notified the district via e-mail that she did not agree with the CSE's speech-language therapy recommendation and believed the student should receive three 30-minute sessions of individual speech-language therapy per week (Parent Ex. C).

The CSE reconvened on January 20, 2017 (Dist. Ex. 3 at pp. 1, 8, 11). The January 2017 IEP noted that the parent was concerned about a disconnect between the student's performance at home versus school, and she requested supports or strategies to help with the student's homework and an additional individual speech-language therapy session per week (*id.* at pp. 2, 9). The CSE recommended that the student receive an additional group push-in speech-language therapy session per week instead of an individual session (*id.* at p. 9). The IEP indicated that the parent disagreed with this decision, but ultimately consented to the additional group speech-language therapy session (*id.*). The January 2017 CSE found that the student remained eligible for special education and related services as a student with a learning disability and again recommended ICT services for ELA and math, as well as two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of group speech-language therapy (*id.* at p. 5). By prior written notice dated January 27, 2017, the district informed the parent of the January 2017 CSE's recommendations (Dist. Ex. 5 at p. 1-2).

On February 10, 2017, the parent emailed the student's speech-language therapist to inquire about missed speech-language therapy sessions (Parent Ex. D). In a February 16, 2017 e-mail to the speech-language therapist, the parent again inquired about missed sessions on February 1, 2017 and February 8, 2017 (Parent Ex. E). The student's speech-language therapist explained that she would make up sessions as her schedule permitted (*id.*).<sup>1</sup>

In an email to district staff dated February 17, 2017, the parent expressed concerns about the implementation of the student's speech-language therapy services, including missed services being logged as completed, sessions not lasting a full 30-minutes, and insufficient support within

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<sup>1</sup> The February 16, 2017 e-mail correspondence also included some disagreement regarding what took place during a February 15, 2017 group speech-language therapy session (Parent Ex. E).

the sessions to meet the student's goals (Parent Ex. F). In a March 3, 2017 telephone conversation, the parent informed a district psychologist that the parent was having an independent speech-language evaluation conducted "through her insurance," and did not want anything done by the district (Dist. Ex. 12 at p. 1). The parent's privately obtained speech-language evaluation was not shared with the district (Tr. pp. 165-66; see Tr. pp. 27, 29-30, 34-35). In an email to the student's teachers and speech-language therapist dated March 15, 2017, the parent expressed concern about the student's deficits in reading comprehension, her need for repetition, and her ability to read independently (Parent Ex. G).

On April 7, 2017, the parent emailed the student's speech-language therapist, expressed her dissatisfaction with the therapist's refusal to communicate over the phone, inquired about an additional missed therapy session, and questioned whether the therapist was meeting with the student for the full 30 minutes mandated for the student's speech-language therapy sessions (Parent Ex. H).

### **A. Due Process Complaint Notice**

By due process complaint notice, dated April 7, 2017, the parent complained that the recommended group speech-language therapy session should be an individual session and alleged that the district failed to fully implement the student's speech-language therapy services during the 2016-17 school year (Dist. Ex. 1 at pp. 2-3). Specifically, the parent alleged that the student's speech-language therapist terminated a number of sessions early, missed sessions entirely, and stated she met with the student on days they had not met (id. at p. 3). The parent complained that due to the allegations she raised, the student's speech-language therapist chose not to communicate with her by telephone (id.).

As a proposed resolution, the parent requested that the weekly group speech-language therapy session recommended in the January 2017 IEP be modified to an individual session (Dist. Ex. 1 at pp. 2-3). Additionally, the parent requested that the district issue an RSA for speech-language therapy services to compensate for services missed during the 2016-17 school year and further requested that the student's speech-language therapy services be provided through RSAs for the duration of the 2016-17 school year and for the upcoming 2017-18 school year (id. at p. 2).

### **B. Impartial Hearing Officer Decision**

After a prehearing conference on April 21, 2017, the parties proceeded to an impartial hearing, which was conducted on July 12, 2017 (Tr. pp. 1-178). In a decision dated September 6, 2017, the IHO concluded that the CSE's recommendation for speech-language therapy for the 2016-17 school year was appropriate, and that there was no basis in the hearing record to conclude that the student required three individual sessions of speech-language therapy per week (IHO Decision at p. 5). The IHO credited the testimony of the speech-language therapist that a basis for recommending a group session of speech-language therapy was the desire to limit the number of times the student had to be pulled out of her class (id.). The IHO further found that the parent's areas of concern could "be appropriately addressed through the development of appropriate goals to be implemented through a special education teacher within the context of an ICT program" with the student's existing speech-language therapy mandate (id.).

Regarding the parent's claim that the district failed to implement the student's speech-language therapy mandate, the IHO agreed that the district failed to deliver a number of speech-language therapy services during the 2016-17 school year (IHO Decision at p. 5). In order to compensate the parent for missed sessions through June 30, 2017, the IHO ordered the district to issue RSAs for twenty 30-minute sessions of speech-language therapy (id. at pp. 5-6).

Turning to the parent's request for the student's speech-language therapy services to be provided through an RSA for the 2017-18 school year, the IHO noted that the parent based her request upon strained communication between the parent and the student's speech-language therapy therapist, missed speech-language therapy sessions, and the parent's allegations regarding limited historical progress (IHO Decision at p. 6). The IHO determined that ordering the parent's requested relief required a finding that the student's IEP would not be appropriately implemented for the 2017-18 school year, or that "the communication between the [district's] speech-language therapist and the parent would be conducted in such a manner as to deny [the student] a FAPE" (id.). The IHO indicated that he was not able to make those findings, and was also unable to find that the student's lack of progress in the area of speech-language justified the preemptive issuance of RSAs for the 2017-18 school year (id.).

However, the IHO also determined that there was disagreement as to the student's current functioning in the area of speech-language and as to the student's need for individual speech-language therapy (IHO Decision at p. 4). The IHO acknowledged that a lack of trust had developed between the parent and district staff (id. at pp. 4-5). The IHO noted that the parent had concerns regarding the student's progress and communication with the student's speech-language therapist, and that the parent had only provided the district with a redacted version of a private speech-language therapy evaluation she had obtained (id.). The IHO ordered the district to fund a speech-language IEE to be conducted by an evaluator of the parent's choice in accordance with existing district guidelines regarding the conduct of IEEs, to be made available to the CSE unredacted (id. at pp. 5-6). The IHO further ordered the CSE to meet within ten days of receiving the evaluation report, and make such recommendations as it deemed warranted (id. at p. 6).

The IHO dismissed all other claims set forth in the parent's due process complaint notice (IHO Decision at p. 6).

#### **IV. Appeal for State-Level Review**

The parent appeals, and alleges that the student should receive eight 30-minute sessions of speech-language therapy in addition to the twenty sessions awarded by the IHO, to account for an additional two missed sessions in September 2016, one missed session in November 2016, and six missed sessions between December 2016 and June 2017. The parent also asserts that the IHO erred in finding group speech-language therapy appropriate, and requests that the recommended group speech-language therapy session be changed to an individual session. The parent also raises concerns regarding "missed and deducted sessions, the lack of consistent progress, the rocky communication history [with the speech-language therapist], and the fact that [the student] no longer feels comfortable meeting with [the speech-language therapist]," and reasserts her request that the student be provided with RSAs for speech-language therapy for the 2017-18 school year.

The parent requests an order directing the district to fund twenty-eight 30-minute sessions of speech-language therapy instead of the twenty sessions ordered by the IHO, to change the student's once weekly group speech-language therapy session to an individual session going forward, and to issue an RSA for the remainder of the student's speech-language therapy sessions during the 2017-18 school year. The parent also requests that the IHO's order awarding an IEE in the area of speech-language be reversed because the parent did not request an IEE at district expense and does not want one conducted.

In an answer dated November 6, 2017, the district generally denies the parent's allegations, and requests that the IHO's decision be upheld in its entirety. The district asserts that it missed 17 sessions, but does not appeal the IHO's award, and takes the position that the award adequately compensated the student for the missed sessions. The District asserts that there is no basis in fact or law to award prospective RSAs requested by the parent. Lastly, the district asserts that it will not evaluate the student without action or consent from the parent.

## **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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 137 S. Ct. at 1001). 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]). 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 Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable 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 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>2</sup> 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).

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<sup>2</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

## **VI. Discussion**

### **A. Speech-Language Therapy**

The issues presented on appeal focus almost exclusively on the student's speech-language therapy needs and the services provided to address them, including the CSE's recommendations for speech-language services, the district's implementation of those services during the 2016-17 school year, concerns regarding the student's speech-language therapist, and the award of an IEE in the area of speech-language. I address each issue in turn, below.

#### **1. Recommendation for Group Speech-Language Therapy**

The parent appeals the IHO's determination that the student's speech-language therapy services, as recommended in the January 2017 IEP, were appropriate. Specifically, the parent objects to the IHO's determination that the CSE's recommendation for one session per week of group speech-language therapy (in addition to two individual sessions), rather than an additional individual session, was appropriate. The parent contends that the student's areas of difficulty could not be—and evidently were not—addressed in a group setting and also asserts that during the course of the 2016-17 school year, the group session turned into an individual session because the student's needs could not be met within the group session. The district argues that the parent has not presented any evaluative information which would support her determination and contends that the January 2017 CSE accounted for the parent's concerns and the district provided a program during the 2016-2017 school year in which the student made a "huge leap" in progress.

The clinical information included in the hearing record is limited, and a speech-language evaluation report dated November 12, 2014 is the only complete evaluation report (Dist. Ex. 11 at p. 1). According to the November 2014 speech-language evaluation report, the student has received speech-language therapy since preschool (*id.*). The evaluator found that the student demonstrated adequate verbal and nonverbal pragmatic language and that articulation was not an area of concern (*id.* at pp. 2, 3). According to the evaluator, the student's speech-language assessment results were significant for her below average performance on subtests assessing comprehension of spoken sentences and expression of word structure, as well as an observed increase in the student's response time; all of which, the evaluator noted, was commensurate with observations reported from school and home (*id.* at p. 3). The evaluator reported "[w]hile these factors [we]re not indicative of a speech and language disorder, they may negatively affect [the student's] use of language for educational purposes" and "[she] would benefit from individualized instruction to increase her ability to comprehend sentences and stories for educational purposes as well as increase her response time" (*id.*).

The student's January 2016 IEP included progress report information under each annual goal (Dist. Ex. 7 at pp. 3-7). These progress reports showed that by the end of the third reporting period the student had met her speech-language annual goals, her math annual goal, and one of her reading annual goals; and that although she had made progress, it was not anticipated that she



would meet one of her reading annual goals related to answering inferential questions (Dist. Ex. 7 at pp. 3-7).<sup>3</sup>

The IEP developed by the January 2017 CSE included the results of Teachers College Reading and Writing Project (TCRWP) assessments administered in October 2016 and January 2017 and an Everyday Math assessment administered in December 2016 (Dist. Ex. 3 at p. 1).<sup>4</sup> According to the IEP, the student obtained a score of 3.5/4 on the TCRWP narrative writing rubric, performed at a level 3.5 on the TCRWP opinion writing rubric and performed at level Q on the TCRWP reading running record (id.). On the Everyday Math unit 3 performance assessment the student obtained a score of 87%, level 3 (id.).

