



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-045

Application of the BOARD OF EDUCATION OF THE KENMORE-TOWN OF TONAWANDA UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Harris Beach, PLLC, attorneys for petitioner, by Jeffrey J. Weiss, Esq., and Andrew R. Mark, Esq.

Housh Law Offices, PLLC, attorneys for respondent, by Frank Housh, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to assign a 1:1 aide to the student at the student's parochial school to implement a sensory diet, and ordered the district and the parent to agree on the particulars of the sensory diet. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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]). 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[a]). 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

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited in full here. The student has attended a parochial school since kindergarten (Tr. p. 52). At the time of the events relevant to this proceeding he presented with average skills when compared to same age peers in reading, writing, and math, and difficulties with social/emotional and behavioral functioning related to low frustration tolerance and sensory regulation (Dist. Exs. 4; 8 at pp. 5-9; 10; 24 at p. 2). The district has determined that the student is eligible for special education as a student with autism (*id.* at p. 1).¹

The student received supplementary aids and services, program modifications, and related services at the parochial school through IESPs during the 2016-17 (second grade), 2017-18 (third grade), and 2018-19 (fourth grade) school years (see Dist. Exs. 12 at pp. 1, 11-12; 25 at pp. 1, 8-9; 30 at pp. 1, 8-9). On March 29, 2019, the CSE convened to develop the student's IESP for the remainder of the 2018-19 school year as of April 11, 2019 and the 2019-20 school year through April 11, 2020 (Dist. Ex. 8 at pp. 1, 5, 11-13). The IESP contained three annual goals to improve the student's social/emotional and behavioral functioning; management needs; supplementary aids and services; and program modifications (*id.* at pp. 9-12). The CSE recommended that the student receive one 30-minute session per week of individual counseling, two sessions per year each of parent counseling and training and team meetings, and two 15-minute sessions per month of an occupational therapy (OT) consultation in the general education setting (*id.* at p. 13). The district provided the parent with a prior written notice dated March 29, 2019 (Dist. Ex. 9 at p. 1).

The parent disagreed with the recommendations contained in the March 2019 IESP, and as a result, commenced an impartial hearing (see generally Parent Ex. A). In a due process complaint notice, dated September 26, 2019, the parent alleged that the district failed to offer the student appropriate services in the March 2019 IESP for the 2019-20 school year (see Dist. Ex. 1). The district responded in writing to the parent's due process complaint notice (Dist. Ex. 2).

An impartial hearing convened on December 3, 2019 and concluded on December 17, 2019 after three days of proceedings (Tr. pp. 1-454). In a decision dated February 5, 2020, the IHO determined that the district failed to offer the student appropriate services in the March 2019 IESP (IHO Decision at pp. 1-12). As relief, the IHO ordered the district to assign a 1:1 aide to monitor the student in his classrooms at the parochial school, remove the student from the classroom as needed, and to provide the student with a sensory diet (*id.* at p. 11). The IHO further ordered that, prior to the assignment of the 1:1 aide, the parent and the district agree upon the particulars of the sensory diet and that the district ensure the assigned 1:1 aide possessed qualifications and training

¹ The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

to monitor the student and provide the sensory diet (*id.*). The IHO further noted that nothing in the decision prohibited the district from consulting with specialists of its choosing or assigning the 1:1 aide additional responsibilities so long as they did not interfere with providing the ordered services to the student (*id.* at pp. 11-12).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parent's answer thereto is also presumed and will not be recited here. The primary issue disputed by the parties on appeal is whether the IHO erred in ordering the district to assign a 1:1 aide to the student in the parochial school the student attended. The district argues that the IHO's order was error because the student was making appropriate progress in school without a 1:1 aide, he did not require an aide to address his need for refocusing and redirection, and that his needs overall were not so intense as to warrant assigning a 1:1 aide. The district asserts that a recently conducted functional behavioral assessment (FBA) determined that the student did not require a behavioral intervention plan (BIP) and that assigning a 1:1 aide to the student would be overly restrictive. The district further contends that the IHO failed to apply the appropriate legal standard in his analysis and ignored the student's progress, and moreover that the hearing record did not support the finding that the student was in a "state of remediable dysregulation" at the parochial school. The district asserts that the student's behavior at home was not a proper basis for assigning the student a 1:1 aide during the school day. Lastly, the district contends that the sensory diet recommended by the CSE in the March 2019 IESP was appropriate and the IHO erred in ordering the district and the parent to agree on modifying its contents.

The parent responds to the district's request for review in an answer, asserting that the IHO's orders were appropriate and proper, and requests that the IHO's decision be upheld in its entirety. The parent asserts that State regulations and guidance supported a finding that the student required a 1:1 aide during the school day to manage his behavioral and sensory needs in order to prevent and manage "meltdowns" that occurred both at school and in the home.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made

(Educ. Law § 3602-c[2]).² "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*)."³

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).

VI. Discussion: March 2019 IESP Services - 1:1 Aide and Sensory Needs

Turning to the issue of whether the IHO erred in ordering the district to assign the student a 1:1 aide at the parochial school the student attended, the evidence in the hearing record shows that the student did not require a 1:1 aide, but rather that the accommodations, interventions, strategies, and services provided in the March 2019 IESP addressed the student's needs.

State and federal regulations provide that a CSE may be required to consider special factors in the development of a student's IEP (8 NYCRR 200.4[d][3]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavtry v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

² State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

³ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*).

While not set forth as a special factor in the IDEA or federal regulation, State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent 15 (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]).⁴ Further, a State guidance document, dated January 2012, contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at <http://www.p12.nysed.gov/specialed/publications/1-1aidejan2012.pdf>).

