



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-064

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

Appearances:

Law Offices of George Zelma, attorneys for petitioners, George Zelma, Esq., of counsel

Jaspan Schlesinger, LLP, attorneys for respondent, Carol A. Melnick, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of their son's tuition at the Gersh Academy (Gersh) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

Although the parties' current dispute in this case does not include challenges to either the student's 2010-11 IEP or its implementation by staff at a Board of Cooperative Educational Services' (BOCES) location, a review of the 2010-11 school year will be included to provide a context for the issues related to this appeal (see Parent Ex. A at pp. 1-5).

For the 2010-11 school year, the student transitioned from receiving special education and related services recommended by the Committee on Preschool Special Education (CPSE) to receiving special education and related services recommended by the CSE (see Dist. Exs. 4-5; 11-12; 14-15). Prior to developing the student's IEP for the 2010-11 school year, the district obtained a social history from the parents and evaluations of the student, including a "Feeding

for Function Evaluation," a speech-language evaluation, and a psychological evaluation (Dist. Exs. 1; 6-7; 10; see Dist. Exs. 12; 15). The CSE found the student eligible to receive special education and related services as a student with autism, and based upon the information presented, the CSE determined that the student required "an intensive level of support in a small class setting" (Dist. Exs. 12 at p. 1; 15 at pp. 1-2).¹ To address the student's needs, the CSE recommended placing the student in a 6:1+2 special class with the following in-school related services: two 30-minute sessions per week of individual occupational therapy (OT) outside the classroom; one 30-minute session per week of individual OT in the classroom; the services of a 1:1, full-time aide in the classroom; one 30-minute session per week of individual physical therapy (PT) outside the classroom; three 30-minute sessions per week of individual speech-language therapy outside the classroom; and two 30-minute sessions per week of individual speech-language therapy in the classroom (Dist. Ex. 15 at p. 2).

The CSE also recommended the following home-based related services for the student: five 60-minute sessions per week of individual behavior intervention services; two 60-minute sessions per week of individual feeding therapy;² and one 60-minute session per week of individual parent training (Dist. Ex. 15 at p. 2).

Finally, the CSE developed 18 annual goals and 35 corresponding short-term objectives to address the student's identified needs in the areas of reading, mathematics, speech-language skills, social/emotional/behavioral skills, motor skills, and basic cognitive/daily living skills (Dist. Ex. 15 at pp. 5-11).³ At that time, the CSE recommended placing the student at BOCES to implement the 2010-11 IEP; the parents agreed, and the student began attending BOCES in September 2010 (id. at pp. 1-2; Dist. Ex. 13).

Within the first month of the 2010-11 school year at BOCES, the student began engaging in behaviors that interfered with his ability to eat lunch, which at times resulted in the student not eating any lunch at all (see Tr. pp. 36-38, 91, 98-99, 930-32, 1728-31; Parent Ex. II at pp. 2-10, 13, 21, 24-27, 29).⁴ Due to concerns about the student's "feeding" difficulties, the parents

¹ The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]; Parent Ex. A at pp. 1-6).

² According to the 2010-11 IEP, the student demonstrated difficulty with feeding, and the home-based feeding therapy would begin "based upon provider availability" (Dist. Ex. 15 at p. 1).

³ Within the annual goals drafted to address the student's basic cognitive/daily living skills, the CSE included a goal specifically targeting his ability to scoop food with a spoon when eating (Dist. Ex. 15 at pp. 10-11).

⁴ Upon speaking with the parents, the student's classroom teacher learned that they wanted the student to "eat all of the food" they sent for lunch (Tr. pp. 98-99; see Tr. p. 1204; but see Tr. pp. 1082-83, 1085, 1087). As the 2010-11 school year progressed, the amount of food the student consumed at lunch, whether BOCES worked on the student's chewing skills, and whether the student made progress, became sources of increasing tension between the parents and BOCES' staff, which ultimately resulted in a deterioration of the levels of communication and trust between the staff and the parents (see Tr. pp. 98, 776-82, 790-94; Dist. Exs. 39 at pp. 1-5; 41; 46-47; 82 at pp. 1-18; Parent Exs. II at pp. 1-92; HH; LL-NN at pp. 1-219; OO). By October 4, 2010, the district—upon a request by the parents received on the same day—began seeking an alternative placement for the student because the parents did not think BOCES was an appropriate placement (Dist. Ex. 24 at pp. 1-9; see Tr. pp. 386-88; see generally Dist. Exs. 24 at pp. 10-14; 26 at pp. 1-3).

requested a CSE meeting and "another feeding evaluation" in a letter to the district dated October 13, 2010 (Dist. Ex. 22).

In the meantime, the BOCES' feeding team attempted to increase the amount of food the student consumed at lunch; when those attempts failed, the Board Certified Behavior Analyst (BCBA)⁵ at BOCES drafted a feeding intervention plan, dated October 14, 2010, to more formally address the student's behaviors (Tr. pp. 1717-19, 1728-32; Parent Ex. P at pp. 1-2; see Tr. pp. 724-27).⁶ On October 22, 2010, the district received a letter from the parents, which indicated that because the parents believed that BOCES was not an appropriate placement for the student, they would be taking the student out of school "everyday" at noon and would arrange for an agency to provide home-based services (Dist. Ex. 27 at pp. 1-2). By October 28, 2010, the parents reconsidered, and agreed to allow the student to remain at BOCES through the end of the school day with the understanding that BOCES would incorporate a third feeding session during the day (Dist. Ex. 28).⁷

On October 29, 2010, the CSE reconvened, and the parents expressed their "dissatisfaction" with the feeding plan and with BOCES because they were not allowed to go into the school to feed the student (Dist. Ex. 29 at p. 3). It was noted in the IEP that while the BOCES' staff acknowledged that the student demonstrated "difficulty chewing his food," they believed that the "feeding problems being evidenced at present [were] largely behavioral" (id. at pp. 3-4). In addition, the IEP indicated that the feeding intervention plan was "designed to

⁵ The BCBA was a certified special education teacher who also functioned as the out-of-classroom support teacher (support teacher) assigned to the student's classroom at BOCES for the 2010-11 school year (Tr. pp. 1717-21). Each support teacher at BOCES was assigned to specific classrooms, and the support teachers conducted bimonthly team meetings with the individual classroom teachers and the accompanying support staff for each classroom on their case loads (Tr. p. 1720). The support teachers observed the classrooms and students assigned to their case loads, and consulted with the classroom teachers about "learning issues" and "behavior issues" that the students within their assigned case loads may be experiencing (id.).

⁶ The feeding intervention plan, dated October 14, 2010, targeted the following behaviors: food acceptance (defined as "an entire spoon of food [was] in the mouth within 5 seconds of presentation"), swallowing ("demonstrated by up and down movement of the anterior portion of the neck"), inappropriate behaviors ("head turns, body leaning, batting the spoon"), and negative vocalizations ("crying, whining, screaming") (Parent Ex. P at p. 1). The feeding intervention plan described the setting in which the feeding sessions would occur, the frequency and duration of the feeding sessions, the feeding procedure to be followed to implement the plan, the reactive procedures related to inappropriate behavior and negative vocalizations, and the reinforcement used in the feeding sessions (id. at pp. 1-2). Upon its implementation in October 2010, the student was required to take one bite in order to "end the feeding session" (see id.; Tr. pp. 1734-37). The overall goal of the feeding intervention plan was to get the student to eat (Tr. p. 1734). By November 2010, the data demonstrated that the student had increased his food consumption during feeding sessions to three bites per session and that the number of feeding sessions had increased to two sessions per day (Tr. pp. 1737-38; Dist. Ex. 25 at p. 1).

⁷ The parents opined that the student exhibited tantruming and other negative behaviors at home after school because he was "hungry;" therefore, the student's mother began picking the student up from BOCES to feed him the lunch she sent to school, and this practice continued throughout the 2010-11 school year (Tr. pp. 283-85, 304-09, 716-20, 766-71, 1073-75, 1198-1205, 1786-91; see Dist. Ex. 71 at pp. 1-2). The hearing record includes no medically related testimony or documentary evidence that indicated the student suffered from malnutrition, weight loss, or any other health problem related to the parents' feeding concerns, the oral-motor instruction provided by BOCES, or the amount of food the student consumed at BOCES during the 2010-11 school year (see Tr. pp. 1-1987; Dist. Exs. 1-82; Parent Exs. A-Z; AA-OO).

reinforce [the student] for taking bites of food" (id. at p. 4). At that time, the district had not been able to locate an experienced feeding therapist to implement the student's recommended home-based feeding therapy (see id.). The CSE indicated in the IEP that although it continued to find BOCES was an appropriate placement for the student, the district would continue to seek an alternative placement for the student (id.).^{8,9}

On December 16, 2010, the CSE reconvened for a program review (Dist. Ex. 38 at pp. 1-2). The parents expressed their frustration with the student's progress in the "feeding program" (id. at p. 2). The CSE noted in the IEP that although the student had increased the "rate of food consumption" since starting the feeding intervention plan, the parents remained concerned that the student was "not getting enough to eat to sustain him during the full school day," which the parents believed caused him to be "irritable and out of sorts" when he arrived home (id.).

At this CSE meeting, the BOCES staff reported on the student's progress on "many of his goals" (Dist. Ex. 38 at p. 2; see also Dist. Exs. 25 [documenting data on the feeding intervention plan]; 30 at p. 3 [reporting on student's progress on IEP annual goals implemented in his home-based program]; 32 at pp. 1-2 [reporting on home-based parent training sessions]; 35 at p. 1 [reporting on the student's progress in his feeding intervention plan]; see generally Dist. Ex. 31 at pp. 1-13 [reporting on the student's progress on annual goals and related services at BOCES through March 2011]).

At the CSE meeting, the student's classroom teacher reported that the student worked on "establishing and maintaining eye contact and attention," he used the picture exchange communication system (PECS) to "request preferred items," his toilet training was progressing, he made progress on "independent task completion," and he could "retrieve and use classroom materials independently and appropriately" (Dist. Ex. 38 at p. 3). She also reported progress on the student's matching goal and learning to walk "independently in the hallways" (id.). The student's speech-language therapist reported on the student's progress, noting his ability to use PECS to "scan two items and request one item" (id.). She further indicated that the student had increased the "occurrence of meaningful verbalizations" and that in terms of feeding, he progressed "up to taking three bites consistently" before refusing (id.). The IEP noted that the parents requested the provision of one additional feeding session each day and for the same 1:1 aide to remain with the student throughout the day (id.). In addition, the parents indicated that

⁸ In a letter dated November 2, 2010, the district was notified that the student had been accepted for an immediate placement at the same location where the student had received two years of special education and related services through the CPSE (compare Dist. Ex. 26 at p. 3, with Dist. Exs. 7 at p. 1; 8 at p. 1; 10 at pp. 1, 3; 11 at p. 1; 12 at p. 1). However, the parents declined the district's offer of placement due to concerns about the school's distance from the student's home (Dist. Ex. 38 at p. 2). The district's efforts to locate an alternative placement for the student continued into February 2011 (see Dist. Ex. 56 at pp. 1-2).

⁹ By letter dated December 2, 2010, the parents notified the district of their intention to remove the student from public school and unilaterally place him, at public expense, at a specifically identified nonpublic school (Dist. Ex. 36). In their letter, the parents indicated that due to the student's learning, sensory and behavioral "disabilities," he required an "appropriate placement and proper feeding therapy," which BOCES could not provide (id.). However, by letter dated December 9, 2010, the parents notified the district that the previously identified nonpublic school did not have an available placement for the student for the remainder of the 2010-11 school year (Dist. Ex. 37).

the student's recommended "home feeding therapy" had not yet begun (id.).¹⁰ At that time, the district agreed to engage the assistance of a behavioral consultant to "help facilitate home/school communication and help foster an improved working relationship between all parties" (id.; see Tr. pp. 776-78).¹¹

By December 21, 2010, the BCBA reported to the parents that the student's "bite criteria for each [feeding] session" of the feeding intervention plan had increased to "4 bites" (see Dist. Ex. 40 at p. 1). The BCBA also reported that while BOCES continued to physically assist the student with hand-over-hand prompting and loading the spoon with food, the student had increased his ability to bring the spoon to his mouth and put the food-loaded spoon into his mouth "independently" by the fourth bite of the feeding session (id.).¹²

By letter dated January 5, 2011, the BCBA updated the parents with respect to the student's progress with the feeding intervention plan, and suggested that the student would "benefit from a program that . . . include[d] exposure to various and increasing types and textures of food which facilitate the chewing response" (Dist. Ex. 46 at p. 1).¹³ The BCBA indicated that a "therapeutic snack program for [the student] would involve introducing a continuum of food that would require increasing levels of chewing skill" and that with the parents' consent the program could be implemented by January 17, 2011 (id. at pp. 1-2; see Dist. Ex. 48 at pp. 1-4 [describing the "Program to Expand Food Choices and Develop Rotary Chew Pattern" and explaining the implementation of the "Therapeutic Snack Group Procedure"]).¹⁴

On January 26, 2011, a feeding therapist received information about the student, and on February 3, 2011, she initiated the home-based feeding therapy and worked on the student's oral motor skills (see Tr. pp. 790-91; Dist. Exs. 59; 63; 65 at pp. 1-2 [indicating that the feeding

¹⁰ As a result of the district's inability to locate a feeding therapist to implement the home-based feeding therapy recommended in the 2010-11 IEP, the parents filed a State complaint (see Tr. pp. 774-76, 790-91).

¹¹ A review of the IEP from the December 16, 2010 CSE meeting reveals that the CSE added the following annual goal: the student "will use accurate bite and chewing patterns on various food textures to lateralize (move side to side), clean oral cavity and grind food for the purposes of digestion" (compare Dist. Ex. 15 at pp. 7-8, with Dist. Ex. 38 at pp. 8-10).

¹² By letter dated December 22, 2010, the parents wrote to the district, and reported on a conversation with the BOCES' principal (see Dist. Ex. 41). In the letter, the parents noted that BOCES was "not working on [the student's] chewing," that the student did not "have a feeding problem," that the student was regressing, and that BOCES was "working on stuff that [the student] already knows" (id.).

¹³ As of January 13, 2011, a BOCES "Work Time Report" indicated that the student received three feeding sessions per day and had increased his "bite criteria" to five bites per session (compare Dist. Ex. 52 at pp. 1-4, with Dist. 40 at p. 1).

¹⁴ In a note to BOCES dated February 7, 2011, the parents declined to allow BOCES to implement the "Program to Expand Food Choices and Develop Rotary Chew Pattern" (Parent Ex. NN at pp. 124-25). The parents explained that the "program" was "not appropriate" for the student's needs, and further indicated that "we should be working on his chewing patterns not his expansion of his food choices" (id. at p. 125). The parents asked whether BOCES was working on the student's "fine oral motor skills" and "chewing patterns" (id.). Nevertheless, BOCES continued to implement the student's feeding intervention plan through the conclusion of the 2010-11 school year (see id. at pp. 126-219).

therapist worked on the annual goal added to the student's December 16, 2010 IEP]; 68 at pp. 1-11; 70).¹⁵ The feeding therapist continued to work with the student through summer 2011 (see Dist. Exs. 73; 74 at pp. 1-6; 75 at pp. 1-2; 76 at pp. 1-8).

By letter dated May 4, 2011, the parents advised the district of their intention to remove the student from the district's public school and to unilaterally place him at Gersh for the 2011-12 school year at public expense (see Dist. Ex. 62). The parents indicated in their letter that due to the student's learning, sensory, and behavioral "disabilities," he required an "appropriate placement and proper feeding therapy," which BOCES could not provide (id.).¹⁶

On May 11, 2011, BOCES began "Phase 3" of the student's feeding intervention plan initiated on October 14, 2010 (see Dist. Ex. 64 at pp. 1-2; Parent Ex. NN at p. 186; compare Dist. Ex. 64 at pp. 1-2, with Dist. Ex. 23 at pp. 1-2). The third phase of the feeding intervention plan targeted the student's ability to participate in "one lunch mealtime per day," and the plan described the targeted behaviors (initiation of scoop, the scoop, placing the spoon with food into his mouth, and the duration of the meal), the setting, the frequency and duration, the feeding procedure, reactive procedures, reinforcement and subsequent procedures, and data collection (see Dist. Ex. 64 at pp. 1-2; Parent Ex. NN at p. 186; see also Dist. Ex. 82 at pp. 1-18 [documenting feeding intervention plan data]).¹⁷

On May 26, 2011, the CSE convened to conduct the student's annual review and to develop the student's IEP for the 2011-12 school year (Dist. Ex. 69 at pp. 1-3).¹⁸ At the CSE meeting, the parents expressed their frustration with the "progress" the student was making in his feeding program at BOCES (id. at p. 3). In addition, the IEP indicated that the parents also expressed their concerns about the student's "lack of chewing skills" and that he was "not getting enough to eat to sustain him during the full school day" (id.).

Based upon the information presented at the May 2011 CSE meeting, the CSE recommended continuing the student's placement in a 6:1+2 special class for a 12-month school year program at the same BOCES location the student attended during the 2010-11 school year

¹⁵ In a May 4, 2011 program observation report by the student's home-based feeding therapist, she noted her concerns that the "portions of food [were] too large" for the student to finish, similar to the concerns expressed by the BOCES' staff (Dist. Ex. 63).

¹⁶ The student's mother admitted in testimony that once Gersh accepted the student for the 2011-12 school year, she was "no longer interested in finding still another possible placement for [the student]" (see Tr. pp. 1123-24).

¹⁷ BOCES' staff recorded the instructor's name, the food type, the time feeding started, the total weight of the lunch food sent to school, the ounces of food consumed, the cups of food consumed, and how long it took the student to complete the meal (see Dist. Ex. 82 at p. 1; see also Tr. pp. 1778-95 [explaining the process used to record data in District Exhibit 82]). According to the data sheets, the student consistently consumed "10" ounces of food, which was alternatively documented as constituting at least one cup of food as measured by a "open measuring cup" (Dist. Ex. 82 at pp. 1-18; see Tr. pp. 1778-82; but see Tr. pp. 1331-32, 1345-46, 1964-73; Parent Exs. HH-d; LL; OO [demonstrating the weight and measuring cup volume of 15 spoonfuls of pasta, as well as the total weight of pasta sent to school in Parent Exhibit HH-d]).

¹⁸ In addition to the required CSE participants, both the parents and the district had attorneys present at the CSE meeting (Dist. Ex. 69 at pp. 2, 17-22).

with the following in-school related services: two 30-minute sessions per week of individual OT outside the classroom; the services of a 1:1, full-time aide in the classroom; four 30-minute sessions per week of individual speech-language therapy outside the classroom; and one 30-minute session per week of individual speech-language therapy in the classroom (Dist. Ex. 69 at pp. 2-3, 13).¹⁹ The May 2011 CSE also recommended the following home-based services for the student: five 60-minute sessions per week of individual behavior intervention services; two 60-minute sessions per week of individual feeding therapy; and one 60-minute session per week of individual parent training (*id.* at pp. 2, 13).²⁰

Finally, the CSE incorporated 20 annual goals and 45 corresponding short-term objectives drafted by BOCES into the IEP to address the student's identified needs in the areas of basic concepts/classroom language skills, targeted skills, activities of daily living/community skills, OT/motor skills, speech-language skills, and classroom foundation skills (*compare* Dist. Ex. 69 at pp. 7-11, *with* Dist. Ex. 60 at pp. 4-7, 11). Within the area of classroom foundation skills, the CSE included an annual goal targeting the student's ability to follow the designated lunch time routine (Dist. Ex. 69 at p. 9). In addition, the CSE included an annual goal targeting the student's OT/motor skills to improve his ability to scoop or pierce an appropriate amount of food (*id.* at p. 10).

By letter dated May 27, 2011, the parents wrote to the district's director of special education, indicating that pursuant to the "CSE meeting" they wanted the district to send application packets to four schools identified in their letter because they believed that BOCES was not an appropriate placement for the student for the 2011-12 school year (*see* Dist. Ex. 56 at p. 3). The district complied with the parents' request; however, the student was not accepted at any of the four schools (*see id.* at pp. 4-10, 13).²¹

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year

¹⁹ The CSE recommended the following services for summer 2011: placement in a 6:1+2 special class at BOCES; two 30-minute sessions per week of individual speech-language therapy in the therapy room; one 30-minute session per week of individual speech-language therapy in the classroom; two 30-minute sessions per week of individual OT in the classroom; and the services of a 1:1, full-time aide in the classroom (Dist. Ex. 69 at pp. 2, 13-14). In addition, the CSE recommended the following home-based services for summer 2011: one 60-minute session per week of individual behavior intervention services; one 60-minute session per week of individual parent training; and 12 quarterly, 60-minute sessions of feeding therapy (*id.* at pp. 2, 14).

²⁰ According to the May 2011 IEP, the student was "owed make-up sessions for his home feeding therapy," and that the "make-up sessions ha[d] already begun and w[ould] continue throughout the summer" (Dist. Ex. 69 at p. 3).

²¹ I note that while the parents expressed a willingness to cooperate with the district's offer to seek an alternative placement for the student for the 2011-12 school year—after rejecting both the student's 2011-12 IEP and the district's offer of placement at BOCES for the 2011-12 school year by letters dated May 4, 2011 and July 1, 2011—this spirit of continued cooperation and collaboration may be relevant to an analysis of equitable considerations, but it is not relevant to whether the district's recommended 2011-12 IEP offered the student a FAPE.

based upon both procedural and substantive violations (Parent Ex. A at pp. 1-4).²² Specifically related to the 2011-12 school year, the parents asserted that the district failed to generate and to provide the parents with a copy of the student's IEP resulting from the May 2011 CSE meeting; the parents disagreed with the district's recommendation to place the student at BOCES for the 2011-12 school year; the parents disagreed with the district's oral representation at the May 2011 CSE meeting to discontinue the student's feeding therapy; the district denied the parents an opportunity to meaningfully participate in the development of the student's annual goals at the May 2011 CSE meeting; and the district failed, to date, to recommend an "appropriate school program" for the 2011-12 school year (id. at pp. 3-4).²³ The parents also asserted that Gersh was an appropriate placement for the student and that equitable considerations favored an award of tuition reimbursement because the parents cooperated throughout the CSE process (id. at pp. 4-5). As relief, the parents requested reimbursement for the costs of the student's tuition at Gersh for the 2011-12 school year and for costs of transportation to Gersh (id. at p. 5).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on September 27, 2011, which concluded on December 21, 2011 after 10 days of hearing (Tr. pp. 1, 1852). By decision dated February 20, 2012, the IHO determined that the district offered the student a FAPE for the 2011-12 school year, and denied the parents' request to be reimbursed for the costs of the student's tuition at Gersh (IHO Decision at pp. 17-18). After reciting the facts of the case, the IHO concluded that a properly composed CSE reviewed the student's most current evaluations at the May 2011 CSE meeting, the CSE accurately identified the student's needs, and the CSE provided for the appropriate use of special education services to meet those needs (id. at pp. 3-17). The IHO also found that the student's IEP included "relevant goals and objectives," and identified how the parents would be advised of the student's progress (id. at p. 17). Next, the IHO determined that the parents meaningfully participated in the development of the student's 2011-12 IEP and that no other procedural or substantive flaws affected the IEP (id.).

²² The student began attending Gersh on July 5, 2011 (Tr. p. 800; see Parent Ex. Z at p. 1). On July 29, 2011, the parents executed an enrollment contract with Gersh for the student's attendance from July 5, 2011 through June 22, 2012 (Parent Ex. Z at pp. 1-2). In July and August 2011, the district continued to send application packets to schools on behalf of the student (see Dist. Ex. 56 at pp. 11-12, 14-17). In September 2011, the district was notified by two public schools that the student had been accepted into programs for the 2011-12 school year (Dist. Exs. 78-79). The parents testified that they never learned that the student had been accepted into other public school programs until the impartial hearing (Tr. pp. 804-07, 1123). Notwithstanding the parents' rejection of the proposed public school program and placement at BOCES for the 2011-12 school year, the district continued to provide the student with the recommended home-based services—behavior intervention services, parent training, and feeding therapy—while he attended Gersh (Tr. pp. 424-25).

²³ While the 2010-11 school year was not at issue, the parents relied upon "facts" directly related to the 2010-11 school year to describe the "nature of the problem" in their due process complaint notice challenging the 2011-12 school year, including the following: the student failed to make progress, the student's food consumption declined at BOCES due to the lack of an appropriate feeding program, the student demonstrated behavioral problems "stemming from his eating and feeding," the student's difficulties with feeding affected his educational needs, the student regressed and lost "ground in areas" previously "mastered," BOCES did not follow the annual goals in the IEP, and the student did not make any progress on his annual goals (Parent Ex. A at pp. 1-4).

Based upon the evidence presented, the IHO concluded that the student "made progress in all measurable educational areas" during the 2010-11 school year and that the student's IEP for the 2011-12 school year had been "constructed largely" upon the preceding school year's IEP (IHO Decision at p. 17). Consequently, the IHO found that the district sustained its burden to establish that the student's IEP was reasonably calculated to enable the student to receive educational benefits, and he denied the parents' request for tuition reimbursement without addressing whether Gersh was an appropriate placement or whether equitable considerations supported an award of tuition reimbursement (*id.* at pp. 17-18).

IV. Appeal for State-Level Review

The parents appeal, and contend that the IHO erred in concluding that the district offered the student a FAPE for the 2011-12 school year. Generally, the parents challenge the IHO's decision as arbitrary and capricious, careless and thoughtless, replete with errors, and based upon evidence fabricated by the district. The parents allege that the IHO exhibited bias against the parents as demonstrated by the IHO's conduct during the hearing and the rulings set forth in his decision. In particular, the parents argue that because the district failed to demonstrate that the student made meaningful progress at BOCES during the 2010-11 school year, the IHO erred in concluding that the district sustained its burden to establish that the recommended placement at BOCES for the 2011-12 school year was reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE for the 2011-12 school year. In addition, the parents assert that the IHO failed to address whether Gersh was an appropriate placement for the student and whether equitable considerations weighed in favor of the parents' request for tuition reimbursement. As such, the parents seek to reverse the IHO's decision in its entirety.²⁴

In its answer, the district responds to the parents' allegations, and asserts as defenses that the parents' petition fails to state a claim upon which relief may be granted, and the hearing record supports the IHO's conclusion that the district's recommended program was reasonably calculated to enable the student to receive educational benefits. The district also asserts that the parents failed to sustain their burden to establish that Gersh was an appropriate placement for the student and that equitable considerations do not support the parents' claim for tuition reimbursement in this case. In addition, the district asserts that the hearing record supports the IHO's determination and that there is no support for the parents' allegations of IHO bias. The district seeks to dismiss the parents' petition and to uphold the IHO's decision in its entirety.

V. Applicable Standards

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

²⁴ Since the parents do not appeal the IHO's conclusion that they were provided with an opportunity to meaningfully participate in the development of the student's 2011-12 IEP, this issue is final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic,

developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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]). 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; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. IHO's Decision

As noted above, the parents allege in their petition that the IHO's decision was arbitrary and capricious and must be annulled on this basis. To support this assertion, the parents argue that the IHO ignored the parents' demonstrative evidence regarding the weight of the pasta consumed by the student in "15 'spoons' or 15 bites," which the parents contend directly contradicts the district's evidence that the student consumed a "10 ounce portion of pasta" at BOCES; the IHO's conduct, rulings, questions, and comments at the impartial hearing evinced bias against the parents; the IHO "frequently and unfairly admonished the parents for no reason," and thus, evinced bias against the parents; the IHO improperly weighed evidence, ignored evidence, and failed to refer to evidence in the decision; the IHO confused and misstated "[h]unger and nutrition" as material issues of the parents' case; and the IHO improperly shifted the burden of proof regarding whether the district offered the student a FAPE to the parents.

1. IHO Bias

Turning first to the contentions that the IHO evinced bias against the parents at the impartial hearing, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal No. 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

Upon careful review of the record, I find no basis in the record to support the parents' general and conclusory allegations that the IHO displayed bias or prejudice against them through his conduct, his statements, his admonitions, or his rulings. Notably, the parents do not specify or assert with any particularity that the IHO's alleged bias with respect to his rulings, statements, admonishments, or conduct affected either their opportunity to present evidence or their opportunity to otherwise exercise rights under due process (see 8 NYCRR 200.5[j], [k]). While the parents may disagree with the conclusions reached by the IHO, that disagreement, alone, does not provide a sufficient basis for finding actual or apparent bias by the IHO (Application of a Student with a Disability, Appeal No. 12-017; Application of a Student with a Disability, Appeal No. 10-004; Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-090; Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Disability, Appeal No. 95-75). An independent review of the hearing record in this matter demonstrates that the parents were provided an opportunity to be heard at the impartial hearing, which I also find was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]). The hearing record also reveals that the IHO remained courteous during the impartial hearing, treated the parents with respect, and explained his rationale for rulings and decisions (see, e.g., Tr. pp. 3-11, 21-35, 57-59, 65-69, 165-66, 232-33, 348-51, 353-55, 449-52, 540, 610-11, 953, 1238-42, 1929-30, 1933-34). According to the hearing record, the IHO, at times, requested and offered clarification of issues in dispute, questioned witnesses, and made efforts to maintain the decorum of the proceedings while ensuring that each party had the right to be heard in an orderly manner (see, e.g., Tr. pp. 158-61, 194-97, 201-02, 215-17, 224-27, 250-57, 281-82, 321-32, 361-63, 457-58, 460-61, 463-65, 471-73, 532-33, 540-42, 610-11, 657-76, 691-98, 791-94 898, 924-29, 946-47, 988-92, 1218-19, 1260-62, 1801-03, 1874-78, 1893-96). Under sometimes challenging conditions, the IHO remained courteous and did not manifest bias or prejudice in either his

words or his conduct (see generally Tr. pp. 114-15, 119, 122-25, 146-49, 248-57, 356-59, 367-68, 425-40, 507-09, 513-15, 521-23, 532-34, 621-22, 626, 630-32, 782-89, 796-97, 953, 1140-46, 1207-09, 1214-16, 1283-85, 1321-25, 1803-05, 1880-81, 1884-89, 1893-96, 1093-07, 1909-10, 1924-26). Therefore, I find that the parents' contentions regarding the IHO's alleged bias are without merit and must be dismissed.

2. Evidence

Turning next to the contentions that the IHO improperly weighed evidence, ignored evidence, failed to refer to evidence in the decision, and in particular, ignored the parents' demonstrative evidence, I find that an independent review of the hearing record does not support the parents' assertions.

Initially, I note that the parents affirmatively state in the petition that the district's failure to "provide 'nutritional' benefits" to the student was not a basis upon which to conclude that the district failed to offer the student a FAPE for the 2011-12 school year (Pet. ¶ 106). Yet, the evidence that the parents contend the IHO improperly weighed, ignored, and failed to reference in the decision—specifically, the amount of food the student consumed at BOCES and how much that portion of food weighed, the containers used by the parents to send the student's lunch to BOCES, the utensils used by the student to consume lunch at BOCES, that most of the student's lunch sent to BOCES was returned home, that the parents' demonstrative evidence proved that the district fabricated evidence that the student consumed 10 ounces of pasta for lunch at BOCES, and that the student only consumed fruit at lunch at BOCES—could reasonably be construed as relating either directly, or indirectly, to the issue of nutritional benefits, and more particularly, to the implementation of the student's 2010-11 IEP by BOCES and placement at BOCES for the 2010-11 school, which were not raised as issues in the parents' due process complaint notice (Pet. ¶¶ 101-03, 106-15; see Parent Ex. A at pp. 1-6).²⁵

²⁵ A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Furthermore, the hearing record does not reflect that the parents requested to amend the July 2011 due process complaint notice, that the IHO otherwise authorized an amendment to the July 2011 due process complaint notice, or that the district consented to expand the scope of the impartial hearing to include issues regarding either the student's 2010-11 IEP or the implementation of the student's 2010-11 IEP at BOCES (see Tr. pp. 1-1987; Dist. Exs. 1-82; Parent Exs. A-Z; AA-OO). Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 U.S. Dist. LEXIS 107381, at *33 [S.D.N.Y.

In any event, even if the abovementioned evidence does not relate to the issue of nutritional benefits, contrary to the parents' contentions I find that the IHO carefully considered all of the testimonial and documentary evidence presented by both parties, and further, that he carefully marshaled and weighed the evidence in support of his conclusions and properly supported his conclusions with citations to the hearing record (see IHO Decision at pp. 3-18; see also 8 NYCRR 200.5[j][5][v]). In addition, a review of the entire hearing record does not support the parents' conclusory allegation that the IHO improperly shifted the burden of proof regarding whether the district offered the student a FAPE to the parents (see Tr. pp. 1-1987; Dist. Exs. 1-82; Parent Exs. A-Z; AA-OO).

B. Progress During 2010-11 School Year

Contrary to the parents' assertion that the student made no progress during the 2010-11 school year, the weight of the evidence in this case supports the IHO's determination that the student made meaningful progress during the 2010-11 school year.²⁶ According to a quarterly IEP Progress Report completed by BOCES, the student consistently demonstrated progress on his annual goals throughout the 2010-11 school year (see Dist. Ex. 31 at pp. 1-13). The student's classroom teacher at BOCES testified that parents received progress reports through the mail, and she also explained that the four benchmarks referenced in the progress report corresponded to the four quarters of the school year (see Tr. pp. 128-32).²⁷ In particular, a review of the progress report indicates that by January 2011, the student had mastered the ability to match at least four identical objects, the ability to complete the designated arrival routine, and the ability to reduce or extinguish out-of-seat behavior (see Dist. Ex. 31 at pp. 2, 4). By March 2011, the student had mastered the ability to match six identical objects (id. at p. 2).²⁸

With respect to the student's progress in his related services through the third marking quarter at BOCES, the student's speech-language provider documented that although the student made no progress on the annual goal targeting his ability to respond to simple questions by

Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

²⁶ The parents argue that due to noncompliance with a subpoena issued by the IHO, the hearing record is devoid of "data" and thus, the district cannot sustain its burden to prove that the student made meaningful progress during the 2010-11 school year (Pet. ¶ 117). However, the hearing record indicates that the parties discussed this issue at the impartial hearing and that the IHO offered whatever assistance the parents' attorney wanted from him in order for the parents' attorney to further pursue compliance with the subpoena (Tr. pp. 215-17, 321-32, 692-98, 830-35, 841-45). The parents' attorney acknowledged, however, that "as a practical matter there [was] not too much we can do in the time frame" and it made "no sense" to initiate a "federal or state action just to get the subpoena ordered" (Tr. p. 694).

²⁷ For instance, under the heading "Basic Concepts/Classroom Language" the classroom teacher would report on the student's progress during the first quarter at BOCES under "Benchmark 1," his progress during the second quarter at BOCES was reported under "Benchmark 2," and so forth (see Tr. pp. 128-32).

²⁸ The hearing record also includes a quarterly IEP Progress Report generated in June 2011 after the May 2011 CSE meeting (Dist. Ex. 81 at pp. 1-13). A review of the fourth quarter progress report indicated the student continued to demonstrate progress on all of his annual goals and that he mastered the ability to match at least eight identical objects (id. at p. 2). The student's classroom teacher at BOCES also generated an "End of Year Summary" in June 2011 describing the student's progress toward his annual goals (Dist. Ex. 72 at pp. 1-2).

shaking his head yes or no, the student consistently demonstrated progress on annual goals specific to the student's imitation of vocal sounds and target sounds produced by a therapist; the student's use of jargon and single words to comment or request an object with moderate assistance, the student's ability to identify and use 10 nouns, and the student's ability to control eye contact during two verbal exchanges (see Dist. Ex. 31 at pp. 6-8). In PT, the therapist reported that by March 2011, the student mastered annual goals addressing the student's ability to walk forward the length of a balance beam, turn around, and walk forward again according to the criteria referenced; and to jump in place four times according to the criteria referenced (see id. at pp. 9-10). In OT, the therapist reported that by April 2011, the student mastered the ability to correctly use a pincer grasp during fine motor activities according to the criteria referenced, and that he consistently demonstrated progress on the annual goals addressing his ability to correctly use scissors and to scoop food when eating (see id. at pp. 11-13).

Notwithstanding the evidence of the student's progress reported in the IEP Progress Report from BOCES, the hearing record also includes evidence of the student's progress on annual goals in the 2010-11 IEP reported by his home-based providers during the 2010-11 school year (see Dist. Exs. 30 at pp. 1-4; 32 at pp. 1-2; 42 at pp. 1-4; 43 at pp. 1-6; 45 at pp. 1-4; 49 at pp. 1-6; 55 at pp. 1-17; 61 at pp. 1-2; 63; 65 at pp. 1-2; 66 at pp. 1-5; 68 at pp. 1-10; 70).

In addition, testimony by the student's classroom teacher at BOCES further described areas of the student's progress during the 2010-11 school year, which included improving his ability to sit in his chair without anyone near him for up to 40 minutes and improving his ability to complete independent tasks, such as puzzles and shape order activities (see Tr. pp. 45-46, 84-85). Socially, the classroom teacher testified that as the school year progressed, the student would increasingly approach a specific teacher aide to give her a hug and that he improved his ability to display interest in other students in the classroom by making eye contact with another classmate (see Tr. pp. 85-86). In addition, the classroom teacher testified that between the middle of the school year to the end of the school year, the student—with assistance by his 1:1 aide—increasingly participated in some group activities (see Tr. pp. 86-89). The classroom teacher also testified about the student's progress with toilet training, his ability to match objects and pictures—describing the student as a "fluent matcher"—and explained the importance of the student's ability to match as a prerequisite to other skills, such as identifying pictures, discriminating pictures, reading, and basic communication abilities (see Tr. pp. 47-48, 74-77).

Based upon the foregoing, I find that the hearing record contained sufficient evidence to support the IHO's determination that the student made meaningful progress during the 2010-11 school year.

C. May 2011 IEP

Next, the parents argue that by recommending the "same failed program for the 2011-12" school year at BOCES, the district failed to sustain its burden that it offered the student a FAPE for the 2011-12 school year. However, courts have recognized that under the appropriate circumstances, "[m]odeling an IEP after the previous year's [IEP], with appropriate changes, [was] a sensible practice that, as long as it [was] not done reflexively and without consideration of the student's individual circumstances and needs, does not signify that no progress has been made" (K.A. v. Chappaqua Cent. Sch. Dist., 09-cv-699 at *14 [S.D.N.Y. Mar. 12, 2010]; see

S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]). Consequently, having already demonstrated that the evidence supports the IHO's conclusion that the district's recommended special education and related services in the student's 2010-11 IEP—and as implemented by BOCES during the 2010-11 school year—resulted in the student making progress in his areas of need, and upon an independent review of the hearing record, I agree with the IHO's conclusion that the district sustained its burden to establish that the May 2011 IEP was reasonably calculated to enable the student to receive educational benefits. Here, the evidence demonstrates that the 2011-12 IEP—and its continued implementation at BOCES—was an appropriate continuation of an educational program that provided the student with educational benefits, and thus, offered the student a FAPE for the 2011-12 school year (see Rowley, 458 U.S. at 203 n. 25; S.H., 2011 WL 6108523, at *10; Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir.2008]; see also D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at * 12 [E.D.N.Y. Sept. 2, 2011]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *16 [S.D.N.Y. Sept. 29, 2008]).²⁹

First, I note that the parents did not allege in their due process complaint notice or in their petition any specific challenges to a majority of the information contained in the student's May 2011 IEP, such as the student's present levels of academic achievement, social development, physical development, and management needs; the recommended frequency and duration of speech-language therapy or OT; the services of a full-time 1:1 aide; or the recommended home-based program (see Parent Ex. A at pp. 1-6; Pet. ¶¶ 1-131; see also Tr. pp. 1257-59, 1265). However, out of an abundance of caution, I have reviewed the entire May 2011 IEP, and as discussed within, I find that the evidence demonstrates that the May 2011 CSE carefully and accurately described the student's present levels of academic achievement, social development, physical development, and management needs, and further supports the IHO's determination that the district sustained its burden to establish that it offered the student a FAPE for the 2011-12 school year.³⁰

²⁹ Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and the district's offer of placement at BOCES, and enrolled the student at Gersh prior to the time that the district became obligated to implement the student's 2011-12 IEP (see Dist. Ex. 62; Parent Ex. A at pp. 1-6). Even assuming for the sake of argument that the student had attended the district's recommended program, there is no evidence in the hearing record to support the conclusion that BOCES would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S., 2011 WL 3919040, at *13; A.L. 2011 WL 4001074, at *9).

³⁰ According to the evidence, the May 2011 CSE relied on several evaluations and reports—including a school attendance record, a classroom observation report, a PT progress summary, a speech-language progress summary, and an OT progress summary, as well as a previously obtained feeding evaluation, speech-language evaluation, and social history—to develop the student's 2011-12 IEP (see Dist. Ex. 69 at p. 4). In addition, the student's classroom teacher, his support teacher/BCBA, speech-language provider, physical therapist, and the school psychologist from BOCES during the 2010-11 school year all participated at the May 2011 CSE meeting (see id. at pp. 17-22).

Initial comments in the May 2011 IEP report the student's progress on many of his annual goals during the 2010-11 school year, the parents' frustration with the student's progress in his feeding program, the parents' concerns about the student's lack of chewing skills, the parents' concerns that the student did not receive "enough to eat to sustain him during the full school day," that the parents did not believe that BOCES was an appropriate program for the student, and that the district would apply to "several other programs" at the request of the parents (see Dist. Ex. 69 at p. 3; see also Tr. pp. 1260-62, 1279-83). Testimony by the district's assistant director of special education and pupil personnel services (director) who attended the May 2011 CSE meeting reveals that the CSE discussed "all areas of [the student's] functioning," the CSE "went over all the goals," and the CSE discussed the student's progress on his goals, which she characterized as "significant" (Tr. pp. 373, 412-17). In addition, the director testified that the CSE reviewed the student's related services' needs and his progress in OT and PT (see Tr. pp. 412-13). The director also testified that the May 2011 CSE specifically reviewed "each area, whether it was cognitive, adaptive" and discussed the goals for "next year," indicating a need to "continue" with certain annual goals, such as "matching," developing the student's ability to "imitate[e] skills," and developing the student's fine motor skills (Tr. pp. 536-37). The director further testified that the May 2011 CSE reviewed and discussed the student's progress in toilet training, feeding, and chewing (id.). The student's mother confirmed in her testimony that the May 2011 CSE discussed the student's "related services for the next year and goals and placement" (Tr. pp. 1155-56; see Tr. pp. 1247-82).³¹

Turning to the student's present levels of academic performance, the May 2011 IEP included information regarding the student's knowledge and skill areas, including activities of daily living (ADL), intellectual functioning, adaptive behavior, progress in acquiring skills and information, and learning style (see Dist. Ex. 69 at pp. 5-6). Specifically, the May 2011 IEP described the student as nonverbal and learning to communicate with PECS, noting that he requested highly preferred items, such as toys or pretzels, and that he could use PECS to request to use the bathroom with prompts (id. at p. 5). The IEP also noted although the student made some verbalizations, the verbalizations were inconsistent and not necessarily relevant to the task at hand, and similarly, the student inconsistently used gestures to indicate yes and no when prompted to do so (id.). In addition, the IEP indicated that the student was learning to imitate sounds; he increased his spontaneous verbalizations during play; he matched objects, pictures, and colors; he could complete a nine-piece interlocking puzzle; and he had improved his ability to attend, to wait, and to make eye contact (id.). At the time of the May 2011 CSE meeting, the student made progress in his toilet training and experienced no toileting accidents at BOCES in eight weeks (id.). The IEP described the student's fine motor skills as weak, and noted that the student's gross motor skills had improved significantly (id.).

With respect to the student's feeding skills, the May 2011 IEP indicated he could scoop his food and bring it to his mouth independently during lunch at BOCES with 88 percent success (Dist. 69 at p. 5). The IEP also noted the student no longer cried and whined during mealtime; he appeared comfortable when eating at BOCES; he ate a 10-ounce portion of pasta with teacher

³¹ Evidence indicates that the May 2011 CSE meeting lasted between two hours and three and one-half hours (see Tr. pp. 1247-48). The student's mother admitted in testimony that at the time of the May 2011 CSE meeting, her "primary concern" and "goal" was having the student attend Gersh (see Tr. pp. 1253-55). The student's mother also testified that the parents received the student's 2011-12 IEP between July 2 and July 4, 2011 (see Tr. pp. 1262-65).

supervision and limited verbal prompting; and he improved the pace of eating (id.). At that time, the BOCES' feeding team reported the student demonstrated more chewing skills and was developing a rotary chew a pattern (munching) (id.). In addition, the May 2011 IEP noted the student's home feeding therapist worked on the student's chewing skills (id.). Finally, the IEP indicated that the student made progress in developing skills related to independence in regard to ADLs, including motor imitation necessary for ADL tasks, following one-step directives, and using a pincer grasp with medium-sized items (id.).

Describing the student's social development, the May 2011 IEP indicated that the student was sweet and affectionate, he behaved well in the classroom, and he appeared to enjoy the company of his classmates, although he exhibited weak social skills and limited social awareness was limited (see Dist. 69 at p. 6). In addition, the IEP described the student as highly distractible; he engaged in self-stimulatory behaviors; his ability to transition within the school building improved; and his behavior was well managed in the classroom (id.). Turning to the student's physical development, the May 2011 IEP reported the student as being in good general health and that he had "typical" hearing and vision (id.). In addition, the IEP indicated the student had difficulty with feeding and with chewing his food (id.).

In addition to reporting the student's present levels of performance, the IEP also identified the student's academic, developmental, and functional needs as the following: completing the student's toilet training; improving his chewing ability and his feeding skills; improving his receptive language, expressive language, his ability to communicate using PECS, and his ability to make more meaningful verbalizations; improving the student's fine motor skills; improving his ADL skills; and to further develop his attention skills (see Dist. 69 at p. 6). The May 2011 IEP also identified the following as the student's social development needs: improving his social skills; increasing his awareness of peers; increasing his ability to maintain eye contact; improving his play skills; and decreasing the student's distractibility (id.). The May 2011 IEP also identified the following as the student's physical development needs: learning an appropriate pincer grasp; improving his cutting skills; and further developing his feeding and chewing skills (id.). Finally, the May 2011 IEP indicated that due to the student's identified management needs, he required a highly structured classroom environment with a small class ratio, as well as constant adult supervision (id.).

As previously noted, the CSE incorporated 20 annual goals and 45 corresponding short-term objectives into the May 2011 IEP, which upon review, are specific, measurable, and aligned to address the student's identified needs (see Dist. 69 at pp. 7-11; see also 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). The director testified that the May 2011 CSE discussed the annual goals (see Tr. p. 516).³² Specifically, the annual goals address the student's needs specific to requesting a game or toy using aided language or visual strategies; initiating at least 10 new gross motor movements; indicating the need to use the toilet; pinching an object between his thumb and index finger; receptively identifying targeted new object and noun labels; responding to social greetings; identifying specified objects, pictures or icons from a field of four items; demonstrating vocal imitation by imitating single words; receptively identifying colors; joining a peer in an activity; working

³² Notably, the student's mother testified that Gersh was implementing the annual goals incorporated into the student's 2011-12 IEP (Tr. pp. 1183-86).

independently for 10 minutes; following one-step directions out-of-seat; following the designated lunch routine; using the toilet independently; maintaining a lifted and extended posture of his head, upper body, and legs while propelling a scooter board on his stomach; using one hand to place an object across the midline of his body; scooping or piercing an appropriate amount of food; attending and participating during functional activities; expanding his repertoire of play activities by increasing his use of a variety of new toys; and communicating his wants and needs using visually aided language during structured tasks (Dist. Ex. 69 at pp. 7-11).³³

Based upon all of the evidence presented, I find that the district's recommendation to continue the student's placement in a 6:1+2 special class for a 12-month school year program at the same BOCES location the student attended during the 2010-11 school year with the recommended in-school and home-based related services, was reasonably calculated to enable the student to receive educational benefits, and thus, offered the student a FAPE for the 2011-12 school year.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE during the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Gersh was an appropriate placement (Burlington, 470 U.S. at 371). In addition, I have considered the parties' remaining contentions and find that they are without merit and need not be addressed more fully.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
April 30, 2012


STEPHANIE DEYOE
STATE REVIEW OFFICER

³³ To the extent that the parents indicate in their petition that the 2011-12 IEP failed to "address or provide goals for chewing/feeding therapy in school," I note that the parents did not raise this issue in their due process complaint notice (compare Pet. ¶79, with Parent Ex. A at pp. 1-6). Having raised this issue for the first time on appeal, the issue is outside the scope of my review (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also Application of a Student with a Disability, Appeal No. 12-026; Application of a Student with a Disability, Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112; supra note 25). However, even if the issue had been properly raised, I note that the 2011-12 IEP accurately identifies the student's continuing needs related to improving his ability to chew, appropriately indicates that the student made progress in this area during the 2010-11 school year, that the student's chewing skills were "emerging," that the student's home-based feeding therapy was "progressing," that the feeding therapist worked on the student's chewing skills, and that the May 2011 CSE continued to recommend—and the student continued to receive—a home-based feeding therapy program to address this need (see Dist. Ex. 69 at pp. 2-3, 5-6, 13-14; see also Tr. pp. 424-25; Dist. Exs. 70; 74-76). Thus, even though the 2011-12 IEP does not include a specific annual goal targeting the student's chewing skills, I could not conclude that this omission, alone, would result in either a substantive or procedural violation that rose to the level of a denial of a FAPE.