With respect to academic achievement and functional performance, the present levels of performance on the January 2017 IEP described the student as a highly motivated, well-mannered and enthusiastic member of her class community (Dist. Ex. 3 at p. 1). According to the IEP, the student was organized and able to work independently and sustain focus for an extended period of time (id.). The IEP further noted that the student was meticulous and precise when completing independent work, however, that sometimes led to her needing additional time to complete tasks (id.). The January 2017 IEP described the student's receptive language as "solid" but stated that, with respect to expressive language, the student often searched for the correct word or thought to share orally when participating during lessons (id.). The IEP indicated that the student expressed literal thoughts and was working to become a more inferential thinker (id.).

According to the IEP, the student made excellent progress in her ability to paraphrase and retell narrative texts, as well as "great progress" holding on to the arc of a story, retaining the details and making thoughtful inferences (Dist. Ex. 3 at p. 1). However, the IEP noted that with respect to assigned texts, the student continued to require frequent adult check-ins to ensure that she was keeping characters straight, was cognizant of the setting, and was making accurate inferences (id.). The IEP indicated that the student could adequately retell a narrative text, including all story elements, but needed support to summarize a book using 1-3 sentences (id.). According to the IEP, the student demonstrated good comprehension monitoring and was aware when she encountered an unfamiliar word (id.). The student struggled with figurative language and word play (id.). In addition, the IEP indicated that many expressions were unfamiliar to the student and could be a source of confusion (id.).

With respect to the student's strengths in reading, the IEP stated that the student was reading one level below the then-current benchmark, and had progressed two reading levels between September 2016 and January 2017 (Dist. Ex. 3 at p. 1). The IEP indicated that the student's fluency and decoding were strong and that she read accurately with good speed, phrasing and expression (id.). In addition, the student's literal comprehension was solid and she was able to retell what happened in a story with minimal prompting (id.). The IEP noted that writing was an area of

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<sup>3</sup> Since the January 2016 IEP was to be implemented on January 28, 2016, the third reporting period would have ended sometime in the fall of 2016 (Dist. Ex. 7 at pp. 1, 8).

<sup>4</sup> The IEP indicated that the benchmark for January of fourth grade for the reading running record was Level R (Dist. Ex. 3 at p. 1).

strength for the student and that she was excited to share her ideas, stories and opinions (*id.* at pp. 1-2). The IEP further noted that the student excelled at spelling, grammar and handwriting (*id.* at p. 2). In math, the IEP indicated that the student had a good understanding of addition and subtraction strategies, as well as beginning multiplication strategies (*id.*).

With respect to the student's academic needs and student needs that were of concern to the parent, the IEP indicated that the student demonstrated more uncertainty and confusion with inferential comprehension (Dist. Ex. 3 at p. 2). According to the IEP, the student seemed more hesitant to express ideas when there wasn't a single acceptable answer (*id.*). The IEP noted that the student was working on being more flexible, and accepting that there may be a wide range of possible ideas, and that she was working with a checklist to develop interpretations/inferential thinking with sentence frames and guidelines (*id.*). The IEP stated that while the student was meeting grade-level standards in writing she could show more flexibility by following the framework within a given genre and adding more of her own voice by being mindful of word choice and tone (*id.*). In math, the IEP stated that the student needed reinforcement of multidigit multiplication concepts and strategies including the standard algorithm, partial products area model (*id.*). According to the IEP, the student required additional support in identifying the steps and operations necessary to solve problems and benefitted from repeated practice and visual cues to reinforce a new concept (*id.*).

The IEP reflected the parent's concern that the student took a long time to complete homework assignments and was reluctant to leave an assignment incomplete (Dist. Ex. 3 at p. 2). The IEP noted that the student took much more time than usual to complete her homework and, to address this concern, her teachers adjusted homework requirements, removed the technology/current events homework, modified the length of vocabulary homework, and provided the student with math tools and reading checklists to use at home (*id.*). The IEP indicated that the parent had requested an increase in the student's speech-language services several times leading up to the IEP and shared her concern over the student's lack of time management and memory of school instruction while doing her homework (*id.*).

The social development section of the present levels of performance indicated that the student got along well with peers and adults, appeared to have good self-esteem and worked well in partnerships, groups and independently (Dist. Ex. 3 at p. 2). According to the IEP the student was working on asserting herself in a collaborative way by compromising when dealing with group members who have a variety of ideas (*id.*). The student enjoyed being a leader (*id.*). In general, the IEP indicated that there were no concerns in terms of the student's social or physical development (*id.* at p. 3).

With respect to management needs, the January 2017 IEP indicated that she benefitted from inferential reading frames or charts to support her reading comprehension, as well as small group instruction for reading; use of a checklist or procedural chart for solving math word problems and practicing close reading of word problems; visual note taking tools for reading across subjects for fiction and nonfiction; modified homework and time to complete homework assignments (Dist. Ex. 3 at p. 3). The IEP further stated that the student benefitted from speech-language therapy and the integrated co-teaching classroom environment for small group teaching to address her reading comprehension needs (*id.*).

The January 2017 CSE developed annual goals targeting the student's ability to answer inferential questions, identify and show steps when solving multi-step word problems, demonstrate understanding of common phrases and expressions and summarize a book in 1-3 sentences (Dist. Ex. 3 at pp. 4-5).

To address the student's identified needs, the January 2017 CSE recommended that the student receive integrated co-teaching services in ELA and math along with two 30-minute sessions of individual speech-language therapy per week and one 30-minute session of group speech-language therapy per week (Dist. Ex. 3 at p. 5). The parent does not challenge the appropriateness of the integrated co-teaching services or the two individual speech-language sessions, however, she does challenge the appropriateness of the one group speech-language therapy session.

The speech-language therapist testified that the student had been receiving individual speech-language therapy twice a week for a year and a half, and that in January 2017 the CSE changed the student's mandate to twice a week individual and once a week in a group setting within the classroom (Tr. pp. 67-68). She explained that the change was made predominantly because the parent believed the student needed more speech-language therapy, although the teaching staff—including the speech-language therapist—did not feel the increase was warranted given the progress the student was making in the classroom (Tr. pp. 68-69).<sup>5</sup> The speech-language therapist explained that the staff felt it was important to take the parent's concerns into account and the additional session in a group in the classroom "was an agreement that [the team] reached together" (*id.*). In addition, the speech-language therapist noted that the teachers felt that it was important that the student remained in her classroom working with her peers as much as possible (Tr. p. 98).<sup>67</sup>

For the additional group speech-language therapy session, the speech-language therapist stated that she went into the classroom and worked with the student and her group members on "extracting the meaning from all of the text that they were reading" (Tr. p. 97). In response to a question as to whether working in a group would take away from meeting the student's needs, the speech-language therapist noted the benefits of working with others with the same struggles (i.e.

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<sup>5</sup> The January 2017 IEP indicates that the parent had requested an increase in speech services several times leading up to and at the January 2017 CSE meeting (Dist. Ex. 3 at p. 9). The parent requested a third individual speech session (*id.*). The parent expressed concern over the student's comfort in receiving push-in group services and felt the student should be excused from the session if requested (Dist. Ex. 5 at p. 2).

<sup>6</sup> The parent testified that when she requested an increase in the student's speech-language therapy in November 2016 the speech-language therapist told her that "her schedule was full and it would be hard to add in another session" (Tr. p. 57). The parent further testified that it was her impression that the reason the speech-language therapist would not add another session was due to her scheduling issues and not necessarily the student's needs (*id.*). The parent confirmed that district staff also cited the least restrictive environment as a reason for not increasing the frequency of the student's speech-language therapy (Tr. p. 117).

<sup>7</sup> While the speech-language therapist further testified at the hearing that the student's current mandate was "excessive" and stated that she felt that a more appropriate mandate would be twice a week in a group of three, I note that this post January 2017 CSE meeting testimony is not reflective of the student's level of functioning and needs at the time of the January 2017 CSE meeting (Tr. pp. 74-75).

learning together, hearing others' ideas, hearing how others are interpreting the material) and she testified that she did not see it as a limitation (Tr. pp. 85-86).

Based on the foregoing, the hearing record supports finding that the January 2017 CSE had information available indicating that the student was making progress toward her speech-language annual goals with the support of two sessions per week of individual speech-language therapy and absent evidence that the student would not have benefitted from an additional group session of speech-language therapy, the hearing record supports finding that the speech-language therapy services recommended in the January 2017 IEP were reasonably calculated to enable the student to receive educational benefits.

The parent also alleged that the student's speech-language needs were not met in a group setting and that, during the course of the 2016-17 school year, the group session turned into an individual session because the student's needs could not be met within the group sessions. Ultimately, the student did not receive many group speech-language therapy sessions during spring 2017; only seven group sessions were logged between February 2017 and June 2017 (Dist. Ex. 14 at pp. 2, 12, 19, 22, 25, 28; 15 at p. 8). During another scheduled session, the speech-language therapist reported that the student refused participation choosing to work on her lap top during the session (Parent Ex. E; Dist. Ex. 14 at p. 37). The parent sent an email to district staff indicating that the student did not refuse the session and instead indicated the student was not provided with "much help" and that another student was being disruptive (Parent Exs. E; F). Additional scheduled group sessions were missed for various reasons (see Parent Exs. F; I; Dist. Ex. 14 at p. 39; 15 at pp. 3, 6, 11, 14). However, during the sessions that took place, session notes indicated that the student was making expected progress towards her annual goals (Dist. Ex. 14 at pp. 2, 12, 19, 22, 25, 28; 15 at p. 8).

Additionally, despite the parent's expressed disappointment with the conduct of the group speech-language therapy sessions, the hearing record supports the IHO's determination that the student continued to make progress throughout the school year. While the speech-language therapist testified that the student had not yet met her goals for the 2016-17 school year, she noted that the student had made "tremendous" progress over the course of the 2016-2017 school year in retaining information and making inferences (Tr. pp. 69-70, 96). The speech-language therapist added that the student made progress throughout the year, with slightly more progress in the second half of the year, and she noted that the student's speech-language needs steadily decreased (Tr. p. 96). The speech-language therapist also stated that the student's growth was not entirely dependent on her speech-language therapy, yet attributed some to maturation and "a huge part of it" to the "kind of work that was being done in the classroom" (Tr. p. 104). In an email to the parent, the student's teachers indicated that the student's most recent responses to reading during class time demonstrated a grade appropriate level of comprehension and a notable improvement from the beginning of the year (Parent Ex. G; see Dist. Ex. 3 at p. 11). The speech-language therapist stated that at the end of the year the student was reading material which was "solidly end of 4th grade grade-level books" and that she was showing a very deep level of understanding of what she was reading (Tr. p. 71). The parent testified that in the second half of the year, the added speech session, "definitely helped" the student progress (Tr. 165).

## 2. Implementation

Turning to the implementation of the student's IEP, the parent appeals the number of speech-language therapy sessions the IHO ordered the district to provide to compensate the student for missed sessions during the 2016-17 school year. The parent alleges that the total number of speech-language therapy sessions should be recalculated to account for a number of additional missed sessions during the 2016-17 school year, and requests that the number of speech-language therapy sessions the IHO ordered be changed to 28. The district acknowledges that it missed 17 sessions of speech-language therapy during the 2016-17 school year, but alleges that the IHO's order awarding 20 sessions of speech-language therapy adequately compensated the student. The district further notes that the IHO did not specifically find that the district denied the student a FAPE for the 2016-17 school year, but declines to cross-appeal any portion of the IHO's decision.

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 there was more than a de minimus failure to implement all elements of the IEP and, instead, the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at \*3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 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 failure to implement claims 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., 370 Fed. App'x 202, 205 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [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, 75-76 (D.D.C. 2007) [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, the district's failure to follow the IEP was excusable and did not amount to a failure to implement the student's program]).

In this instance, both parties agree that the student's January 2016 and January 2017 IEPs, as they applied to the 2016-17 school year, were not fully implemented, and that during the 2016-17 school year the student missed a number of speech-language therapy sessions, which have not been made-up. The parties only dispute the number of speech-language therapy sessions the student missed and the appropriate number of compensatory speech-language therapy sessions awarded to make up for the missed sessions.

The parent argues that the IHO erred in ordering only 20 make-up sessions for missed speech-language therapy during the 2016-17 school year and contends that the IHO should have awarded 28 sessions. The parent explains that her accounting of 28 missed sessions included two sessions from the first week in September 2016 which were previously overlooked, an agreed upon missed session from November 2016, and 25 sessions from December 2016 through June 2017. The district maintains that the student missed 17 speech-

language therapy sessions during the 2016-2017 school year and contends that the IHO's award of 20 sessions sufficiently compensates the student for the missed sessions.<sup>8</sup> The IHO did not tabulate missed speech-language therapy sessions in his decision, yet simply explained that the award of twenty 30-minute speech-language therapy sessions "would cover any missed speech-language therapy services through June 30, 2017" (IHO Decision at p. 6).

As detailed above the January 2016 IEP mandated two 30-minute sessions per week of individual speech-language therapy and the January 2017 IEP—which was to be implemented beginning February 1, 2017—mandated two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of speech-language therapy in a group (Dist. Exs. 3 at p. 5; 7 at p. 8).

The parties agreed at hearing that there were no missed services in September, October, and December 2016, and that there was one missed session in November 2016 and one missed session in January 2017 (Tr. pp. 139-41). Nevertheless, based on the school calendar which was not included as a part of the hearing record, the parent, in her closing statement and on appeal, argues that the student missed two speech-language therapy sessions in the first week of September 2016 (Req. for Rev. at p. 1; IHO Ex. II at p. 1). A review of the 2016-2017 speech-language therapy attendance and service logs reveals that speech-language therapy was not provided during the week of September 5th through 9th, therefore, depending on when the 2016-17 school year started, the student may have missed up to two speech-language therapy sessions in September 2016 (Parent Ex. B at p. 1; see Dist. Ex. 14 at pp. 1-79).

In February 2017—the first month in which the January 2017 IEP mandated three sessions per week of speech-language therapy—the hearing record shows that four sessions were provided, leaving five to eight missed sessions depending on how many weeks school was in session (Parent Ex. B at p. 6, Dist., Ex. 14 at pp. 35-41).<sup>9</sup> For March 2017 the attendance and service logs show there were two missed speech-language therapy sessions (Parent Ex. 14 at p. 7; Dist. Ex. 14 at pp. 20-34).

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<sup>8</sup> In support of her tally the parent cites to Parent Exhibit K, which is not a part of the hearing record (Req. for Rev. at p. 1; IHO Ex. II at p. 1). Additionally, in its closing brief the district indicated that its accounting of missed sessions included the use of a school calendar identified as District Exhibit 16, which was not admitted into evidence at the hearing (IHO Ex. I at p. 3). In an email to the IHO dated July 18, 2017, the parent indicated that the district submitted the school calendar as evidence and further indicated that the parent submitted additional evidence (Req. for Rev. Exhibit); however, the IHO's certification of the hearing record did not identify any evidence submitted by the parent outside of the evidence submitted during the hearing or the school calendar as exhibits. District Exhibit 15 (encounter attendance sheets from May 24 through June 23, 2017) was not submitted during the hearing, but was included in the IHO's exhibit list attached to the decision and in the IHO's certification of the hearing record.

<sup>9</sup> While public schools traditionally have a recess in February and April, the hearing record does not include information regarding school holidays nor does it identify when school was in session each month (Tr. pp. 135-36).

The April 2017 service log indicates that the student was provided with 11 speech-language therapy sessions; however, while the service log indicates a session took place on April 21, 2017, there is no corresponding attendance log for that session (Parent Ex. B at p. 8; see Dist. Ex. 14 at pp. 10-19). In addition, although both the attendance and service logs reflect that a session took place on April 5, 2017, via email the speech-language therapist acknowledged that she was "off-site" and did not meet with the student on that date (Parent Ex. H; see Parent Ex. B; Dist. Ex. 14 at p. 19). Without knowledge of the school calendar or how many weeks the school was in session, it is not possible to discern an exact number of missed sessions. Based on the above, the student received nine sessions of speech-language therapy in April; however, assuming school was in session for all of April, the student would have been entitled to 12 sessions of speech-language therapy (see Parent Ex., B at p. 8; Dist. Ex. 14 pp. 10-19). If the school schedule included a week-long spring recess in April, the student would have been entitled to nine sessions of speech-language therapy.

For May 2017, the hearing record shows four missed speech-language therapy sessions and one make-up session completed on May 10th, which leaves a total of three missed sessions for May (Parent Ex. B at p. 9; Dist. Exs. 14 at pp. 1-9; 15 at pp. 11-14). The June 2017 service log reveals five missed speech-language therapy sessions (Parent Ex. B at p. 10; Dist. Ex. 15 at pp. 1-10).

Although, in emails dated February 17, 2017 and April 7, 2017, the parent questioned whether the speech-language therapist provided the student with the full 30-minutes set forth in the IEP for her speech-language therapy sessions (Parent Exs. F, H), the attendance logs show that the sessions predominantly lasted the full 30 minutes (see Dist. Exs. 14 at pp. 1-37; 15). The speech-language therapy service log for June 2017 showed a session for 25 minutes on June 15, 2017, which the speech-language therapist testified was made up by a session for 40 minutes on June 22, 2017 (Parent Ex. B at p. 10; Dist. Ex. 15 at pp. 2, 5; see Tr. p. 101). The speech-language therapist testified that this was the only time that happened (Tr. p. 101).

Acknowledging the hearing record's limited information regarding the school calendar, the sometimes-contradictory service information, and the disputes regarding who made the determination of whether a session was provided (compare Parent Ex. B at p. 8, with Dist. Ex. 14 at pp. 12-13; Parent Ex. H; Dist. Ex. 12 at p. 1); the evidence available in the hearing record detailed reveals that the student missed between 16 and 26 speech-language therapy sessions during the 2016-17 school year.<sup>10</sup> The IHO's award of 20 sessions is within this range and absent additional evidence to support the parent's request to depart from the IHO's determination, it will not be disturbed.

### **3. 2017-18 RSA and Choice of Provider**

The parent appeals the IHO's decision rejecting her request for a speech-language RSA to be issued for the 2017-18 school year. In its answer, the district alleges that there is no basis in fact or law to award a prospective RSA as requested by the parent. The IHO found that the parent's request was based upon the strained communication between the parent and the student's speech-

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<sup>10</sup> The high number would require the assumption that the school did not have breaks in February and April.

language therapist, missed speech-language therapy sessions, and alleged limited progress (IHO Decision at p. 6). The IHO found that awarding the relief requested by the parent would require a finding that the student's IEP for the 2017-18 school year would not be appropriately implemented or that the communication between the speech-language therapist and the parent would be conducted in a way that denied the student a FAPE (*id.*). The IHO therefore declined to order a prospective RSA for the speech-language therapy recommended for the 2017-18 school year (*id.*).

As alleged in the parent's request for review, the relationship between the parent and the speech-language therapist deteriorated over the course of the 2016-17 school year to the point that the parent repeatedly requested that the district arrange for an alternate speech-language therapist, and, at the time of filing the instant appeal, "made the conscious decision to not have [the student] receive Speech & Language services at her school" (Req. for Rev. at p. 2). Generally, when implementing a student's IEP, school districts have discretion to assign qualified staff to students, thus, they need not honor a parent's request for a particular teacher or related service provider (*Slama v. Independent Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 884-85 [D. Minn. 2003]; *Application of the Bd. of Educ.*, Appeal No. 07-007; *Application of a Child with a Disability*, Appeal No. 02-009; *Application of a Child with a Disability*, Appeal No. 98-31; *Application of a Child with a Disability*, Appeal No. 97-87; *Application of a Child with a Disability*, Appeal No. 95-50; *Application of a Child with a Disability*, Appeal No. 91-19; *Marple Newtown Sch. Dist.*, 46 IDELR 295 [SEA PA 2006]).

The parent's request for prospective relief also stems from concerns regarding the student's speech-language therapist's ability to consistently provide the student's speech-language therapy mandates during the 2015-16 and 2016-17 school years and regarding the student's alleged lack of progress due to missed sessions. As discussed above, the evidence available at the hearing indicates that the student missed between 16 and 26 speech-language therapy sessions (*see* Parent Ex. B; Dist. Exs. 14; 15). In addition to the speech-language therapy sessions missed during the 2016-17 school year, the parent testified that a number of sessions were also missed during the 2015-16 school year, resulting in the issuance of RSAs for 10 sessions of speech-language therapy, which were ultimately provided during summer 2016 (Tr. pp. 151-54).

At the impartial hearing, the speech-language therapist acknowledged that she missed a number of speech-language therapy sessions during the 2016-17 school year, and was able to make up a few, but not all of those missed sessions (Tr. p. 74). The speech-language therapist testified that there were 10 or 12 missed sessions that were not made up due to student absence, field trips, and school activities, and three missed sessions due to the speech-language therapist's unavailability, including professional development sessions and schedule conflicts with a CSE meeting for another student (Tr. pp. 99-100). As discussed above, the parent expressed her concerns about a number of missed speech-language therapy sessions in a series of email exchanges during February, April, and June 2017 (Parent Exs. D; E; H; I).

Turning to the impact these missed sessions may have had on the student's progress, the IHO correctly noted that the parent and the student's speech-language therapist have different opinions about some areas of the student's progress (IHO Decision at p. 4). The speech-language therapist testified that the student had made "tremendous progress" over the course of the 2016-17 school year (described in greater detail above) and was reading fiction on grade-level by the end of the school year, and that the speech-language therapist would therefore be shifting her focus to



non-fiction materials to work toward improving the student's ability to make inferences about more difficult historical content in a non-narrative form (Tr. pp. 69-70, 72, 79). Although the parent disputes the speech-language therapist's characterization of the student's progress, she testified that the student had never failed a grade, had passed all of her classes for the 2016-17 school year, and was being promoted to the fifth grade for the 2017-18 school year (Tr. p. 156-57). The parent attributed some of the student's progress to the student's receipt of speech-language therapy, during the summer of 2016, provided as a result of an RSA issued for missed sessions during the 2015-16 school year (Tr. p. 127; see Tr. p. 56). The parent also alleged that the student still had issues making progress during the second half of the 2016-17 school year (Tr. p. 120; see Parent Ex. G). However, although the parent disputes the student's general level of progress, she testified that the student made some minimal (but inconsistent) progress with her reading comprehension, that the parent and student had benefitted from suggestions from the school's service providers to better enable the parent to assist the student with homework, and that the addition of a group speech-therapy session "definitely helped" the student progress (Tr. pp. 156, 158, 165). The hearing record does not contain any recent clinical documentary evidence that would provide further insight into the student's level of progress during the 2016-17 school year (see Tr. pp. 27-34; see Dist. Ex. 11 [the most recent speech and language evaluation, which was conducted in 2014]). Based on the foregoing, weighing the number of missed sessions that were not made up against the limited available information regarding student's progress with her speech-language needs, the hearing record before me does not provide a sufficient basis to make a finding that an award of a prospective RSA for the 2017-18 school year is appropriate at this time.

Although the hearing record does not support a finding that the parent's request for prospective relief is appropriate, the lack of communication between the parent and the speech-language therapist, and its potential impact on the speech-language therapist's working relationship with the student, is something the district will need to address. The hearing record reflects that there is a substantial tension between the parent and the student's speech-language therapist. The speech-language therapist testified that she felt unsafe and threatened during a phone call with the parent in Spring 2017, during which she felt accused of lying on a federal document and falsifying federal records relating to her provision of the student's speech-language therapy (Tr. pp. 76-78). The speech-language therapist testified that because of that conversation she decided to limit communication with the parent to email and in-person meetings with a third-party present (Tr. pp. 76-77). The hearing record suggests that the tension between the parent and the therapist has extended to impact the relationship between the speech-language therapist and the student. Specifically, the hearing record reflects that at some point prior to the impartial hearing the parent suggested that a timer be utilized to track the provider's delivery of speech-language therapy, an idea the speech-language therapist did not find to be appropriate (Tr. pp. 90-91). The hearing record further reflects that the parent tasked the student with tracking every session of speech-language therapy provided by her speech-language therapist, including start and end times in a notebook (IHO Ex. II at p. 1).<sup>11</sup> The speech-language therapist testified that the "most important factor in [the student's] progress is her relationship with me," but later testified that she had no opinion regarding whether the student trusted her (Tr. pp. 89, 92). The speech-language therapist

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<sup>11</sup> The student's notebook was not marked for identification or admitted into evidence during the impartial hearing (Tr. pp. 1-178).

also acknowledged that the parent no longer trusted her, and testified she was not sure why that was the case (Tr. p. 92).

It is ultimately the district's responsibility to provide special education and related services to the student in accordance with her IEP (8 NYCRR 200.4[e][7]). The school district's responsibility to ensure that the recommendations on the student's IEP are implemented includes ensuring that the student's regular education teacher, special education teacher, related service providers, and other service providers and supplementary school personnel responsible for implementation of the student's IEP, provided with a copy of and ongoing access to the student's IEP (Educ. Law § 4402[7][a]; 8 NYCRR 200.4[e][3][i]-[ii]). The district is also required to ensure that all staff members responsible for implementation of the student's IEP are informed of their responsibility to implement the recommendations of the student's IEP prior to its implementation (Educ. Law § 4402[7][c]; 8 NYCRR 200.4[e][3][iii]). Accordingly, it is not the speech-language therapist's sole responsibility to ensure the implementation of the student's IEP, nor is it the student's responsibility to record the occurrence and length of speech-language therapy sessions to ensure provider compliance with her own IEP.

It is therefore concerning that the hearing record does not reflect that a supervisor for the speech-language therapist or any school administrator intervened or provided concrete assistance to the speech-language therapist in order to address the trust issue developing between the parent and the student's therapist. The hearing record reflects that there is an ongoing pattern of missed sessions, and only partial make-up sessions provided by the student's speech-language therapist, which contributed to a deterioration of the working relationship between the parent and speech-language therapist (Tr. pp. 74-78, 88-92, 99-101, 137 149-52; see Parent Exs. D; E; H; I; see generally Parent Ex. B; Dist. Ex. 14). Despite this, there is no indication that the district took steps to address this pattern and to formulate a strategy to support its own staff in ensuring the consistent provision of the student's mandated speech-language therapy sessions, or to more comprehensively provide make-up sessions for missed sessions. Rather, the speech-language therapist indicated to the parent that she would make up sessions as her schedule would allow (Parent Ex. E), and testified at the hearing that she was only able to make up a few of those sessions (Tr. p. 74). Accordingly, while the hearing record may not support the relief requested by the parent, the district is advised to take further steps to ensure that the services mandated by the student's IEP are implemented in compliance with the requirements of the IDEA. In the event that the district is not able to consistently provide the student with mandated services, the district should consider alternative strategies.

#### **4. Independent Speech-Language Evaluation**

The parent appeals the IHO's award of a speech-language therapy IEE, and alleges that the student recently participated in an independent speech-language evaluation, that the student should not be put through another extensive evaluation so soon after that evaluation, and that the parent did not request a new evaluation. In its answer, the district asserts that it will not proceed to evaluate the student without action or consent from the parent, and notes that in order to effectuate the IHO's award, the parent would have to proactively seek out and identify an independent evaluator to arrange for and conduct the assessment.

Both the IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Additionally, it is within an IHO's authority to order an IEE at public expense as part of a hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2], [j][3][viii]). One Court, after quoting the regulation itself, noted that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process," without further elucidation (Lyons v. Lower Merriam Sch. Dist., 2010 WL 8913276 [E.D. Pa. Dec. 14, 2010]), while another Court has noted with approval an SRO's remand of a proceeding to the CSE in conjunction with direction to reevaluate a student to determine the student's educational needs, based both on the absence of sufficient evaluative data in the record and the length of time since the student had last been evaluated (B.J.S. v. State Educ. Dep't, 815 F. Supp. 2d 601, 614-15 [W.D.N.Y. 2011]; see Application of a Student with a Disability, Appeal No. 08-001). However, it has also been acknowledged that the IHO's authority to direct an evaluation is not unlimited (see, e.g., Application of a Child with a Disability, Appeal No. 04-012; Application of a Child with a Disability, Appeal No. 96-13). The extent of the authority has been variously formulated as one which can be exercised when additional evaluative data is necessary to determine an appropriate educational placement (see Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-001). The extent of the IHO's authority to order an evaluation has also been described as a matter committed to the IHO's discretion (see Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 01-076; Application of the Bd. of Educ., Appeal No. 00-090 [finding that "there was a rational basis" for the ordered testing, "which would have been useful"], or as a hybrid of necessity and discretion (see Application of a Child with a Disability, Appeal No. 07-057).

In ordering a speech-language IEE, the IHO noted that there was a disagreement between the parties regarding the student's functioning levels, and a level of distrust between the parent and some representatives of the district (IHO Decision at p. 4). The IHO further cited to the parent's unwillingness to provide the district with a complete unredacted copy of a recent privately obtained speech-language evaluation (id. at p. 5). For these reasons, the IHO found that an IEE should be conducted by a provider of the parent's choice, at the district's standard rate, to be provided unredacted to the to the CSE for its consideration (id. at pp. 5-6).

It is the district's position that it will not proceed to evaluate the student without consent of the parent. The district points out that it is required to obtain informed parental consent in writing prior to conducting an initial evaluation or reevaluation of the student. Subject to certain exceptions, a school district must obtain informed parental consent in writing prior to conducting an initial evaluation or reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]). Furthermore, parental consent is required before the district can release the student's educational records to an independent evaluator conducting an IHO-ordered IEE (Independent Educational Evaluation, 71 Fed. Reg. 46,690 [Aug. 14, 2006]; see 34 CFR 300.622[a]).

However, distrust between the parties and the parent's refusal to provide a complete report of a recently completed IEE to the CSE, is an insufficient basis for ordering an additional IEE

against the wishes of the parent. Based on the above, it appears that the IHO's purpose in ordering the IEE was not in furtherance of the hearing, but rather in anticipation of future issues that may arise between the parties regarding the adequacy of the evaluative information before the CSE for the next school year. Furthermore, despite the IHO's conclusion regarding the disagreement between the parties on the student's functional levels (*id.* at p. 4), a review of the issues presented for appeal indicates that the parent did not raise claims in her due process complaint that she disagreed with the content of any of the evaluations conducted by the district, nor does either party raise any claim related to the student's present levels of academic performance on appeal (*see* Dist. Ex. A; *see also* Req. for Rev.; Answer). Reviewing the award of an IEE as a form of equitable relief, it is true that IHOs are "granted broad authority in their handling of the hearing process and to determine the type of relief which is appropriate considering the equitable factors present and those which will effectuate the purposes underlying IDEA" (*Warren Consolidated Schs.*, 106 LRP 70659 [LEA MI 2000]). However, in this instance, the parent recently obtained an IEE at her own expense and clearly indicated her intent to not provide it to the CSE (Tr. p. 165; *see* Dist. Ex. 3 at p. 1), she did not ask for another IEE to be performed in her due process complaint notice (*see* Dist. Ex. 1), and unequivocally states her desire to not have another IEE performed at this time in her request for review. Accordingly, as the district is not attempting to utilize the consent override procedures and parental consent would be beneficial in mending the trust issues developing between the parent and district, the IHO's award of an IEE was not an appropriate form of relief, and a reversal of that award is justified. The IHO's order that an IEE be performed at district expense, to be provided unredacted to the CSE at a forthcoming CSE meeting, is therefore vacated.

Nevertheless, it appears from the hearing record that the district last evaluated the student in the area of speech-language in November 2014 (Dist. Ex. 11). If the district has not yet conducted an evaluation, then the student was overdue for one as of November 2017. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; *see* 34 CFR 300.303[b][1]-[2]). Accordingly, it is in the best interests of the parties to cooperate to ensure that the student is adequately evaluated in all areas of need, including speech-language, prior to the development of the student's next IEP.

## **VII. Conclusion**

A review of the hearing record demonstrates that the district recommended appropriate speech-language services to the student, as detailed above. Furthermore, the hearing record does not provide a sufficient basis to deviate from the IHO's ultimate award for missed speech-language therapy sessions, or to award a prospective RSA for the 2017-18 school year. However, in light of the unique circumstances of this case, the IHO's award of a speech-language IEE was not appropriate. For the reasons stated above, the IHO's decision to award the parent with a speech-language IEE, to be provided unredacted to the CSE, which was to reconvene to consider the results of that evaluation, is therefore vacated.

I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated September 6, 2017, is modified, by reversing the portion of the decision that awarded the parent with an independent speech-language evaluation, directed that the evaluation be provided to the CSE unredacted, and directed the CSE to reconvene to consider the results of the evaluation.

**Dated:**            **Albany, New York**  
                      **December 8, 2017**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**