With respect to the student in this case, the meeting information summary and the resultant IESP show that at the student's March 29, 2019 annual review CSE meeting, the parochial school staff, including the student's classroom teacher and related service providers, and the parent provided verbal input pertaining to the student's current achievement in reading, math, writing, social skills, as well as social/emotional and behavioral functioning (Dist. Ex. 8 at pp. 1-2, 5, 7-9). The March 2019 CSE also considered a March 26, 2018 FBA report, a November 5, 2018 psychoeducational evaluation report, and a November 16, 2018 OT reevaluation report (*id.* at p. 5). Also available at the time of the March 2019 CSE meeting were the student's IESPs that had been (August 2018) or were (December 2018) in effect during the 2018-19 school year thus far,

⁴ In a Question and Answer document—published subsequent to the promulgation of the provision in State regulation requiring CSEs to consider certain factors before offering a student 1:1 aide services—it was further explained that "[i]n classrooms that have a high staff-to-student ratio, or students with fewer needs, existing staff may be able to support a student with increased needs, and a one-to-one aide may not be necessary" ("Amendment of Sections 200.4, 200.16 and 200.20 of the Commissioner's Regulations Relating to Recommendations for One-to-One Aides for Preschool and School-Age Students with Disabilities and Preschool Special Education Programs and Services: Questions and Answers," at p. 1, Office of Special Ed. [June 2016], available at <http://www.p12.nysed.gov/specialed/documents/q-and-a-preschool-regs.pdf>).

his first and second marking period grades, and his November 2018 and January 2019 IEP annual goals progress reports (see Dist. Exs. 10-12; 14).

The March 2018 FBA report indicated that the purpose of the assessment was to "help drive counseling goals" and that data collection occurred between March 9 and March 26, 2018 (Dist. Ex. 18 at p. 1). According to the report, the student's teacher had identified the student's problem behaviors as "disruption" and that he denied responsibility or blamed others for his behavior (id.). The student was observed in his classroom on three occasions for between 60-75 minutes, during which time it was reported that the student did not exhibit the identified behaviors and therefore the team did not recommend the development of a BIP (id. at pp. 1-2, 4-5). An updated teacher report from June 2018 indicated that the student's "behavior had improved and there had only been 1 incident at school since the FBA was completed in March" (see Dist. Ex. 8 at p. 3).

The student's August 8, 2018 IESP was in effect at the beginning of the 2018-19 school year and provided that the student receive one 30-minute session of individual counseling per week, one 30-minute session per week of OT in a small group in either the classroom or therapy room, as well as supplementary aids and services and program modifications including movement breaks, special seating, refocusing and redirection, tasks broken down, a positive reinforcement plan, school to home communication, and twice yearly sessions of both parent counseling and training and team meetings (Dist. Ex. 14 at pp. 7-9).⁵ During the first marking period of the school year, the student achieved grades of 95 in art, 98 in music, 97 in physical education, 98 in English language arts (ELA), 96 in math, 100 in religion, 97 in science, 100 in social studies, and 97 in Spanish, for a marking period average of 97 (Dist. Ex. 10). According to the student's IEP annual goals progress report, as of November 2018, the student was progressing gradually toward his goals of understanding emotions, determining behavioral triggers, and implementing the coping skills he should use in school across settings (Dist. Ex. 11 at p. 1). Additionally, the student was progressing satisfactorily toward his goal of engaging in multistep adult directed activities with less than five verbal cues and lessening the duration of input needed while completing the tasks (id. at p. 2).

A November 9, 2018 psychoeducational report contained the assessment results pertaining to the student's cognitive skills, academic achievement, and social/emotional/behavioral functioning (Dist. Ex. 24 at p. 1). Administration of the Reynolds Intellectual Assessment Scales-Second Edition (RIAS-2) to the student yielded scores in the average range on the composite intelligence, nonverbal intelligence, and composite memory indices, and in the above average range on the verbal intelligence index (id. at p. 2). Administration of the Woodcock-Johnson IV Tests of Achievement (WJ-IV) to the student yielded broad reading, broad mathematics, broad written language, academic skills, academic applications, and broad achievement composite standard scores in the average range (id. at pp. 3-4). The Behavioral Assessment System for Children-Third Edition (BASC-3) was completed by the parent and student's teacher (id. at p. 4).

⁵ According to the August 2018 CSE meeting information summary, the parent had expressed concerns about the student transitioning to fourth grade and asked about aide support (Dist. Ex. 15 at p. 1). The CSE agreed to reconvene in November 2018 to review how the "transition and start of [the] school year [were] going" (id.). The November 2018 CSE meeting was postponed and rescheduled, and the CSE ultimately reconvened on December 12, 2018 (Dist. Ex. 12 at p. 1).

According to the evaluation report, many of the teacher's reported scale and composite scores fell in the at-risk or clinically significant ranges, including measures of the student's behavioral symptoms and adaptive skills (*id.* at pp. 5-6, 8). The BASC-3 results based upon parent input yielded scores in the at-risk range for the externalizing problems composite and in the clinically significant range for the behavioral symptoms index (*id.* at pp. 7-8). The evaluation report contained recommendations from district staff including maintaining the classification as a student with autism, emphasizing positive behavior, expectations, and classroom structure to assist the student in meeting his academic goals, continuing a classroom-wide positive behavior reward system to improve behaviors, and allowing the student time to remove himself from situations that cause agitation in order to cool down (*id.* at pp. 8-9).

The November 16, 2018 OT reevaluation report indicated that at that time the student received one session of OT per week in a small group setting (Dist. Ex. 23 at p. 1). The occupational therapist reported that the student had good attention to task during sessions, which began with proprioceptive input followed by a multi-step directional task (*id.*). According to the occupational therapist, the student completed those tasks with decreasing prompts, was a leader within his group, and always worked his hardest (*id.*). During the evaluation, the student was observed twisting his shirt and playing with his hair, which the occupational therapist indicated were "self-regulators" the student used to help him focus on the task; as testing progressed and his comfort level increased, those behaviors "diminished" (*id.*). Administration of the Developmental Test of Visual Perception – Third Edition (DVTP-3) to the student yielded scores in the average range for the following subtests/composites: eye hand coordination, copying, figure ground, form consistency, general visual perception, and visual motor integration (*id.* at pp. 2-3). The student achieved scores in the above average range for the visual closure subtest and the motor reduced visual perception composite (*id.* at p. 3). On the Bruininks-Oseretsky Test of Motor Proficiency, 2nd Edition (BOT-2) the student achieved scores in the average range on measures of his fine manual control (including fine motor precision and integration), and manual coordination including upper limb coordination (*id.* at p. 4). The student's manual dexterity subtest score was in the below average range, regarding which the occupational therapist reported that, although the student was able to perform all of the tasks, the subtest was timed and he worked at "a slightly slower" pace (*id.*). She opined that the student would benefit from extra time or practice opportunities to complete those types of tasks (*id.*).

As part of the OT reevaluation the student's teacher completed the School Companion Sensory Profile 2, described as "a 44 question profile designed to assess how a student functions and deals with various forms of sensory input specifically in the school setting" and completed by the student's teacher and support staff (Dist. Ex. 23 at pp. 4-5). The teacher's scores indicated that the student was "Just Like the Majority of Others" in the auditory, visual, touch and movement sensory areas (*id.* at p. 5). The teacher's score for the student's sensitivity in the behavioral area was "Much More than Others" and she reported that the student was inflexible at times, perseverated on points/topics which interfered with his task completion, and had a low frustration tolerance (*id.*). However, the report indicated that progress was noted at school, as the student was "able to work and tolerate more environmental stimuli without becoming overwhelmed" and that he "continue[d] to work on transitioning strategies within the classroom setting" (*id.*). The student's mother completed the caregiver Sensory Profile 2, results of which yielded "significant differences" from those of the student's teacher (*id.*). Specifically, the parent's scores indicated that the student's sensitivities were "More than Others" in the areas of touch, movement, body

position and conduct; "Much More than Others" in the areas of auditory, visual, oral and social/emotional; and "Just Like the Majority of Others" in the area of attention (*id.*). Additionally, the parent reported that at home, the student's "sensitivities persist[ed] in multiple areas" (*id.*). Based on the student's average to above average performance on the DTVP-3 and BOT-2, the occupational therapist recommended discontinuing direct OT services for the student at the end of the 2018-19 school year, and thereafter receive a bi-weekly OT consultation (*id.* at p. 6). The occupational therapist also suggested a "relaxation program with grounding sensory input" to help the student "transition from the demands of the school environment to home" (*id.*).

The CSE reconvened on December 12, 2018 for a program review and to discuss the psychoeducational and OT reevaluation reports (Dist. Ex. 12 at p. 1). According to the meeting information summary, after the reports were reviewed the CSE discussed the parent's request that the student be provided with 1:1 aide services in order to help him de-escalate and to provide his program modifications, and reviewed State "guidelines" regarding the provision of a 1:1 aide (*id.* at p. 2). The CSE determined that more data including the frequency and severity of behaviors and transition needs was required to support the parent's request and therefore at that time deferred making a decision "due to lack of supporting documentation and data to support the need" for a 1:1 aide (*id.*). The CSE agreed that parochial school staff would collect data and the CSE would reconvene once the documentation was provided (*id.*). The December 2018 IESP provided that the student receive one 30-minute session per week of individual counseling and one 30-minute session per week of OT in a small group (5:1), as well as accommodations and program supports including movement breaks, special seating, refocusing, redirection, school to home communication, tasks broken down, a positive reinforcement plan, and twice yearly parent counseling and training and team meetings (*id.* at pp. 11-12).

The January 2019 IEP annual goals progress report indicated that the student continued to progress gradually toward his social/emotional goals and had achieved his goal to complete multistep fine and visual motor tasks following "heavy work" activities (Dist. Ex. 11 at pp. 1-2). During the second marking period of the school year (ending in March 2019), the student achieved grades of 97 in art, 100 in music, 96 in physical education, 95 in technology, 95 in ELA, 93 in math, 100 in religion, 95 in science, 96 in social studies, and 98 in Spanish, for a marking period average of 96 (Dist. Ex. 10).

The CSE convened on March 29, 2019 for the student's annual review (Dist. Ex. 8). Turning to the March 2019 IESP present levels of performance—which are not in dispute on appeal—teacher reports indicated that the student's skills in reading, writing, and math were at grade level (*id.* at p. 7). The IESP described his academic achievement, notably that the student followed along with text when reading, answered questions in small and large groups, and pulled information from a text independently (*id.*). According to the teacher the student wrote using good sentence structure, spelling, grammar, and appropriate spacing in sentences and letter formation (*id.*). In math, the teacher reported that the student demonstrated grade level fact fluency for addition, subtraction, multiplication, and division and had a "good grasp on math concepts," noting that the student did well after a "refresher" on old concepts and needed breaks during longer assignments (*id.*).

Regarding study skills, the March 2019 IESP reflected teacher reports that the student was responsible with homework (Dist. Ex. 8 at p. 7). She further reported that "[a]t times, [the student

had] difficulty remaining seated during class discussions and [would] wander about the room" but that "when he [was] reminded to remain in his seat, he [did] well" (*id.*). According to the teacher, the student at times became "frustrated when new material [was] presented" and/or when presented with "previously learned material that he perceive[d] as too difficult" (*id.*). The student "also demonstrate[d] difficulty waiting his turn to respond and/or be called on during group discussions and lessons" (*id.*). Although the student was "provided opportunities for movement breaks, sensory input, and heavy work throughout the day," the student did "not always utilize those opportunities" (*id.*). However, according to the IESP the student's program modifications "successfully support[ed] the educational team in using times of frustration as teachable moments to help [the student] develop coping skills in response to a variety of real-life situations which he encountere[d] in the school setting" (*id.*). Academic needs identified included that the student needed to increase his frustration tolerance when completing classwork/academic tasks and improve his ability to wait his turn to respond during classroom discussions and lessons (*id.*).

Turning to the social/emotional present levels of performance, the March 2019 IESP indicated that the student socialized well with his peers and teachers, participated in group discussions, and liked to be a leader in the classroom although he required prompting to lead in a constructive way (Dist. Ex. 8 at p. 7). According to the IESP, the student had a low frustration tolerance triggered by situations in which he was not called on first when his hand was raised, when he was required to wait his turn to respond, and when he was reminded of "proper behaviors" and what was expected of him within the room (*id.*). The student's frustration could result in "meltdown" behaviors including destruction of classwork and "behavioral outbursts" (*id.*). The IESP indicated that "[a]fter a behavioral outburst, [the student had] difficulty identifying his part in the matter and [was] resistant to discussing" it (*id.*).

However, the March 2019 IESP also indicated that during those "times of frustration, [the student] respond[ed] best to time and space to cope with and express his frustration" and that [o]nce calm, he . . . return[ed] to the assigned task with adult prompting to do so" (Dist. Ex. 8 at p. 7). Over the course of the preceding school year, the student's behaviors appeared to decline. According to the IESP, the student's "behaviors were more prevalent at the start of the school year while [the student] was adjusting to his new classroom environment, schedule, routines, expectations, teacher, and peers" (*id.*). At the time of the March 2019 CSE meeting, reports reflected in the IESP indicated that "[t]hese behaviors have decreased, are currently reported infrequently, and are able to be addressed in the general education setting through the classroom management plan in place and teacher prompting" (*id.* at pp. 7-8). The classroom management plan provided opportunities for the student to earn access to preferred items and activities for appropriate behavior and work completion, and the IESP indicated that, with the classroom management plan in place, he was able to demonstrate appropriate classroom behaviors and that his behavioral needs were met (*id.* at p. 7).

Counseling reports included in the March 2019 IESP indicated that the student was progressing gradually towards his goals of "identifying emotions, triggers and coping skills and developing and practicing strategies for dealing with negative emotions" (Dist. Ex. 8 at p. 8). The IESP further reflected reports that, since returning to school from "December break, [the student had] made a good deal of progress" from not wanting to speak about any emotions at all to being able to work on worksheets about emotions (*id.*). The student was also making progress in determining the behavioral triggers that caused him frustration and was willing to talk about them

(*id.*). At the time of the March 2019 CSE meeting, in counseling the student was "able to identify many tools/strategies he [could] use when feeling upset" including completing five minutes of deep breathing, counting to ten, and asking for a break outside of the classroom (*id.*). During counseling sessions, the student continued to work on understanding the tools he could use prior to an outburst and transferring skills from the counseling sessions into the classroom (*id.*).

Next, with regard to the student's OT services, the March 2019 IESP noted that sessions had "focused on improving [the student's] sensory processing abilities to complete tasks more accurately and efficiently" and that he had achieved his goal of participating in a multistep adult-directed activity following five minutes of proprioceptive input, needing "less than 2 verbal prompts from the therapist" (Dist. Ex. 8 at p. 8).⁶ According to the IESP, the student always put forth his best effort during OT, participated in all activities presented during sessions, demonstrated the ability to maintain appropriate seating at a table for 30 minutes, copied sentences from near/far point surfaces with good letter formation, sizing, and spacing, and complied with therapist requests "100% of the time" (*id.*). Although the student was provided with access to sensory objects in the classroom, which he was observed using at the beginning of the school year, at the time of the March 2019 CSE meeting the student was "not currently using them during perceived times of frustration or to assist with sensory needs" (*id.*). The IESP reflected that the student had undergone an OT reevaluation and provided the results of the fine/visual motor assessments and the sensory profiles (*id.* at pp. 8-9).

The March 2019 CSE developed annual goals for the student to address the needs identified in the present levels of performance (compare Dist. Ex. 8 at pp. 7-9, with Dist. Ex. 8 at p. 10). Specifically, the IESP contained three annual goals for the student to: identify behavioral triggers and explain how those triggers impacted his behavior/behavior of others, identify and use a coping skill when expressing a negative emotion at school to maintain acceptable school behavior, and identify and use a coping skill when presented with a nonpreferred activity or wait period (Dist. Ex. 8 at p. 10). The annual goals all contained the criteria of 80 percent success on five occasions, as measured monthly by recorded observations (*id.*). In addition to the annual goals that addressed the student's social/emotional needs, the March 2019 IESP provided numerous management needs including the environmental modifications of special seating arrangements, an in-place classroom management plan, availability of a calm down area, access to a quiet, minimally distracting area to complete testing, and use of time and space when frustrated (*id.* at p. 9). Human resources included refocusing and redirection, directions repeated/clarified, adult assistance when "escalated" and during transitions, check-ins with familiar adults for positive interactions/behavioral support, and the option to have work broken down into smaller portions (*id.*). Finally, the IESP provided that the student would have access to material resources such as the option to use a seat cushion, wiggle stool, or other flexible seating, and also access to sensory/calming objects and activities (*id.*). Additionally, although the CSE determined that the student did not require a BIP, it found that the student needed strategies including positive behavioral interventions, supports and other strategies to address behaviors that impeded the student's learning or that of others (*id.*).

⁶ The March 2019 IESP described proprioceptive input as "heavy work" including wall pushups, theraputty, and animal walks (Dist. Ex. 8 at p. 8).

Turning to the services in the IESP, the March 2019 CSE recommended that the student receive one 30-minute session per week of individual counseling and twice monthly 15-minute sessions of OT consultation in the general education setting to provide training and monitoring of sensory diet/program, as well as two sessions per year each of parent counseling and training and team meetings (Dist. Ex. 8 at pp. 11, 13). To further support the student's needs the March 2019 IESP contained supplementary aids and services, and program modifications and accommodations (*id.* at pp. 11-13). Specifically, the CSE recommended the use of break periods, described as movement breaks per a sensory diet/program that provided opportunities for movement-based activities in the general education setting in a quiet area for self-calming needs, as well as access to sensory/calming objects and activities as needed (*id.* at p. 11). Special seating arrangements included seating close to the point of instruction, minimizing distractions and noise, and the option to use a seat cushion, flexible seating, or to stand (*id.*). Refocusing and redirection of the student included cues and prompts, and repetition of questions and/or directions as needed (*id.*). School to home communication entailed providing the parent with information about the student's development, progress, and/or behavioral and emotional needs (*id.* at p. 12). The IESP also provided for the student's tasks broken down into smaller chunks, and an option to be given no more than one page of work at a time, as well as directions repeated and clarified if needed (*id.* at pp. 12-13).

The March 2019 CSE recommended that the student be provided with a classroom management plan, which was detailed in the IESP (Dist. Ex. 8 at pp. 12-13). Specifically, the IESP indicated that the student's behavioral needs would be met through the plan that provided opportunities to earn access to preferred items/activities for appropriate behavior and work completion (*id.* at p. 12). The plan also provided and incorporated structured environment, warnings prior to transitions, a predictable schedule and that the student would be informed of any changes to the regular schedule, consistent monitoring of behavioral needs, communication with parents, use of a calm, non-aggressive manner, check-ins with familiar adults for positive interactions, reassurance and allowance for a break, clear and calm non-aggressive explanations of appropriate coping strategies during times of stress and frustration, availability of a quiet area in the classroom or alternate location for self-calming, and the use of time and space when frustrated/upset (*id.* at pp. 12-13).

Turning to the discussion held at the March 2019 CSE meeting, participants included the student's mother, the district's director of student services and special education, the district's CSE chairperson, the district's psychology intern who helped conduct the student's November 2018 psychoeducational evaluation, the parochial school principal, a special education teacher, the student's parochial school fourth grade general education teacher, an occupational therapist, the student's certified occupational therapy assistant (COTA), and attorneys for both the parent and the district (Dist. Ex. 8 at p. 1; see Tr. pp. 80, 295-96; Dist. Exs. 10; 23 at pp. 1, 6; 24 at pp. 1, 9). According to the IESP meeting information summary (summary), the March 2019 CSE met for the student's annual review, at which time the parent reported that, although she did not have any academic concerns, she was concerned about the student's social/emotional skills and the "amount of time he [was] missing from class due to removals" (Dist. Ex. 8 at p. 1). The parent requested that the student be provided with "1:1 aide support to remove [the student] at scheduled times throughout the day to implement a sensory diet/program" (*id.*). The summary reflected the occupational therapists' reports that the student had achieved his goal and that results of the OT reevaluation revealed average skills in all areas, including the sensory profile completed by his

classroom teacher (*id.*). The occupational therapist recommended discontinuing direct OT services and implementing a twice monthly 15-minute OT consult "to assist with training and monitoring of recommended sensory program" (*id.* at pp. 1-2). According to the summary, the recommended sensory program consisted of "movement based activity to be provided 2-3 times per day in [the] general education classroom" which the teacher and principal agreed could be implemented in a general education classroom setting (*id.* at p. 1). The summary indicated that the parent disagreed with the CSE's decision to discontinue direct OT services (*id.*).

The summary also reflected the counselor's report that the student had "recently started opening up and talking more during sessions" and was "progressing toward his current goals" (Dist. Ex. 8 at p. 2). The summary indicated that the student's goals had been revised to include the use of coping skills during waiting periods and non-preferred tasks, which the classroom teacher had identified as "triggers" for the student's behavior (*id.* at pp. 2, 10). According to the summary, the student maintained high honors, there were no academic concerns, and increased peer interaction was reported (*id.* at p. 2). The summary reflected the teacher's report of her concerns that the student was not using his sensory bin as intended, rather, he played with the sensory objects and attempted to engage peers with them instead of using them to calm and regulate himself (*id.*). The teacher further reported to the CSE that the student's behavior had "improved since the beginning of the school year and he ha[d] only been removed 3 times throughout the current school year" (*id.*). She also noted that the student "most frequently shut[] down during math when he perceive[d] the work as too difficult," but also that he "respond[ed] best to time and space when escalated and/or upset," and that he was "allowed to move freely throughout the classroom, as needed," which he typically did without disrupting the other students (*id.*).

The March 2019 CSE then turned the discussion towards the student's need for a 1:1 aide (Dist. Ex. 8 at p. 2).⁷ Regarding her understanding of the parent's desire for a 1:1 aide, the CSE chairperson stated the request was in part due to the student exhibiting behavioral "meltdowns" and being removed from the classroom (Tr. p. 74). As to the frequency of the student's meltdowns, the CSE chairperson stated that at the March 2019 CSE meeting the student's teacher reported that "there were only two meltdowns that school year where [the student] had to be removed or [the teacher] needed help in the classroom" and in other instances the student "became upset and at times had walked out of the room" (Tr. pp. 80-84).⁸ According to the CSE chairperson, the parent indicated to the CSE that the meltdowns happened "daily," while parochial school staff reported that they occurred less frequently (Tr. pp. 84-85; see Tr. pp. 108-09). When asked if the occurrence of meltdowns on a daily basis would have supported the recommendation for a 1:1 aide, the CSE chairperson responded "[n]ot necessarily" because she also would have needed input from staff from the parochial school, who, at the time of the March 2019 CSE meeting, reported that the student did not require a 1:1 aide (Tr. pp. 84-85; Dist. Ex. 8 at p. 2). Specifically, the March 2019 IESP summary indicated that "[t]he school and current OT providers do not feel that is what [the

⁷ The summary also reflected the CSE's discussion about the student's need for an FBA and BIP, which was rejected at that time due to the data collected and results of the March 2018 FBA, and the teacher's report that the student's behavioral outburst occurred at a low frequency and intensity (Dist. Ex. 8 at p. 2).

⁸ The parent testified that during fourth grade the student was removed from the classroom for 30-35 minutes on between 5-10 occasions (Tr. pp. 398-99).

student] needs and there is no data to support the need for a 1:1 aide at this time" (Dist. Ex. 8 at p. 2).

On this note, according to the parent during fourth grade the student's teacher contacted her about the student "being distracted or defiant or unable to sit still and attend for a reasonable stretch of time compared to his peers," and also that the student "would have shutdown behaviors where he would refuse to speak or respond to the classroom teacher" (Tr. pp. 384-86). The parent stated that the district determined that the student's "speech" refusal concerns would be best addressed by a counselor to work on his social/emotional language (Tr. p. 386). She disagreed, stating that the student did not have the social language skills to advocate for himself or to explain his wants and needs effectively and opining that counseling was inappropriate because that service addressed emotional needs rather than language needs (Tr. pp. 386, 390-91). However, the CSE chairperson testified that the March 2019 CSE recommended that the student receive counseling due to his difficulty coping with negative emotions and frustrating events at school, and the IESP annual goals addressed his need to identify and explain how triggers affect his behavior, and use coping strategies such as assertive communication (Tr. p. 69; Dist. Ex. 8 at p. 10).

The CSE chairperson further testified that her understanding of the request for a 1:1 aide was also due to the parent's opinion that the student needed a structured sensory diet program put in place with specific times when the student would be removed with an aide to implement that diet (Tr. p. 74). According to the CSE chairperson, sensory diets are developed by occupational therapists and can include features ranging from a student self-monitoring in a general education setting, to a structured program on a set schedule at intermittent times throughout the day, to "something more intensive" provided consistently throughout the day that requires staff to implement and monitor the target activities to address a student's sensory needs (Tr. pp. 61-62, 74, 78). The parent testified that during the 2018-19 school year the student's sensory needs were met via one session per week of OT, a sensory bin, and a wiggle seat, which she indicated was not "efficient," "because a sensory diet need[ed] to be provided throughout each and every day, and it [could]not be addressed one time a week" (Tr. pp. 384, 392-93). Despite the student's good grades, she stated that she requested a 1:1 aide "[b]ecause a lot of [the student's] sensory issues were manifesting as behavioral issues in the classroom, and I was consistently speaking to the classroom teacher to explain to her that she was seeing stim behaviors that were indicative of his need for a break" (Tr. pp. 385-86, 393). The parent stated that she was "hopeful" that a 1:1 aide would be able to carry out some of the exercises tailored to meet the student's sensory needs throughout the day and also help him focus (Tr. p. 395). She further testified that a 1:1 aide was the only way to implement the sensory diet and disagreed with the district's position that the diet could be implemented by the classroom teachers and by using a sensory bin (Tr. p. 400).

The March 2019 IESP included the recommendation for a sensory diet because according to the CSE chairperson, although the student did not exhibit needs based upon the results of the school-based sensory profile, the parent had indicated ongoing sensory needs and the sensory diet would "allow [the student] to still get those opportunities throughout the day" (Tr. p. 62; Dist. Ex. 8 at pp. 11, 13). Regarding the student's behavior at home, the parent testified that during fourth grade the student continued to have meltdowns at home, although less frequently, but—in her opinion—still related to his sensory needs not being met throughout the school day (Tr. pp. 391-92). According to the parent, the student was "very unregulated and unhappy throughout the school day," which she knew because when the student arrived at home, he sought out OT

"exercises" including working with a yoga ball and exercise machines, and crab walking (Tr. pp. 394-95, 424). She indicated that after the student completed the exercises he was "far calmer and less stressed and more focused and willing to sit down and start his homework," which he could not do "when he first g[ot] home off the bus" (*id.*).⁹

The CSE chairperson testified that the twice monthly OT consultation was recommended to provide "[a]n opportunity for the occupational therapist to provide training and to oversee and monitor any type of sensory diet or program that [was] recommended" (Tr. pp. 56-57). The CSE chairperson also testified that the OT reevaluation results supported the CSE's decision to discontinue direct OT services (Tr. pp. 57-58).¹⁰ According to the CSE chairperson, she was not aware of "anything that would support the notion" that the student required a 1:1 aide "in order to appropriately receive a sensory diet" (Tr. p. 78). Further, although parochial school staff may have indicated that they were lacking "equipment" they did not indicate that they were having difficulty providing an appropriate sensory diet to the student (Tr. pp. 78-79). I note that at the time of the impartial hearing, the March 2019 IESP—the first IESP to provide a sensory diet—had not been implemented (Tr. pp. 432-34).¹¹

In addition to the recommended sensory diet, the CSE chairperson further testified that the March 2019 IESP supplementary aids and services and program modifications/accommodations specifically addressed the student's sensory needs (compare Tr. pp. 59-60, with Dist. Ex. 8 at pp. 11-13). The COTA who provided the student's OT services during the 2018-19 school year testified that the supplementary aids and services could be provided to the student in the classroom without receipt of direct services outside of the classroom (Tr. pp. 295-96, 334-35, 347). Review

⁹ To the extent the student exhibited behaviors at home that were not observed during the school day, several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

¹⁰ It also appears, from the COTA's testimony, that at the time of the impartial hearing the student continued to receive direct OT through pendency at the parochial school (Tr. pp. 294-98, 314-17).

¹¹ The parties do not dispute that the student requires a sensory diet. However, to the extent the parent took issue with the lack of specificity in the IEP regarding the sensory diet, absent evidence that "a specific sensory diet is critical to [a] Student's development, a particular diet need not be prescribed by the IEP" (E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *10-*11 [S.D.N.Y. Sept. 26, 2018]; see N.B. & C.B. v. New York City Dep't of Educ., 2016 WL 5816925, at *5 [S.D.N.Y. Sept. 29, 2016] [finding that the omission of certain sensory management techniques from the student's IEP did not deny the student a FAPE]; E.P. v. New York City Dep't of Educ., 2016 WL 3443647, at *12 n.8 [S.D.N.Y June 10, 2016] [declining to find an IEP inappropriate on the basis that it did not include the same sensory regimen that the student received at a private school placement]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *15 [S.D.N.Y. Mar. 30, 2016] [noting that the law does "not require every aspect of a child's specific educational needs to be detailed in the IEP, as long as the IEP is designed to address those issues"]).

of the student's December 2018 IESP—in effect at the time of the student's annual review—shows that one of the supplementary aids was a positive reinforcement plan, which, according to the CSE chairperson, the March 2019 CSE "reworded to a classroom behavior management plan" to which "some additional recommendations . . . were added" (Tr. pp. 68-69; compare Dist. Ex. 8 at pp. 12-13, with Dist. Ex. 12 at p. 12). The CSE chairperson testified that other than the parent, no one else had indicated that the student needed or requested that he receive 1:1 aide services (Tr. pp. 73-74). Additionally, she also testified that no one from the parochial school ever indicated "that they fe[lt] those elements in the State guid[ance] document appl[ied] to [the student]," referring to the New York State Education Department's January 2012 Special Education Field Advisory Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide (Tr. pp. 75-77; Dist. Ex. 3).

The COTA testified that during the 2018-19 school year she saw the student once per week for 30-minute sessions in a small group and worked toward his goal of using different sensory tools and proprioceptive input followed by completing multistep directions (Tr. pp. 300-01). She further testified that the goal corresponded to the student's sensory needs and "being able to have the input through his body to regulate himself throughout the school day, and being able to follow multistep tasks" (Tr. p. 301). The student's progress toward the goal was monitored by the COTA, who used daily notes and observations during his sessions, and she testified that by January 2019 the student had achieved the goal (Tr. pp. 301, 304; Dist. Ex. 11 at p. 2). The COTA stated that she had "regularly" discussed the student's sensory needs with his fourth grade teacher, who reported that she "did not see [the student] having sensory needs presented in the classroom" (Tr. pp. 305, 333). According to the COTA, the teacher indicated that the student had a sensory bin in the classroom that he did not use often but that he had a movement cushion for his chair that he did use (Tr. pp. 306-07). The COTA observed the student for a "few minutes" in the morning when she "pick[ed] him up for his sessions" and testified that she had not "observed any sensory needs during those transition times" (Tr. p. 307).

While the parent's concerns about the student's behavior at school and home are understandable, the evidence in the hearing record does not support her opinion that the district's approach to the student was "catastrophically unsuccessful" and that although he achieved high grades in a general education environment the district was "failing to meet his needs and to provide him with a level playing field against his nonhandicapped peers" such that he required a 1:1 aide during the 2019-20 school year in order to be provided with appropriate services in a IESP (compare Tr. pp. 438-39, with Dist. Exs. 8 at pp. 1-2; 10; 11; 18; 23; 24). To the contrary, and contrary to the IHO's finding, the March 2019 IESP provided the student with annual goals, counseling, and individualized supplemental aids and services—including a sensory diet offering movement breaks in the general education setting—that were designed to address his unique needs.

Turning to the evidence upon which the IHO relied, three of the student's teachers at the parochial school testified at the impartial hearing concerning the 2019-20 school year (see generally Tr. pp. 125-87, 188-231, 244-93).¹² In his analysis of the student's needs exhibited at

¹² One of the teachers testified he had taught the student in a computer class during second grade, the other teachers did not appear to have provided instruction to the student prior to the 2019-20 school year (see Tr. pp. 126-27, 189, 244-45).

school, the IHO cited the testimony of the student's ELA, social studies, and science fifth grade teachers, none of whom attended the March 2019 CSE meeting which was conducted while the student was in fourth grade (compare Tr. pp. 126-27, 188-89, 244, 246, with Dist. Ex. 8 at p. 1). Although this testimonial information was not available to the March 2019 CSE and therefore cannot be used to evaluate the adequacy of the IESP (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]), some of the testimony regarding the student's presentation in their classrooms corresponded to information that was before the CSE, namely responses by the student's fourth grade teacher on the BASC-3, including that the student was "at times" withdrawn, pessimistic, and/or sad, might appear lonely, could present as irritable, and sometimes cried easily, such that the IHO determined that the student was "in a state of remediable sensory dysregulation" which the March 2019 IESP did not sufficiently address (IHO Decision at pp. 7-9; compare Tr. pp. 153-54, 176, 186, 205-06, 261-62, with Dist. Ex. 24 at pp. 4-5). With regard to the information before the CSE, the IHO noted in his decision that the fourth grade teacher had indicated to the CSE that the student had meltdowns in school on two occasions, and that during other behavioral observations, the student did not experience behavioral difficulties (IHO at p. 7). However, the IHO's analysis of the student's IESP was also flawed insofar as a significant portion of his analysis of the student's IESP was impermissibly based upon observations of the student's behavior by his fifth grade teachers—discussing events and observations that postdated the development of the student's March 2019 IESP (IHO Decision at pp. 7-9).¹³ Even assuming for the sake of argument that it was appropriate for the IHO to rely upon the retrospective testimonial evidence of the fifth grade teachers to evaluate the adequacy of the March 2019 IESP, and could note instances of when the student may have become frustrated or upset in the classroom, just in factual terms the IHO should have also noted that most of the same testimony from the fifth grade teachers also generally showed that the frequency with which

¹³ The IHO noted in a footnote that the information was not before the CSE, but nevertheless determined that testimony about subsequent events could be considered, but his reasoning as to why the rule barring retrospective evidence to evaluate the IESP was not clear. My discussion of the fifth-grade teachers' testimony is illustrative only and is not relied upon in my determination of whether the student's IESP was appropriate based upon the information available at the time of the CSE meeting. My criticism of the reliance on retrospective evidence in the hearing record is leveled as equally at the district as the party who offer it and created the confusion in the first place. It is entirely unclear why the district would present testimony from the student's fifth-grade teachers to defend the development of its IESP that was developed when he was in fourth grade, rather than his fourth-grade teachers who could have testified regarding the student's strengths and needs as they were communicated to and discussed by the March 2019 CSE. Notwithstanding that the district presented such testimonial evidence and it may not be relied upon to evaluate the May 2019 IESP, the remainder of the district's non-retrospective evidence was sufficient to support the conclusion that the student did not require a full time 1:1 aide to monitor the student's behavior.

the student exhibited those behaviors was limited, and when he did, that the situation was fairly easily resolved (see Tr. pp. 153-55, 204-07, 260-62, 264-65; see also Tr. pp. 164, 196).¹⁴

The IHO's decision also contained a second flaw. The IHO stated that [r]egardless of the kind or degree of benefit a child receives or the kind or degree of progress a child makes, I do not believe there is FAPE when a student is in a state of remediable sensory dysregulation" (IHO Decision at p. 9). The district correctly argues that the IHO employed an improper standard. State law required the CSE to "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" and the CSE was required to consider the kind of progress the student was making under his then-current IESP when developing the March 2019 IESP (Educ. Law § 3602-c[2][b][1]). The IHO was required to consider the student's progress without a 1:1 aide, and while he discussed it in his decision, he explicitly refused to consider the student's progress when making his ruling. This was error.

As mentioned by the IHO, and as further discussed above, the information before the CSE showed that the student was progressing and performing very well academically. It also showed that the frequency of meltdowns in school had decreased and that the student's sensory needs were addressed in the IESP though, among other things, counseling, an OT consult, and program modifications that featured the use of a sensory diet and a classroom management plan that was appropriate to address his needs, and in this instance the district was not required to accede to the parent's preferred approach of adding a 1:1 aide to the student's IESP. The evidence was insufficient to support a finding that the March 2019 CSE offered an inappropriate IESP by failing to assign a full-time 1:1 aide to the student to implement a sensory program and that the student was denied appropriate special education services for the 2019-20 school year through April 11, 2020.

¹⁴ Regarding the student's need for refocusing and redirection, the student's fifth grade teachers had conflicting opinions. On the one hand, the fifth grade ELA teacher testified that she needed to use prompts to refocus the student "consistently" during class—such as tapping the desk, pointing to the question, or providing him with a sentence starter—which "help[ed] him quite a bit" and enabled him to "comply and complete his work" (Tr. pp. 137-39, 145, 150-51, 172-73). She further testified that although she was successful in redirecting the student when necessary, due to the frequency with which she provided refocusing and redirection to the student, it was her opinion that he would benefit from 1:1 aide services (Tr. pp. 171-72, 175-78). On the other hand, review of the testimony from two other fifth grade teachers for social studies and science shows that although the student required refocusing and redirection in those classes as well, they did not believe that the provision of 1:1 aide services was the only way to address the student's needs (compare Tr. pp. 171-72, 175-78, with Tr. pp. 191-93, 198, 213, 215, 219-20, 222-23, 250-51, 276, 282-83, 288-89). The testimony of the fifth grade teachers shows that they were implementing accommodations and supports from the December 2018 IESP (the stay-put placement), which were either identical or similar to those on the March 2019 IESP, and the report card reflects that the overall the student was successful in their classes (Tr. pp. 157-60, 204, 208-10, 274-76; compare Dist. Ex. 8 at pp. 9, 11, with Dist. Ex. 12 at pp. 9, 11; see Dist. Ex. 4 at pp. 1, 4, 6). Once again, this information is not discussed for the purpose of my evaluation the IESP based upon information at the time it was created, but merely to illustrate that if the IHO was going to go ahead and use retrospective evidence as part of the calculus, such an analysis should have also included the opinions of his teachers who opined that the student did not require a 1:1 aide.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determination that the district was required to provide additional services to the student during the 2019-20 school year, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated February 5, 2020, is modified by reversing those portions which found that the district failed to offer the student appropriate special education services in the March 2019 IESP and directed the district to assign the student a one-to-one aide and the parties to agree to the particulars of the student's sensory diet.

Dated: **Albany, New York**
April 10, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER