



The University of the State of New York

The State Education Department
State Review Officer

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No. 21-243

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Liz Vladek, General Counsel, attorneys for petitioner, by Frank J. Lamonica, Esq.

Law Offices of Regina Skyer and Assoc., LLP, attorneys for respondents, by Sonia Mendez-Castro, Esq. and Linda A. Goldman, 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 respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Aaron School for the 2019-20 school year. The appeal must be sustained.

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

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 detail here, rather the factual underpinnings of the matter will largely be discussed below in the context of the development and implementation of the student's IEP's during the 2019-20 school year. Briefly, for the 2018-19 school year (3rd grade), the student attended the Aaron School (Dist. Ex. 12 at p. 1). A CSE convened on August 19, 2019, to formulate the student's IEP for the 2019-20 school year (see generally Dist. Ex. 1). The August 2019 CSE recommended that the student attend a 12:1+1 special class in a non-specialized school for his core academic classes and receive related services of speech-language therapy, occupational therapy (OT), and counseling services (id. at pp. 30-31, 34-36). The parents enrolled the student in "PS 277," the local public

school, on or about October 7, 2019 (Tr. pp. 252, 370-71, 549-50). The parents requested a reconvene of the CSE, which occurred on October 15, 2019, resulting in an IEP recommending placement in a 12:1 special class in a non-specialized school (Tr. pp. 216, 550-52; Dist. Ex. 2 at pp. 33-34,39-41; 6).¹

While the student continued to attend P.S. 277, the parents requested an adapted physical education evaluation of the student and the CSE reconvened on December 17, 2019, to consider the evaluation (District Ex. 8) and, at the same meeting, continued to recommend placement in a 12:1 special class in a non-specialized school (Tr. p. 278, 390; Dist. Exs. 4 at pp. 12, 20-21, 25-27; 7; 8).²

The parents disagreed with the August 2019 and October 2019 CSEs' recommendations and notified the district on January 29, 2020 of their intent to remove the student from P.S. 277, enroll him in the Aaron School at public expense (Parent Ex. B at p. 2). Thereafter the parents unilaterally placed the student at the Aaron School on or about February 13, 2020, where he attended for the remainder of the 2019-20 School year (see Tr. p. 43; Parent Ex. B; N at p. 1; O at p. 1).

In a due process complaint notice, dated July 14, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year, raising allegations related to the recommendations contained in the August 2019, October 2019, and December 2019 IEPs, as well as claims regarding implementation of the IEPs' recommendations and management needs (see Parent Ex. A).

An impartial hearing convened on February 22, 2021 and concluded on September 9, 2021 after seven days of proceedings (Tr. pp. 1-825). In a decision dated November 9, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year (IHO Decision at pp. 9-11). The IHO found that the district failed to have a program in place for the student at the start of the 2019-20 school year and that the October 2019 CSE did not have sufficient information available to support a change of the student's recommended class placement from a 12:1+1 special class to a 12:1 special class (id. at p. 10). The IHO also noted that the October 2019 CSE's recommendation for a 12:1 special class with a 1:1 health paraprofessional was not as supportive for the student as the August 2019 CSE's recommendation for a 12:1+1 special class (id.). The IHO went on to find that the Aaron School was an appropriate unilateral placement and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 11-15). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at the Aaron School for the portion of the 2019-20 school year during which the student attended the school (id. at p. 15).

¹ At the time of the student's placement, P.S. 277 did not have a 12:1+1 special class (Tr. p. 550). A 12:1+1 was also rejected as too restrictive for the student (Dist. Ex. 2 at p. 41). A full-time paraprofessional was added to the IEP (id. at pp. 34-35), as was parent counseling and training (id. at p. 34).

² The adapted physical education evaluation indicated that the student was not eligible for adapted physical education (District Ex. 8 at p. 5).

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 parents' answer thereto is also presumed and will not be recited here in detail. The gravamen of the parties' dispute on appeal is whether the district offered the student a FAPE during the 2019-20 school year prior to the parents' unilateral placement of the student at the Aaron School in February 2020.

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]).³

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to

³ 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).

belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

A. IEP Development for the 2019-20 School Year and Scope of Review

The CSE convened on August 19, 2019, to develop the student's IEP for the 2019-20 school year (fourth grade) (Tr. p. 59; Dist. Ex. 2 at p. 35). The August 2019 CSE found the student eligible for special education services as a student with a learning disability and recommended a 12:1+1 special class placement in a district non-specialized school for English-language arts (ELA) for 12 periods per week, math for nine periods per week, social studies for two periods per week, and science for two periods per week (Dist. Ex. 1 at pp. 30, 34-35). Additionally, the August 2019 CSE recommended related services of one 30-minute session of group (3:1) counseling services per week, three 30-minute sessions of individual occupational therapy (OT) per week, two 30-minute sessions of individual speech-language therapy per week, and one 30-minute session of group (3:1) speech-language therapy per week (id. at pp. 30-31).⁴ The August 2019 IEP indicated the student would participate in the same State and district-wide assessments of student achievement as were administered to general education students, and included testing accommodations such as extended time (1.5X), breaks (five minutes every 30 minutes), on-task focusing prompts (verbal prompts to focus on task at hand until completion, as needed), separate location/room (separate location with minimal distractions no more than three students), and revised test directions (directions read and re-read aloud), as well as tests read on all assessments that measure reading comprehension (test passages, questions, items and multiple choice responses read aloud two times) (id. at pp. 32-33). The August 2019 CSE also indicated that the student be exempt from the language other than English requirement (id. at p. 34). Consistent with a June 2019 neuropsychological evaluation report, the August 2019 IEP noted the student's instructional/functional levels for reading and math were at the first grade level (Parent Ex. C at p. 10; Dist. Ex. 1 at pp. 10, 35).⁵

The August 2019 CSE meeting occurred while the student was enrolled at the Aaron School (Tr. p. 546; see Dist. Ex. 12 at p. 1). The parent testified that the August 2019 CSE discussed the student's educational background and reviewed a neuropsychological and

⁴ The August 2019 IEP included a notation that at the CSE meeting, the NEST autism spectrum disorder (ASD) program, assistive technology, and special education teacher support services (SETSS) were discussed as possible additions to the 12:1+1 special class placement (Dist. Ex. 1 at p. 10). The parent reported that she had already submitted an inquiry to the NEST program (id.).

⁵ According to the SESIS documentation, the district mailed the August 2019 IEP to the parent on August 20, 2019 (Dist. Ex. 13 at p. 8). It is unclear from the hearing record whether the district identified a recommended public school location for the student prior to the start of the 2019-20 school year.

educational evaluation report and Aaron School progress reports that she provided to the district (Tr. p 546.). She reported the August 2019 CSE discussed the student's needs, supports that worked for him, his goals, and his struggles (*id.*). With regard to a program recommendation, the parent indicated she requested the August 2019 CSE defer the student to the central based support team (CBST) because she felt the student was ready to move from the Aaron School to a nonpublic school within the district (Tr. p. 547). She noted that she informed the August 2019 CSE that the parents had already reached out to a particular State approved nonpublic school, which thought the student would be an appropriate fit, but the school normally did not accept students if they were not referred by the district (Tr. pp. 547-48). The parent indicated the August 2019 CSE did not defer the student to the CBST (Tr. p. 548). According to the parent, although the parents had concerns with the August 2019 CSE's recommended program, they decided to give their local public school "a try" (*id.*).

The parent testified that the student was not enrolled in school in September 2019 and that she was not "extremely concerned" that the student's progress would be affected (Tr. pp. 683, 756).⁶ The parent also testified that although the student was not enrolled in school in September 2019, he had a structure and an educational plan at home with her (Tr. p. 759).⁷

According to the parent's testimony, "[o]n the day" she went to P.S. 277 to register the student, she spoke with the pupil secretary and the IEP teacher for the team (Tr. p. 550). At that time, the IEP teacher told her that the school did not have a 12:1+1 special class (Tr. p. 551). The parent indicated she knew "that they would want to have a meeting with (her)" (*id.*).

Prior to the student's enrollment at P.S. 277, in an email to the school principal dated October 3, 2019, the parent requested that the CSE reconvene to review the student's IEP "to address concerns related to his classification and his support needs" (Dist. Ex. 6 at p. 1).

The assistant principal and the school psychologist at P.S. 277 testified that the student was enrolled at the public school on October 7, 2019 (Tr. pp. 35-36, 85-86).

Approximately one week after the student began attending P.S. 277, and in response to the parent's October 3, 2019, email requesting a CSE meeting, the CSE convened on October 15, 2019 (Dist. Ex. 2 at p. 39). The October 2019 CSE changed the student's eligibility classification for special education services from a student with a learning disability to a student with autism and recommended a 12:1 special class placement in a district non-specialized school for English-language arts (ELA) for ten periods per week, math for ten periods per week, social studies for three periods per week, and science for two periods per

⁶ The parents testified that they chose to remove the student from the Aaron School and there were no obstacles to the student to returning to the Aaron School in September (Tr. p. 744). The student's mother reported that the parents wanted the student to be in a small class in P.S. 277, where he also had the opportunity to be in an inclusive setting with general education students from his community, with opportunity to socialize, flourish, and thrive (Tr. pp. 680, 744-45).

⁷ The parent was a district special education teacher and had also been a district assistant principal (Tr. pp. 668-69).

week (id. at p. 34).⁸ Additionally, the October 2019 CSE continued the previously recommended related services of one 30-minute session of group (3:1) counseling services per week, three 30-minute sessions of individual Occupational Therapy (OT) per week, two 30-minute sessions of individual speech-language therapy per week, and one 30-minute session of group (3:1) speech-language therapy per week, and it added one 60-minute group session of parent counseling and training four times per year (compare Dist. Ex. 1 at pp. 30-31, with Dist. Ex. 2 at p. 34).⁹ The October 2019 CSE also recommended that the student be supported by a full-time, 1:1 health paraprofessional (Dist. Ex. 2 at p. 35). In addition, the October 2019 IEP continued the same testing accommodations as were included in the August 2019 IEP (compare Dist. Ex. 1 at p. 32, with Dist. Ex. 2 at p. 36). The October 2019 IEP also indicated that the student be exempt from the language other than English requirement (Dist. Ex. at p. 38). The October 2019 CSE also continued the goals contained in the August 2019 IEP (compare Dist. Ex. 1 at pp. 19-29, with Dist. Ex. 2 at pp. 19-33).

In a prior written notice dated October 16, 2019, the district notified the parents of the special education program and services recommended for the student for the remainder of the 2019-20 school year (see Dist. Ex. 3 at pp. 1-2). In addition, the October 2019 prior written notice indicated that the October 2019 CSE relied on the August 19, 2019, IEP in developing the student's October 2019 IEP (Dist. Ex. 3 at p. 1). It also included a description of the other placement options considered and the reasons why those options were rejected (id.).

Approximately two weeks after the October 2019 CSE meeting, in an email to the principal of P.S. 277 dated October 28, 2019, the parent formally requested an adapted physical education evaluation for the student (Dist. Ex. 7). The email indicated the student had been diagnosed with ADHD, developmental coordination disorder, ASD, a learning disability, and chronic food allergies (id.). Due to the student's struggles with coordination, graphomotor skills, fine motor skills, self-regulation, and body awareness, the parent requested that "the team" should consider adapted physical education as a necessary support for the student (id.).

Following the parent's request for an adapted physical education evaluation for the student, in a letter to the parent dated November 13, 2019, the district requested the parent's consent to conduct additional evaluations, as needed, as part of a requested reevaluation or mandated three-year evaluation (Dist. Ex. 10). The parent provided signed consent to evaluate the student on the same day (id.). On December 2, 2019, a district adapted physical education teacher, with a physical education teacher present, conducted an adapted physical education evaluation and motor skills assessment of the student (Dist. Ex. 8 at p. 1). The evaluator indicated that the student was not eligible for adapted physical education (id. at p. 5).

The CSE convened on December 17, 2019, to review the December 2019 adapted physical education evaluation but due to a breakdown in communication among those present, the meeting needed to be continued at a later time (see Dist. Ex. 4 at pp. 28-29; Tr. pp. 47-50,

⁸ The district school psychologist testified that there was no evidence to recommend a 12:1 special class for art, music, or electives (Tr. p. 228).

⁹ I note that the addition of parent counseling and training to the October 2019 IEP was consistent with the change in the student's classification as a student with autism (see 8 NYCRR 200.13[d]).

163, 166, 179-81, 748-51). The principal source of disagreement was the CSE's reluctance to recommend that the student be placed in a class with Integrated Co-Teaching (ICT) services, which the parent preferred, rather than a special education class (Tr. pp. 47-50, 162-70, 234-35, 586-87). According to testimony by the school psychologist who was present at the October 2019 and December 2019 CSE meetings, attendees at the December 2019 CSE meeting included all the mandatory participants in person as well as by telephone, as well as the adapted physical education teacher who conducted the adapted physical education evaluation (Tr. pp. 165-66; see Dist. Ex. 4 at pp. 28-29).

In a letter dated January 29, 2020, the parents disagreed with the CSE's recommendations and notified the district of their intent to remove the student from P.S. 277 and unilaterally place him at the Aaron School and seek funding from the district for the student's placement (Parent Ex. B). On or about February 13, 2020, the parents placed the student at the Aaron School, where he attended for the remainder of the 2019-20 School year (see Tr. p. 43; Parent Exs. N at p. 1; O at p. 1).

On February 13, 2020, the CSE reconvened to finalize the December 2019 IEP, with the parents participating by telephone (Tr. pp. 230, 287). On the same day, the district sent the parents a prior written notice that summarized the December 2019 CSE meeting (Dist. Ex. 5). The prior written notice included the assessments and materials reviewed and discussed by the CSE, notably the adapted physical education evaluation, and identified the recommended special education program and services the student was eligible to receive (id.).

With the above in mind, I note that the facts in this matter do not present with the traditional "Burlington/Carter" framework wherein an IEP is drafted prior to the start of a given school year that the parent or parents disagree with, followed by the parents unilaterally placing the student in a program that was not recommended by the CSE and then seeking public funding or reimbursement from the district for the unilateral placement (see e.g., Application of a Student with a Disability, Appeal No. 21-125). In the typical tuition reimbursement case, the student's IEP is never implemented by the district, and the offer of FAPE in an IEP must be considered in light of the written program offered in the document. Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]). The Second Circuit has also stated that when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because

necessary services included in the IEP were not provided in practice" (F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3). Therefore, if the student never attends the public schools under the proposed IEPs, there can be no denial of a FAPE due to the parent's speculative concerns that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 611 Fed. App'x at 731).

However, in the present matter, the parents were aware that P.S. 277 did not have a placement offering a 12:1+1 special class at the time they enrolled the student in the public school and sought modifications to the student's IEP that had been developed in August 2019. The subsequent October 2019 IEP was accepted by the parents and was implemented at P.S. 277, albeit the parents allege it was not implemented sufficiently. Additional changes to the student's 2019-20 school year IEP were recommended during the December 2019 CSE meeting. Notably the parents did not reject the district's recommended program found in the various IEPs until they notified the district on January 29, 2020, of their intent to remove the student from P.S. 277 and unilaterally place the student at the Aaron School (see Tr. p. 43; Parent Exs. B; N at p. 1; O at p. 1). In light of the above, I disagree with two particular findings made by the IHO. First, the IHO found that the district had denied the student a FAPE in that it had not offered sufficient evidence "regarding their procuring a program for the student at the start of the school year" presumably referring to the program recommended in the August 2019 IEP (IHO Decision at p. 10). However, there is no request for relief concerning the period from the beginning of the 2019-20 school year until the parents' unilateral placement of the student at the Aaron School on or about February 13, 2020 (IHO Decision at p. 15; Parent Ex. A at p. 4; Answer at p. 10). Instead, although the parent challenged the August 2019, October 2019, and December 2019 IEPs in their July 14, 2020 due process complaint notice, the focus of the hearing should have been on the program recommendation included in the December 2019 IEP, as that was the IEP in effect at the time the parents made their decision to reject the district's placement and to instead place the student at the Aaron School for the remainder of the 2019-20 school year (see Parent Exs. A-B, N-O).

The hearing record indicates that the December 2019 IEP was not finalized until February 13, 2020, the same day that the student began attending the Aaron School (see Tr. pp. 230, 287; Parent Ex. O; Dist. Ex. 5). The school psychologist testified that the district attempted to reschedule the CSE for some time in January 2020 right after the school break, but the parents were not available until February 13, 2020 (Tr. p. 182). The 12:1 special class teacher testified that the December 2019 CSE meeting was rescheduled several times, due to the parents repeatedly canceling the meeting (Tr. p. 302). The December 2019 IEP was finalized on February 13, 2020, but the parent removed the student from P.S. 277 prior to the meeting (Tr. p. 302). The teacher indicated the student told her he would be leaving P.S. 277 one day before he left, and that he would be upset that he was leaving (Tr. p. 303). Based on the events that occurred, the parents did not reject the recommended program until after they were aware of the contents of the December 2019 IEP. Accordingly, review of the December 2019 IEP should have been undertaken as it was the operative program at the time the parents "decide[d] whether to make a unilateral placement . . . [and] [t]he appropriate inquiry is into the nature of the program actually offered" (R.E. 694 F.3d at 187-88; see M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016] [concluding that a later-developed IEP was the operative IEP as the operative IEP is the IEP the district chooses to defend at the end of the resolution period]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL

237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *25 n.3 [S.D.N.Y. Sept. 28, 2018] [finding the later developed IEP to be operative even though it was developed during the first weeks of school]).

Second, the IHO found that the district could not assert that it offered the student a FAPE by utilizing evidence of progress the student had made while attending P.S. 277 during the 2019-20 school year (IHO Decision at p. 11). The IHO based this finding on her conclusion that evidence of progress under the October 2019 IEP was retrospective testimony used to rehabilitate an otherwise defective IEP (id.).¹⁰ However, as noted above, the analysis in this matter should focus on the appropriateness of the December 2019 IEP; accordingly, evidence of progress the student may or may have not made during the implementation of the October 2019 IEP that was available to the December 2019 CSE is relevant to the consideration of the appropriateness of the recommendations contained in the December 2019 IEP because a FAPE analysis is appropriately limited to a review only of the information "reasonably known to the parties at the time of the [parents'] placement decision" (R.E., 694 F.3d at 187; see J.C., 643 Fed. App'x at 33; M.O., 793 F.3d at 244; Reyes, 760 F.3d at 220; C.F., 746 F.3d at 81).

Accordingly, the relevant inquiry to follow will consist of consideration of the progress the student made under the October 2019 IEP and the appropriateness of the recommended program contained in the December 2019 IEP in light of the student's progress under that prior IEP.

B. 2019-20 School Year

1. October 2019 IEP

Although the December 2019 IEP was the IEP in effect at the time the parents made their placement decision, review of the October 2019 IEP and the student's progress thereunder is relevant to the recommendations made by the December 2019 CSE because the CSE considered the student's progress during the prior two months that he attended P.S. 277 in order to craft an appropriate program for the remainder of the 2019-20 school year.

Turning first to the content of the October 15, 2019 IEP, the school psychologist testified, that she drafted the October 2019 IEP based on the recently developed August 2019 IEP (Tr. p. 145; compare Dist. Ex. 1 and Dist. Ex. 2). As noted above, the parents wanted the student to attend his local school under the August 2019 IEP; however, the August 2019 IEP

¹⁰ The Second Circuit's holding in R.E. prevents a district from attempting to rehabilitate a deficient IEP by relying on information not available to the CSE (694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]; see P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 411 [S.D.N.Y. 2017]; Application of the Bd. of Educ., Appeal No. 18-001; Application of a Student Suspected of Having a Disability, Appeal No. 16-011). Since R.E., the Second Circuit has continued to emphasize the importance of limiting a FAPE analysis to include a review only of the information "reasonably known to the parties at the time of the [parents'] placement decision" (R.E., 694 F.3d at 187; see J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 220 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 81 [2d Cir. 2014]).

recommended a 12:1+1 special class for the student and the IEP teacher for the school told the parent that the school did not have a 12:1+1 special class for students in grades three to five (Tr. p. 549-51).

According to the school psychologist, the October 2019 CSE meeting was a reevaluation meeting conducted at the request of the parent (Tr. pp. 136-38.).¹¹ The school psychologist reported that when creating the October 2019 IEP, the CSE relied on a recent IEP developed in August 2019 and the June 2019 neuropsychological evaluation report (Tr. pp. 139, 200). She explained that the neuropsychological evaluation included an educational component and the October 2019 CSE "used all of that information as well as what the parent had communicated to us" during the meeting (Tr. p. 139). She further indicated that the district did not conduct its own psychoeducational evaluation of the student because the parent's neuropsychological evaluation was very recent, provided sufficient information about the student and was still valid (Tr. pp. 139-40, 201). The school psychologist noted that considering the student was new to P.S. 277, the neuropsychological report gave the CSE a "picture of what to expect" of the student (Tr. p. 201). In addition, the school psychologist stated that the neuropsychological evaluation was more comprehensive and more thorough than a psychoeducational evaluation at the district level would be, and it provided more information than the district would have collected by conducting the basic standard evaluation at the school level (Tr. 139-40). The district did not have its own progress notes yet because the student had just started attending the district school and was only there for a few days prior to the October 2019 CSE meeting (Tr. pp. 140-41).

The school psychologist testified that the October 2019 CSE changed the student's placement recommendation from a 12:1+1 special class to a 12:1 special class because the neuropsychologist who evaluated the student recommended that he not be placed in a class with students that had behavior difficulties, the student did not have any behavior difficulties and he was transitioning smoothly into the local public school (Tr. pp. 141-42). Also, the student was prone to becoming anxious, and he had difficulty focusing and with attention (Tr. p. 142). The school psychologist reported, that "typically in a 12:1+1 program, there are oftentimes disruptive behaviors occurring" (*id.*). She noted, however, that the main reason for the change was that the student did not have any behavior issues that the CSE was aware of and it therefore determined a 12:1+1 special class would have been too restrictive for the student (*id.*). In addition, the school psychologist testified that as the parent also requested a 1:1 health paraprofessional for the student due to his chronic allergies, there would have been too many adults if there was another classroom paraprofessional in the room, a situation "way too restrictive" for the student at that point (Tr. pp. 142-43). Accordingly, while the hearing record indicates that the student's community school did not have a 12:1+2 readily available at the time of his enrollment in the school in October 2019, the record also supports a finding that the CSE considered the student's needs and determined that, in any event, a 12:1+2 class would be too restrictive.

The October 2019 CSE recommended a 12:1 special class placement in a district non-specialized school for English-language arts (ELA) for 10 periods per week, math for ten

¹¹ The school psychologist participated in the October 2019 CSE meeting (Tr. pp. 136, 200; Dist. Ex. 2 at p. 42).

periods per week, social studies for three periods per week, and science for two periods per week (Dist. Ex. 2 at p. 34). Additionally, the October 2019 IEP included recommendations for related services, identifying weekly services of one 30-minute session of group (3:1) counseling, three 30-minute sessions of individual OT, two 30-minute sessions of individual speech-language therapy, and one 30-minute session of group (3:1) speech-language therapy (*id.*). The IEP also recommended parent counseling and training four times per year (*id.*).¹² Finally, the October 2019 CSE included a recommendation for a full-time individual health paraprofessional (*id.* at p. 35).

The school psychologist explained that she felt the October 2019 IEP was appropriate for the student at the time and could help enable the student to make progress (Tr. pp. 161-62). She indicated that based on the student's academic delays, difficulties with fine motor skills, and weaknesses in attention, and self-regulation, and all the supports the student needed, she and the CSE team felt that the small 12:1 special class was the most appropriate program for the student (Tr. pp. 162-62).

The school psychologist indicated that changing the recommended program from 12:1+1 to 12:1 would not change the student's related services (Tr. p. 143). The only difference in the programs was the extra paraprofessional in the classroom (Tr. p. 144). The school psychologist testified that the parent agreed with and seemed pleased with the October 2019 IEP recommendations and appeared not to have any problems with the IEP at that time (Tr. p. 161). Testimony by the parent indicated she had concerns about the 12:1 special class recommendation but she "agreed to it...hoping for the best" (Tr. p. 553).

Prior to turning to the student's progress under the October 2019 IEP, one of the aspects of the IHO's decision that merits attention is the IHO's finding that the October 2019 CSE had no new evaluative information to justify changing the student's placement from the 12:1+1 special class recommended by the August 2019 CSE to a 12:1 special class with the support of a 1:1 health paraprofessional recommended by the October 2019 CSE (IHO Decision at pp. 9-11). More specifically, the IHO determined that the 12:1+1 special class would have included the support of two special education teachers in the classroom and the addition of a health paraprofessional would not have provided the same support as a special education teacher (IHO Decision at p. 11). However, neither placement option recommended would have provided two special education teachers in the student's classroom.

A 12:1+1 special class is described in State regulations under the continuum of special education as follows:

The maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction.

¹² I note that the addition of parent counseling and training to the October 2019 IEP was consistent with the change in the student's classification as a student with autism (*see* 8 NYCRR 200.13[d]).

(8 NYCRR 200.6[h][4][i])

In addition, State regulations no longer define the term "paraprofessional," as the term "paraprofessional" was replaced with the term "supplementary school personnel" (see "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID Mem. [Aug. 2004], [available at http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf](http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf)). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]).

Thus, the August 2019 CSE recommended an additional supplementary school personnel in the classroom, not a second special education teacher, as did the October 2019 CSE, which recommended additional supplementary school personnel in the student's classroom in the form of the 1:1 health paraprofessional.

Turning to the progress the student was making under the October 2019 IEP, the IEP included approximately 18 annual goals related to the student's identified needs (Dist. Ex. 2 at pp. 19-33). Academic goals addressed the student's ability to compute three-digit addition and subtraction problems with regrouping, add details supporting his opinion and conclude his writing with a closing sentence, retell stories with key details and demonstrate an understanding of the text, and revise and edit his writing to check for errors in spelling, capitalization and punctuation (id. at pp. 21-23). The October 2019 IEP also included a goal that targeted the student's ability to generate the appropriate letter for corresponding sounds when writing words that included short vowels, digraphs, blends, long vowels and vowel teams by using anchor charts and exemplars (id. at p. 24). An additional goal addressed the student's understanding and application of properties of operations and the relationship between addition and subtraction (id. at p. 25). The IEP also included a goal designed to improve the student's executive functioning through his use of tools such as checklists to help organize himself to complete a task on time independently (id.). Annual goals included on the October 2019 IEP also targeted the student's needs in the areas of speech-language development, social skills, and motor and sensory, and identified strategies to improve the student's body awareness, impulse control, frustration tolerance and self-regulation (id. at pp. 19-21, 26-33).

Testimony by the 12:1 special class teacher, who was present for the December 2019 CSE meeting, indicated she was familiar with the student as she was his teacher for a portion of the 2019-20 school year, beginning when he started attending P.S. 277 in October 2019 and in that capacity she interacted with him daily (Tr. pp. 251-52; see Dist. Ex. 4 at pp. 28, 29). She reported that she was familiar with the student's academics because she was his primary teacher for instruction in reading, writing, math, social studies and science (id.). The teacher confirmed that the student had academic delays (Tr. p. 252). The teacher indicated that she was familiar with the student's social and emotional needs as they spoke every day (id.). The teacher described the student as a "very, very nice boy" who was friendly and "very sweet" (id.). The 12:1 special class teacher testified that overall, the student made measurable academic progress based on the goals in the October 2019 IEP (Tr. p. 277; see Tr. pp. 256-75).

The 12:1 special class teacher identified the skills targeted by the each of the academic goals on the student's IEP and the methods and materials she used to instruct the student relative to the goals (Tr. pp. 256-275; Dist. Ex. 2 at pp. 13-15).

With regard to the math goal that addressed the student's ability to add and subtract three-digit numbers with regrouping, the teacher reported that she provided the student with direct instruction, modeling and guided practice as well as manipulatives, charts, and color-coded index cards to help him keep track of place value and how to regroup (Tr. pp. 256-57; Dist. Ex. 2 at p. 21). The teacher testified that she took "constant notes" on how the student was doing on problems she gave him and measured his progress daily (Tr. pp. 257-58; Dist. Ex. 2 at p. 21). According to the teacher, the student made progress on this math goal despite the fact that he still had trouble doing math calculation problems on his own (Tr. p. 259). More specifically, the teacher reported that the student was more confident when given three-digit math problems to solve, was less hesitant to begin solving them, and was adding and subtracting better (Tr. p. 259).

For a second math goal that addressed the student's understanding of the relationship between addition and subtraction the teacher testified that she provided the student with direct instruction and guided practice, as well as tools including color-coded cards and counters as necessary (Tr. pp. 270-71; Ex. 2 at p. 25). Progress was measured daily over a period of four weeks through the student's work samples and through the teacher's conference notes (Tr. p. 272). The teacher reported that during his time in the 12:1 special class the student became more comfortable answering, and was able to solve, math questions more independently using the tools that he was given (Tr. p. 273).

With regard to the writing goal included in the October 2019 IEP, the teacher indicated that she provided direct instruction in writing daily (Tr. p. 260; Dist. Ex. 2 at pp. 22). She indicated that she gave the student checklists to help him make sure he had a topic sentence, details, and a closing sentence, and sentence starters to help student begin what he was writing and transition words to expand on ideas (Tr. p. 260). According to the teacher, she measured the student's progress daily through conference notes and discussions, and the student's work samples (Tr. p. 261; Dist. Ex. 2 at p. 21). The teacher reported that overall, the student "definitely" showed progress in this writing goal (Tr. p. 262). She noted that he was able to write more sentences than he could when he initially arrived at P.S. 277 (id.). When he arrived in October 2019 he struggled with writing and could possibly complete one sentence, whereas when he became more comfortable and used the provided tools more, he was able to write two to three sentences on his own (id.).

With regard to a second writing goal included in the October 2019 IEP, that targeted the student's ability to edit his written work, the teacher explained that she provided the student with checklists as well as word lists to help him with spelling and to "remember exactly what he needed to write a complete sentence" (Tr. p. 266). She reported that she used a strategy with the student called "COPS" to help him with capitalization, organization, punctuation, and spelling (Tr. pp. 266-67). The student followed specific steps to check his writing mechanics and was given sight word lists to help him spell his sight words (Tr. p. 267). According to the teacher, the student demonstrated progress toward this goal as he became "pretty independent" in his ability to use the checklist to help him remember the steps needed to write a sentence (id.). In addition, the student made fewer errors in capitalization and punctuation (Tr. p. 267-68).

With regard to the reading goals included in the October 2019 IEP, the teacher testified that she addressed the reading comprehension goal by reading with the student daily (Tr. p.

263). In addition, she provided the student with direct instruction and used graphic organizers to help him retell a story (id.). The teacher reported that when introducing a skill to the student, the skill was modeled (id.). The student was guided through how to complete a graphic organizer and how to retell a story and the teacher and student kept practicing until the student was able to do it (id.). The teacher reported that she measured the student's progress on the reading comprehension goal based on how he completed the graphic organizers, how he was able to retell the story to her, and the daily notes she took during her meetings with the student and daily observations over a period of four to six weeks (Tr. pp. 263-65). The teacher testified that from October 2019 when he arrived in her class, the student's decoding skills improved, which helped him comprehend what he was reading (Tr. p. 265). The more the student was comprehending, the more he was able to retell and understand what he had read (id.).

With regard to the decoding goal included the teacher indicated that she used a special phonics program in the classroom called "Foundations" (Tr. p. 268). The Foundations program associated a letter or a sound with a key word and a visual to help students remember the sound (id.). Foundations was used with the student daily and progress was measured based on how well the student was reading and applying learned strategies (Tr. p. 269). The teacher reported the student was making progress in identifying letter sounds and vowel team sounds, that he decoded more words as he was reading, and his ability to decode more words helped him understand more of what he was reading (Tr. pp. 265, 269).

With regard to an executive functioning goal included in the October 2019 IEP the teacher indicated the student needed help staying organized and that she provided him with checklists that were helpful to him and a routine that he used on a daily basis (Tr. pp. 273-74; Dist. Ex. 2 at p. 25). The teacher reported that as the student learned new skills, he was introduced to a checklist that he put into his "toolkit" (id.). As he became more familiar with the checklists, he was able to use them more independently (id.).

The district occupational therapist, who was present at the initial December 2019 CSE meeting, reported she was familiar with the student as she began treating him when he first arrived at P.S. 277 in October 2019 and continued until he left the school in January 2020 (Tr. p. 370; see Tr. p. 368; Dist. Ex. 4 at p. 28). In total, she worked with the student for about three months (Tr. p. 372).

Similar to the student's 12:1 special class teacher, the occupational therapist provided detailed information regarding how the student's October 2019 IEP goals were addressed, including how skills were practiced, how progress was monitored and measured, and the type of documentation that took place (Tr. pp. 372- 374; Dist. Ex. 2 at pp. 28-32).

With regard to the first OT goal, related to the student's ability to tie his shoelaces, the occupational therapist reported that the student achieved the goal by mid-November, and he was observed to tie his shoes independently on numerous occasions by the occupational therapist and other school staff (Tr. pp. 374-75).

With regard to the second OT goal, related to the student's ability to use sensory information to effectively interact with his environment and maintain an optimal level of arousal, the occupational therapist testified that she tried to get to know the student and to know what sensory needs he had, to maintain an optimal level of arousal (Tr. pp. 375-76). She and

the student worked to determine what sensory modifications the student needed, and she introduced the student to a program called "MeMoves" (Tr. p. 376).¹³ She described MeMoves as a program where the student watched a "little" video that worked on calmness or being able to focus, following which she observed the student to see if it helped him with his level of arousal with regard to presented activities (Tr. p. 376). The occupational therapist reported that she measured the student's progress multiple times per week during therapy sessions, and at the end of the week, and the end of the month she would know how much progress the student had made (Tr. pp. 377-78). According to the occupational therapist, the student made "very good" progress toward this goal beginning in late November/early December and continued to make progress, in that he was able to sustain his attention to any sensory movement needed prior to an activity and he partook in and completed activities (Tr. p. 378).¹⁴

With regard to the third OT goal related to the student's ability to follow two-step directions in the presence of competing auditory and visual stimuli, the occupational therapist testified that she implemented the goal by giving the student two-step directions that he needed to complete while in the busy therapy room where other providers were treating students at the same time and where the student would be required to filter out a lot of auditory distractions (Tr. p. 380). The occupational therapist measured the student's progress over a period of about four weeks, based on the student's performance and if he completed the task of a two-step direction (Tr. pp. 380-81). She reported the student met this goal (Tr. p. 381; Dist. Ex. 2 at p.39).¹⁵

With regard to the fourth OT goal that targeted the student's ability to maintain an upright sitting position without leaning head on hands or desk for one academic period the occupational therapist indicated she worked on improving the student's core strength by working on his ability to sustain a sitting posture, how to correctly sit in a chair, and by

¹³ During cross-examination, the occupational therapist indicated different sensory programs were used to address the student's sensory needs in addition to the MeMoves program (Tr. p. 423). These sensory programs included the "Zones of Regulation" and "S'cool Moves" (Tr. p. 423). The occupational therapist further reported that fidget tools were used in the classroom if the student needed them (Tr. p. 424). A seat cushion was also provided for the student, but he did not like the feel of it and did not use it (*id.*). The occupational therapist conducted all OT services in a therapy room according to the student's mandate (Tr. p. 423). She provided materials to the classroom teacher (Tr. p. 424). The student had no difficulties transitioning from the classroom to OT (*id.*). He was aware of when it was time for the occupational therapist to pick him up and when he saw her, the student stood up and went to her (Tr. pp. 424-25).

¹⁴ The occupational therapist reported that the student did not have a sensory diet in place when he began at P.S. 277 (Tr. p. 414). She opined that prior to starting a sensory diet it was necessary to know a student (Tr. p. 414). She stated that it was necessary to know "what distractions or what sensory weaknesses are shown" in order to know what a student needed (*id.*). The occupational therapist explained that, for example, if a student had a very low arousal level, was tired, or lethargic, they might need a few minutes of jumping jacks, sit-ups, or push-ups (*id.*). She indicated that it was necessary to know what worked and did not work with a student, what the student preferred or was not interested in, and what worked (Tr. pp. 414-16). If the student progressed nicely after doing those kinds of things, that was when a sensory diet could be individualized to target what a student needed. (Tr. pp. 414-15).

¹⁵ The occupational therapist testified that when working with the student she wanted there to be auditory distractions so the student could learn to filter them out (Tr. 412). If she needed the student to focus on completing a different task, she took him to a different area that was more closed off (*id.*).

providing any modifications necessary, for example a seat cushion or modification to chair height (Tr. pp. 381-82; Dist. Ex. 2 at p. 30). To measure the student's progress the occupational therapist looked for the student's ability to do his work without leaning (Tr. p. 383). According to the occupational therapist, the student was functionally able to keep an upright position while doing his work without supports to help him and was able to give himself the full posture he needed to complete tasks (Tr. pp. 383-84).

With regard to the fifth OT goal related to the student's ability to maintain a supine flexion position for 30 seconds with minimal support, the occupational therapist described what a supine flexion position looked like and how she implemented this goal using a timer (Tr. p. 384-86; Dist. Ex. 2 at p. 31). The occupational therapist reported that the goal was tough for the student, as he did not reach 30 seconds, but he did sustain the position for approximately 10 to 15 seconds by the end of December, with progress maintained or continued in January 2020 (Tr. 386-87).

With regard to the sixth OT goal that targeted the student's ability to complete ten jumping jacks through a full range of motion with arms and legs coordinated and moving in synchronicity the occupational therapist indicated through performance, coordination, and use of metronomes to notice the rhythm of the beat when moving, she tried to teach the student to do full jumping jacks by showing him how to coordinate his upper and lower body together in a synchronized way (Tr. pp. 387-88; Dist. Ex. 2 at p. 32). She measured the student's progress by how many times he could perform the full range of jumping jacks, trying to reach ten of them (Tr. p. 388). The occupational therapist reported that she saw the student three times per week and practiced the activity two times per week (Tr. p. 388). She reported that the student was able to complete a full range of ten jumping jacks completely by the end of November/beginning of December 2019 (Tr. pp. 388-89).

Overall, while the hearing record does not include periodic reporting regarding the student's progress towards achieving his annual goals, which the district was required to provide to the parents while the student received programming during the 2019-20 school year (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3][ii]; 8 NYCRR 200.4[d][2][iii][c]), the testimony of the student's special education teacher and the occupational therapist, who both attended the December 2019 CSE meeting, as summarized above, provides sufficient detail to show that the student was making progress towards his annual goals during the 2019-20 school year¹⁶ and a review of the student's progress during

¹⁶ The State Education Department's Office of Special Education has issued guidance indicating that "[t]he method or combination of methods to inform the parents of their child's progress is left to local discretion" and that "reports to the parent do not need to be lengthy or burdensome, but they need to be informative" ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 36, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The guidance indicates that "the report to parents could include a statement of the goals with a written report of where the student is currently functioning in that goal area and/or a rating of progress to indicate whether the student's progress to date will likely result in the student reaching the goal by the end of the year" (*id.*). Although the hearing record does not include written reports as to the student's annual goals, it does include the student's second marking period report card reflecting the student's performance with respect to grade level expectations (see Dist. Ex. 15 at pp. 3-4).

the 2019-20 school year provides a starting point for review of the December 2019 CSE's recommendations.

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

2. December 2019 IEP

A review of the student's updated present levels of performance in the December 2019 IEP further demonstrates that the student made meaningful progress in the time he attended the 12:1 special class with the support of a 1:1 paraprofessional and his recommended related services at P.S. 277 (see Tr. pp. 280, 290-96).¹⁷ The student's progress in the district program between October 2019 and December 2019 was incorporated into the December 2019 IEP based on information provided by the teachers and related service providers who worked collaboratively to develop the IEP (Tr. pp. 195-198). The school psychologist reported that separate progress reports were not needed in December 2019 because they were not requested; e the CSE was not doing a reevaluation where a change of program would be considered or conducting a three-year mandated reevaluation; the purpose of December 2019 meeting was to review the requested adapted physical education evaluation; and it had been only two months since the previous IEP was developed (Tr. p. 195-96).

¹⁷ As discussed above, the December 2019 CSE took place over two meetings, one in December 2019 and one in February 2020, with the IEP being finalized in February 2020 (see Tr. pp. 230, 287; Parent Ex. O; Dist. Ex. 5); however, as it is referred to as the December 2019 IEP throughout the hearing record, that is how it is referenced within this decision as well.

According to the school psychologist, the December 2019 CSE carried over a lot of the information from the student's previous IEP (Tr. p. 167; compare generally Dist. Ex. 2 and Dist. Ex. 4). She noted that the December 2019 CSE looked at the neuropsychological evaluation report that it had, both the August and October 2019 IEPs, and since district staff had known the student for two months, they were able to report on his progress at P.S. 277 up to that point (Tr. p. 167; Dist. Exs. 1; 2; 4 at pp. 1-11, 13). The school psychologist indicated that the student's progress factored into the development of the December 2019 IEP in that the teachers and related service providers were modifying his goals as needed and his management needs were "tweaked" based on what was already implemented in the classroom and what did and did not work (Tr. p. 168; see generally Dist. Ex. 4). She reported that the December 2019 IEP was "really getting fine-tuned" in terms of the student's needs based on his performance at P.S. 277 (Tr. pp. 168-69). According to the school psychologist, the student's present levels of academic performance were different in the December 2019 IEP than they were in the October 2019 IEP because the December 2019 IEP was updated to reflect the student's progress in reading, math, and writing, as well as his social/emotional functioning (Tr. pp. 169-70). Similarly, the student's present levels of physical performance were updated as well (Tr. p. 171). She reported that the student did not show regression in any of these areas (Tr. pp. 170-71).

With regard to a reduction in the student's management needs included in the December 2019 IEP, the school psychologist reported that at the October 2019 CSE meeting the CSE transferred the management needs over from the August 2019 IEP in an effort to start working with the student to see what was or was not effective for him (Tr. p. 172). The student's special education classroom teacher "tweaked" and individualized the list of the student's management needs, narrowing it to those resources that helped the student experience success (id.). The school psychologist noted the student's progress was strongly considered in creating the student's management needs on the December 2019 IEP (Tr. pp.172-73).¹⁸

The school psychologist indicated that the new goals created for the December 2019 IEP were "tailored" to the student, based on how he had been functioning up to that point and that they were designed to enable the student to make even more progress (Tr. p. 184).¹⁹ With regard to the counseling goals, the school psychologist reported that for the December 2019 IEP, the guidance counselor changed the student's goals from the previous IEP based on the student's progress toward the previous goals and what the guidance counselor felt the student needed to work on moving forward (Tr. p. 176). She opined that the goals in the December 2019 IEP were appropriate for the student to make progress (id.).

The student's 12:1 special class teacher indicated that throughout her time as the student's teacher, the student consistently made measurable progress, the October 2019 IEP enabled the student to make progress, and that the December 2019 IEP was created to enable

¹⁸ Testimony by the 12:1 special class teacher was consistent with the school psychologist's testimony (Tr. pp. 280-82).

¹⁹ The 12:1 special class teacher reported that she created the academic goals in the December 2019 IEP based on the notes she had about the student, his work samples, her observations of how he had been performing in the classroom, and the progress he had been making (Tr. pp. 283-85).

the student to make measurable academic progress (Tr. p. 308). According to the 12:1 special class teacher, when the student started at P.S. 277 in October 2019 there were seven students in his class (Tr. p. 312). By the time of the December 2019 CSE meeting the student had shown progress in reading, writing, and math (Tr. pp. 280, 290; see Dist. Ex. 15).²⁰ However, the 12:1 special class teacher did testify that the student was still below grade level (Tr. p. 280). The teacher confirmed that the student had difficulty with focusing and attending and reported that she addressed these weaknesses by providing the student with frequent check-ins: he sat directly in front of her in the classroom which allowed her to check with him "constantly" (Tr. p. 321). The 12:1 special class teacher noted that the student had a paraprofessional to help him remain focused, for example by showing the student where he was in a book, or drawing the student's attention back to the assignment being completed (id.). The teacher noted she was able to refocus the student using strategies and techniques in the classroom and that the student consistently responded to them (Tr. pp. 331-32).

Turning to the December 2019 IEP, the present levels of performance indicated that the student was able to unpack and pack his belongings independently (id.). He needed reminders as to which materials needed to be brought home, but he was able to gather his books without assistance (id.). The IEP indicated that the student enjoyed participating in class discussions and answering questions (id.). At times he had trouble focusing and required directions and questions to be repeated (id.). In addition, he benefited from having directions broken down into smaller, more manageable components (id.). The IEP noted that the student had become more flexible regarding his schedule and if a last-minute change needed to be made, he was able to adjust accordingly (id.). He was also able to transition from one subject to the next and could put his materials away from the previous lesson and gather the materials he needed for the upcoming lesson independently (id.).

With regard to reading, the December 2019 IEP indicated that the student was reading on a "Level J," which the 12:1 special class teacher indicated was equivalent to a second-grade level (Tr. p. 313; Dist. Ex. 4 at p. 7).

The December 2019 IEP indicated the student was able to answer literal questions about a text he had read on his level (Dist. Ex. 4 at p. 7). He could retell a text using a graphic organizer and was able to identify key details in the text and use the details to find the main idea (id.). In addition, the student read with expression and changed the inflection of his voice when reading a question and read louder when a character was expressing strong emotions (id.). The IEP indicated that the student was beginning to self-correct independently when he misread a word and would go back to the text, reread the portion where he made the error, and correct it (id.). However, he still required prompting to correct an error he might not have recognized (id.). According to the December 2019 IEP, the student's fluency had also improved, and he was able to read short phrases and simple sentences fluently (id.). The IEP noted that the student had difficulty thinking critically about a text, especially when asked to make inferences and draw conclusions about a text he had read (id.). When given the chance to discuss the text bit by bit, guidance, and the opportunity to build background knowledge, the student was better prepared to think critically about it (id.). The IEP stated that the student

²⁰ When asked if the student had shown regression regarding his academic strengths between the October 2019 and December 2019 CSE meetings, the special education teacher responded "no" (Tr. p. 280).

needed wait time to process information being presented to him (id.). When being asked a question, it was helpful for the student to be told in advance and given the opportunity to formulate his answer before being called on to share it (id.). The IEP noted that when reading a longer text or listening to a text read aloud, the student had trouble remaining focused on it and having him follow along in the text with his finger helped him to remain focused for longer periods of time, as did frequent check-ins to make sure he was in the correct place (id.).

The December 2019 IEP included a detailed description of the student's decoding abilities, notably that he was able to consistently read c-v-c words with all of the short vowel sounds; decode words using some digraphs and the trigraph tch; read one syllable words with bonus letters, as well as one syllable words with some "glued" sounds; follow the "bossy e" rule for some words; and correctly read some suffixes (id.).²¹ The IEP indicated that the student was making progress decoding words containing vowel teams but still became confused when the vowel team made more than one sound (id.). When reading words in isolation, the student had trouble recalling the /g/ sound (id.).

The December 2019 IEP indicated the student had many creative and interesting story ideas (Dist. Ex. 4 at p. 7). He had trouble when it came time to write down his ideas and needed reminders to begin sentences with a capital and end sentences with a period (id.). The student also needed the margins of his book to be highlighted to remind him where he should begin writing (id. at pp. 7-8). In addition, the student needed reminders to stay on the line when writing and not drop below it or float above it (id. at p. 8). The student required prompting to use his finger spacer tool and take out his toolkit to follow his checklists and help with his spelling (id.). According to the December 2019 IEP, the student used a checklist to remind him to begin sentences with a capital letter and end them with punctuation and also used a checklist to remind him what materials he needed to take out when he began writing (id.). The student was a phonetic speller but did not hesitate to complete his writing task because he had trouble spelling a word (id.). The student's writing could be difficult to read and understand, even when he used his finger spacer his words still tended to be close together, making it difficult to read (id.). When copying from the board, the student had trouble writing on the lines and often wrote underneath them (id.). The IEP noted that the student often did not write more than a sentence or two about a small moment; however, when writing a story the student was motivated to include more details and was more focused on the task (id.). With teacher prompting, the student could tap out closed syllable words (id.). He preferred to work independently, in close proximity to the teacher, and when so situated he often wrote significantly more than when a teacher assisted him (id.).

In terms of math, the December 2019 IEP indicated that the student had memorized many of his times tables using the songs he learned but still had trouble with portions of his 2, 7, and 9 times tables (Dist. Ex. 4 at p. 8). When the student was unsure of his answer, he knew to take out his toolkit and used it to help himself (id.). The IEP indicated that the student used his times tables to help himself both multiply and divide but needed these concepts to be continually discussed and reviewed so that he could retain them (id.). When solving a word problem, the student became confused when presented with the information all at once (id.). When given a frame of reference and organizing his paper accordingly, he was more prepared

²¹ The specific sounds/words the student was able to read were included in the IEP (Dist. Ex. 4 at p. 7).

to tackle the problem (id.). The IEP stated that word problems were read one line at a time and each part was discussed (id.). The student was usually able to determine whether or not his answer should be "going up" or "going down," which helped him eliminate two mathematical operations and once he had identified whether the answer was increasing or decreasing, he used his toolkit to help identify key words in the sentence to narrow down his choices even further (id.). The student was able to make a plan and execute it before moving onto the next step although the student still required much support when solving a word problem, especially those requiring multiple steps (id.).

According to the December 2019 IEP, the student was able to add and subtract two-digit numbers easily, although he sometimes needed assistance in writing the problem correctly if it was not already written for him (Dist. Ex. 4 at p. 8). When presented with three-digit numbers to add or subtract, the student was able to talk through the process of solving it with the teacher or his paraprofessional; however, he was not yet consistently solving three-digit addition and subtraction problems independently (id.). The 12:1 special class teacher indicated that, when the student came to P.S. 277, he functioned at about a first-grade level in math, but, by the time of the December 2019 CSE meeting, he had moved to about a second-grade level (Tr. pp. 314, 340-41). For math, the teacher used a curriculum called "enVision," with instruction provided in a group or as a whole class (Tr. pp. 312, 323-24). She indicated that all of the students in the student's math group were at about the same level, second grade (Tr. p. 324).

With regard to speech and language, the December 2019 IEP indicated the student was an inquisitive boy who had transitioned well into his speech program consisting of 1:1 and 1:3 small group speech-language therapy (Dist. Ex. 4 at p. 8). The IEP indicated that the student's therapy had focused on increasing his pragmatic language skills, processing skills, and expanding his ability to understand and use higher-level language, for example making inferences and understanding figurative language (id.). The IEP noted that the student could answer main idea and text-based questions (id.). He could be literal in his comprehension of a text and responded to verbal prompts and visual cues to develop deeper meaning of a text (id.). The student engaged in group discussions and waited his turn to speak and responded to verbal prompts to look at others more consistently while speaking (id.). The IEP indicated that the student's ability to build on a peer's statements or opinions would be targeted in future sessions in order to increase his conversational skills in group discussions (id.). According to the IEP, the student continued to use a high pitch, high volume, and an unexpected whining tone when he was frustrated and improving his ability to use language to express himself when frustrated would be addressed as well (id.).

The student's present levels of social development in the December 2019 IEP were consistent with the description of his social development in the October 2019 IEP (compare Dist. Ex. 2 at pp. 10-11 and Dist. Ex. 4 at p. 10). The December 2019 IEP indicated that the student benefited from positive reinforcement and praise recognizing him for a job well done (Dist. Ex. 4 at p. 10). The 12:1 special class teacher indicated that at the beginning of the student's time in her class he tended to get frustrated; however, as he got to know his classmates his frustration was "much less so" (Tr. p. 324). She reported that she used The Zones of Regulation as a "whole class behavior model" and the student responded well to it and talked about his feelings (Tr. pp. 324-25).

The December 2019 CSE recommended that the student continue to attend a 12:1 special class for his core academic subjects, that he be provided with the support of a full-time 1:1 paraprofessional, and that he receive related services of one 30-minute session of group counseling per week, two 30-minute sessions of individual OT per week, one 30-minute session of group OT per week, 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. 4 at pp. 20-21). The IEP also called for four 60-minute sessions of group parent counseling and training per year (Dist. Ex. 4 at p. 20). The December 2019 IEP included approximately 15 annual goals (Dist. Ex. 4 at pp. 15—19). Many of the goals were similar to those found in the student's October 2019 IEP, with slight modifications (compare Dist. Ex. 2 at pp. 19-33; with Dist. Ex. 4 at pp. 15-19). The December 2019 IEP included fewer OT goals than the October 2019 IEP but also included new goals related to critical thinking, handwriting, and self-regulation (compare Dist. Ex. 2 at pp. 2-15, with Dist. Ex. 4 at pp. 15-19). The extensive narrative describing strategies to address the student's management needs was eliminated from the December 2019 IEP; however, the IEP included a list of resources that the student required to address his management needs (compare Dist. Ex. 2 at pp. 13-18, with Dist. Ex. 4 at pp. 13).

According to the December 2019 IEP, during the meeting, the student's mother asked that the student be moved to a classroom with the support of ICT services (Dist. Ex. 4 at p. 10).²² The IEP indicated that the parent did not provide any explanation or point to any data to support her demand for the change in program (id.).²³ According to the IEP, the team "opened the discussion to consider ICT services and provided the justification that, given the evidence available at that time, including academic evaluation results of June 2019 as well as [the student's] current academic functioning, a change in program [wa]s not appropriate at th[at] time" (id.). The IEP noted that while the student was beginning to make progress in his recommended small class, which he had attended for approximately two months, he remained well below grade level at that time (id.).

According to the district school psychologist, there had not been enough time for the student to grow as much as he would need to grow to begin a transition to a program with the support of ICT services (Tr. p. 177). Although he was growing and moving forward and progressing to that point, the team did not feel the student was ready for ICT services (Tr. 178). The school psychologist indicated that at that time, the student had been showing progress across the board in the 12:1 special class and, a change in the student's placement recommendation from a 12:1 special class to ICT services would "absolutely hinder his

²² ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

²³ The school psychologist testified that a change in the student's recommended program would have required additional testing such as a classroom observation and updated academic achievement testing, but the parent refused to provide consent or engage in conversation with the school psychologist (Tr. pp. 169, 177, 215, 234-35). However, the hearing record includes a consent for evaluations signed by the parent on November 13, 2019 (Dist. Ex. 10).

progress" (Tr. pp. 178-79). Similarly, the student's 12:1 special class teacher opined that a change from a 12:1 special class to ICT services would have "halted" the student's progress (Tr. p. 286). She reported the December 2019 IEP would have been appropriate for the student because it was written based on the data that was gathered during the time he was at P.S. 277 (Tr. pp. 287-88).

With regard to the student's physical development, the December 2019 IEP indicated the student had an OT mandate for three times a week individually in a separate location, which services began on October 10, 2019 at P.S. 277 (Dist. Ex. 4 at p. 11). According to the December 2019 IEP, the student was able to independently tie his shoelaces as demonstrated on several occasions (id.). With regard to the student's postural control, strength, and endurance, the IEP indicated that he was able to maintain a supine flexion position for 30 seconds while on the rug and performed over ten jumping jacks through a full range of motion with his arms and legs coordinated and moving in synchronicity with no verbal prompts (id.). The student sat with various upright positions in his seat, meaning sometimes his legs were hanging down, sometimes his legs were in a pretzel, sometimes one leg was up and one leg was hanging down; however, his back was always appropriately touching the back of the chair (id.). The IEP stated that despite using the varied sitting positions, the student was able to attend to instructional activities and the change in positions did not affect the student's academic performance (id.).

The December 2019 IEP indicated that the student had been introduced to varied sensory tools including different seating options that were accessible for him in the room such as a bumpy seat cushion or therapy ball, but, when asked if he found it useful, the student rejected the idea and wanted to stay sitting on his chair (Dist. Ex. 4 at p. 11). The student had been trying the use of a chair band on the legs of his chair during treatment sessions and liked the fact that he could move his legs while sitting to do his work (id.). The IEP noted that the student was able to listen to a verbal two-step direction and complete the direction while other visual and auditory stimuli were present; however, he required some directions to be repeated (id.). The IEP stated that, generally, the teacher reported that the student was able to stay alert and screen out distractions around the room, but there were times when his focus and attention to directions could be varied (id.).

The IEP indicated that the student's ability to maintain an optimal level of arousal during academics for participation during both floor and tabletop activities with or without environmental modifications or after implementing sensorimotor strategies with minimal support had been addressed during OT sessions (Dist. Ex. 4 at p. 11). The student often found or requested deep breathing visual posters, as well as a calming visual sequence poster, to be beneficial in helping him regulate his arousal level (id.). According to the IEP, the student preferred more sedentary activities such as S'cool Moves/deep breathing activity posters compared to more physical gross motor exercises such as "[m]ove to improve" or "activity works" (id.).

The December 2019 IEP further stated that no evidence of transitioning issues had been noted (Dist. Ex. 4 at p. 11).

According to the IEP, the student used a functional right quadruped pencil grip with open web space when writing and he started letters such as h, n from the right to left (Dist. Ex.

4 at p. 12). In OT, the student had been using the TV Teacher handwriting program to learn how to form letters from top to bottom and with the use of a chant to form the letter (id. at p. 12). The student had been learning the difference between different letter placements, where some letters were tall, some were small, and some went below the line (id.). The IEP stated that the student's handwriting could be fairly large and his word spacing was inconsistent (id.). The results of standardized testing showed a clear weakness in the student's ability to control his pencil when writing, which affected his legibility (id.).

The student's teacher agreed that the student continued to benefit from improving his writing legibility, "far copying with proper accuracy throughout the school day" (Dist. Ex. 4 at p. 12). The student's rate of handwriting fell below grade level (id.). According to the IEP, the student's behavior and response to OT could be very inconsistent and there were sessions where he was more willing to learn and others where he was uncooperative (id.). When the student was given a challenging task or a non-preferred activity he flapped his arms, whined that he did not want to do it, and refused to complete the task (id.). The student could also be very literal (id.).

The December 2019 IEP noted that an adapted physical education evaluation was completed but that adapted physical education was not recommended and the student was recommended for participation in a regular physical education program (Dist. Ex. 4 at p. 12).

The district occupational therapist indicated that she drafted the physical development section of the December 2019 IEP (Tr. p. 391-92). She testified that the section included information regarding the progress the student made on his IEP goals, OT treatments, the program that was used, her overall assessments, observations made, and discussion of "any weakness areas for his new goals" (Tr. pp. 391-92). The occupational therapist characterized the description of the student's physical abilities on the December IEP as "very accurate" (Tr. p. 392).

The occupational therapist described the process she used to create the student's goals and indicated that she considered the student's progress "a lot" when creating the goals (Tr. p. 393). The occupational therapist indicated that the goals in the December 2019 IEP changed from the October 2019 IEP as they were more school-based, and they focused on the student's need pertaining to school-related tasks such as academics (Tr. pp. 394-96).

The occupational therapist testified that despite multiple school absences where the student missed his mandated OT sessions "quite a few times," he still "made very good progress overall" and "did very well actually" (Tr. pp. 401-02; see Dist. Ex. 14).

The occupational therapist indicated that throughout her time with the student he consistently made progress in OT and with the Zones of Regulation program (Tr. p. 406).

Based on a review of the evaluative information in the hearing record, the content of the student's IEPs, and the testimony and documentation regarding the student's progress in a 12:1 special class with the support of a 1:1 paraprofessional under the October 2019 IEP, I find that the December 2019 CSE's decision to continue recommending placement in a 12:1 special class with the support of a 1:1 paraprofessional and related services was reasonable. Accordingly, the recommendations contained in the December 2019 IEP were reasonably

calculated to enable the student to receive educational benefits and offered the student a FAPE for the 2019-20 school year.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determination that the district failed to offer the student a FAPE for the 2019-20 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the Aaron School was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

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 November 9, 2021, is modified by reversing those portions that determined the district did not offer the student a FAPE for the 2019-20 school year and awarded the parents tuition reimbursement for the cost of the student's attendance at the Aaron School for the 2019-20 school year.

Dated: **Albany, New York**
 February 14, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER