



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-105

**Application of the [REDACTED]
[REDACTED] for review of a determination of a hearing
officer relating to the provision of educational services to a
student with a disability**

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, John Tseng, Esq., of counsel

Law Offices of Regina Skyer and Associates, LLP, attorneys for respondents, Jaime Chlupsa, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer 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 Churchill School (Churchill) for the 2010-11 school year. The appeal must be sustained.

Background

At the time of the impartial hearing, the student was attending Churchill, a school for students with average to above average intelligence who have received classifications of a learning disability or a speech or language impairment and who do not exhibit behavioral or emotional issues (Tr. pp. 141, 150, 165-66, 229, 236-37, 243-44; Dist. Ex. 24). Churchill is a nonpublic school that has been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7; Tr. pp. 148-50). The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

Having been identified in July 2009 as a preschool student with a disability by the Committee on Preschool Special Education (CPSE), the student attended a center-based

therapeutic preschool for the 2009-10 school year, where he received speech-language therapy, occupational therapy (OT), and play (counseling) therapy (Dist. Ex. 8 at p. 1). In October 2009, the parents applied for the student's admission to Churchill for the 2010-11 school year (Tr. pp. 235-36; Dist. Ex. 31 at pp. 1-10).

In November 2009, in preparation for the student's transition from the CPSE to the Committee on Special Education (CSE), a private psychological evaluation was conducted of the student (Dist. Ex. 8).¹ Testing occurred over three one-hour testing sessions, and the evaluation included a 90 minute classroom observation (*id.* at p. 2). Results of formal cognitive testing, which were confirmed by further neuropsychological testing, revealed that, although the student's abilities were "highly uneven" and the disparity between the student's visual and verbal functioning was "statistically significant," he functioned within the average range in comparison to his peers and presented with stronger visual reasoning abilities than verbally based reasoning abilities (*id.* at pp. 8-9). The evaluation identified the student's strengths in visual analytic skills, understanding of visual relationships and patterns, and efficient visual processing, and noted his deficits in expressive and receptive language, which "inhibited his ability to complete more abstract reasoning tasks in the verbal domain, interfered with his understanding of more complex verbal directions and questions, and impeded his ability to fully articulate and communicate his ideas on verbally based tests" (*id.*). The evaluating psychologist indicated that the student displayed good attention skills (*id.* at p. 9). Although language comprehension deficits inhibited the student's ability to perform some tasks successfully, she noted that the student displayed stronger word retrieval and processing skills when tasks were highly structured and when visual supports were provided (*id.*).

Academically, the psychological evaluation yielded "highly uneven" test results, with the evaluating psychologist characterizing the student's early reading and numeric reasoning skills as "really strong," but also indicating his language processing deficits were evident in academic tasks requiring auditory comprehension (Dist. Ex. 8 at p. 9). The evaluating psychologist indicated that the student had been able to learn and acquire early academic skills in his current classroom setting, noting his interest in academics and motivation to learn, but suggested that he needed an educational environment that supported his language processing weaknesses through the implementation of compensatory strategies, such as visual cues and simpler language, and strengthened his language skills (*id.*).

Socially/emotionally, the evaluating psychologist described the student as "well-related once he becomes familiar and comfortable," and noted that the student was engaged and focused in the classroom, was interested and responsive to peers, and was able to initiate interactions with support and took pleasure in doing so (Dist. Ex. 8 at p. 9; *see* Dist. Exs. 7; 11). She further noted that although the student's ability to socialize and play symbolically was affected by his language-based weaknesses, his understanding of emotions and ability to play symbolically were emerging (Dist. Ex. 8 at p. 9).

The evaluating psychologist recommended that the student attend a small, self-contained, "calm," language-based, and academically challenging special education school for the upcoming academic year, augmented by speech-language therapy to address the student's

¹ The hearing record reflects that this evaluation took place over six separate days in September, October, and November 2009 (Dist. Ex. 8 at p. 1).

receptive, expressive, and pragmatic language deficits; OT to support his fine motor skills and graphomotor ability; and play therapy (counseling) twice weekly to support his symbolic play abilities, social skills, and emotional development (Dist. Ex. 8 at pp. 9-10).

On December 14, 2009, the student's preschool special education teacher prepared an educational progress report summarizing the student's cognitive, speech-language, social/emotional, physical, and self-help skills development (Dist. Ex. 12). His special education teacher indicated that overall, the student "made good use of the therapeutic environment" at the center-based preschool, and with support from adults, the high student-teacher ratio, and the structure of the therapeutic setting, he displayed steady progress in all areas (id. at p. 6). She identified the student's strengths as his joy of learning, his sweet and affectionate nature, his increased interest in social interaction with peers, and his emerging social skills (id. at pp. 6-7). She further noted that the student "internalized" concrete cognitive skills and concepts and appeared proud of his abilities (id.). However, she also remarked that the student demonstrated delays in the development of higher-level reasoning and abstract cognitive skills, receptive and expressive language skills, and age appropriate social and symbolic play skills, but improved in these areas when an adult was available to model, facilitate, and support the student's cognitive, linguistic, and social development (id.). The student's special education teacher recommended that the student attend a small, structured classroom with bright, nonaggressive peers, a high student-teacher ratio, and continued speech-language therapy, OT, play therapy, and music therapy (id. at p. 7).

In a December 15, 2009 OT progress report, the student's preschool occupational therapist confirmed that the student had received OT twice per week for 30 minutes per session since the start of the 2009-10 school year, and that OT sessions focused on improving the student's play skills, sensory integration skills, fine motor skills, and perceptual motor skills (Dist. Ex. 13 at p. 1). She recommended continued OT focused on assisting the student to use his skills in the classroom environment and providing him with appropriate sensory activities throughout the day (id. at p. 3).

A December 17, 2009 OT parent checklist (Dist. Ex. 10) and an undated parent survey (Dist. Ex. 11) indicated that as the student prepared to transition to kindergarten, the parents and the student's preschool teacher sought an OT evaluation to assess the student's gross and fine motor skills (Dist. Ex. 10 at pp. 1-2; see Dist. Ex. 11). The parents identified the student's strengths as his easy-going nature, attention span, keen interest in numbers and letters, and drawing and painting; they identified his frustration, sensitivity to loud noises, difficulties listening or understanding when others spoke, poor pencil grasp, and fatigue when writing as concerns (Dist. Ex. 10 at pp. 2-3; see Dist. Ex. 11).

A January 2, 2010 speech-language progress report, completed by a speech-language pathologist at the student's preschool, confirmed that the student was receiving individual speech-language therapy twice per week for 30 minutes per session at his center-based preschool (Dist. Ex. 4 at p. 1; see Dist. Ex. 6 at p. 1). Formal language testing relative to receptive and expressive language resulted in the student scoring in the 66th percentile for auditory comprehension and in the 63rd percentile for expressive communication, and identified receptive language and auditory memory as areas of weakness, suggesting that the latter appeared reduced and compromised the student's ability to follow two and three-step commands (Dist. Ex. 4 at p. 1). The speech-language pathologist indicated that the student experienced difficulty in

processing longer and more complex utterances, but cited improvement in his abilities to comprehend the sequences of stories and books and to respond to questions about a sentence when salient details were highlighted beforehand (id.). Expressively, the speech-language pathologist remarked that the student spoke primarily in simple sentences, observing verbal formulation difficulties attributed to grammatical immaturities and difficulties with semantics and syntax (id. at p. 3). She credited multimodal instruction incorporating art activities with facilitating the student's abilities to list and recall attributes verbally, and cited his ability to describe sequence stories with present, past, and future tense when he was provided with models and prompts to initiate (id.). She remarked that pragmatically, although the student no longer perseverated on numbers throughout therapy sessions, he occasionally displayed a "ritualistic quality" in repeating the same comment (id. at p. 2; see Dist. Ex. 6 at p. 2). The speech-language pathologist noted that with redirection, the student readily connected with presented tasks, she described his eye contact as fair to good, and she cited his ability to engage in simple conversational exchanges, particularly when initiated by her, observing that the student was more verbally assertive with peers in the classroom (Dist. Ex. 4 at p. 2; see Dist. Exs. 6 at pp. 1-2; 7). The speech-language pathologist offered recommendations that included enrolling the student in a structured, language-based, nurturing program with a high student-teacher ratio to facilitate his cognitive, linguistic, and social/emotional development; individual speech-language therapy twice weekly at school; a multimodal approach to facilitate language development; and development of goals focused on facilitating the student's pragmatic, receptive, and expressive language (Dist. Ex. 4 at p. 3; see Dist. Exs. 6 at p. 1; 7).

Two undated progress reports from two of the student's CPSE related service providers also addressed the student's speech-language functioning (Dist. Exs. 6; 7). The report generated by his speech-language therapy provider described the student, among other things, as presenting with global linguistic delays; demonstrating inconsistent ability to respond to conversational exchanges; experiencing difficulties with temporal and sequencing concepts, including following directions involving those concepts; exhibiting a deficit in his word structure and grammatical components within sentences, which was reflected in his verbal expressive language; and having achieved some progress toward his goals, including following one-step directions without visual/verbal prompts, and appropriately responding to "wh" questions within a structured task, increasing his "lexical base" through his use of subjective/objective pronouns, and formulating questions independently (Dist. Ex. 6 at pp. 1-2). Although the report indicated that his use of language during play showed improvement, it further revealed that the student continued to experience difficulty focusing on unstructured activities and challenging tasks, and suggested the development of goals addressing his comprehension of possessive nouns, future and regular past tense, comparatives, and reflexive pronouns, and his comprehension of temporal and size concepts (id.).

The report generated by the student's play therapy/counseling services provider indicated, among other things, that the student had made "clear gains" in his abilities to take turns with peers when provided with verbal cues, to show increased attention to play and language-based activities, and to respond to simple "wh" questions without visual support (Dist. Ex. 7). The report projected that goals for September 2010 should address the student's abilities to respond to abstract "why" questions with verbal and/or visual cues, to engage in conversational exchanges with verbal/visual cues, and to role play (id.).

On January 27, 2010, the CPSE met to develop the student's preschool individualized education program (IEP) for the period of January 2010 through August 2010 (Dist. Ex. 8 at p. 1; Parent Ex. B at pp. 1-2). The January 2010 CPSE continued the student's eligibility for special education programs and services as a preschool student with a disability, recommended an 8:1+2 special education class at the center-based therapeutic preschool, continued individual speech-language therapy, OT, and counseling sessions, all two times per week for 30 minutes per session on a pull-out basis, and recommended transportation services (Parent Ex. B at pp. 1, 16). The hearing record establishes that the student remained in the 8:1+2 special class through August 2010, and that he received related services in accordance with the January 2010 CPSE IEP, as well as music therapy (see Tr. p. 112; Dist. Ex. 12 at p. 1; Parent Ex. B at pp. 1-2, 16).

On February 4, 2010, a district social worker conducted a 45-minute classroom observation of the student in his 8:1+2 special class at the center-based therapeutic preschool (Dist. Ex. 19 at p. 1). The social worker observed the student review a job chart, sing a song, listen to the teacher read a book, and participate in a tabletop activity involving hand coordination, noting that the student neither joined other students who screamed at the start of the read aloud activity, nor mimicked their excitable behaviors, and instead remained properly seated, focusing on the teacher and lesson (id.). The social worker added that the student responded to teacher questions, volunteered answers, made observations about the pictures in the book, and demonstrated a sense of humor appropriate to the lesson (id.). The social worker was informed by the student's classroom teacher that overall, he had progressed significantly in the program, describing him as interested, cooperative, and receptive to guidance from his teachers (id.). The social worker concluded that the student "seemed happy, content and ... wasn't fazed by peer distraction" (id.).

Contemporaneous with the classroom observation, the social worker also conducted the Preschool Evaluation Scale – School Version (PES-SV), with input from the student's teacher (Tr. pp. 43-44; Dist. Exs. 19 at p. 2; 20 at pp. 1-4). Results of the PES-SV suggested that the student's overall intellectual functioning was within the low average range (20th percentile), with subscale results indicating that the student functioned in the low average range relative to large muscle skills and self-help skills, and in the average range relative to small muscle skills, cognitive thinking skills, expressive language skills, and social/emotional skills (Dist. Exs. 19 at p. 2; 20 at p. 4).

On February 22, 2010, Churchill accepted the student into its kindergarten program for the 2010-11 school year (Dist. Ex. 23). According to the student's father, by March 8, 2010, he remitted a nonrefundable deposit reserving the student's seat at Churchill for the 2010-11 school year (Tr. pp. 232, 237-38). Subsequently, the CSE convened on March 12, 2010, to review the student's educational program (Tr. pp. 17, 114, 219, 241; Dist. Ex. 15 at pp. 1-2; see Dist. Exs. 16-18). CSE attendees included a district representative, a regular education teacher, a special education teacher, a school psychologist, a district social worker,² a social worker from the student's then-current preschool placement, both parents, and the parents' attorney (Dist. Ex. 15 at p. 2; see Tr. pp. 16-19).

² The hearing record reflects that the district social worker also conducted the February 4, 2010 classroom observation of the student (compare Dist. Ex. 15 at p. 2, with Dist. Ex. 19 at p. 1).

The March 2010 CSE determined the student eligible for special education programs and services as a student with a speech or language impairment, and recommended a 10-month special education program consisting of a 12:1+1 special class in a community school, and related services consisting of counseling, twice per week for 30 minutes per session in a 1:1 setting, OT, twice per week for 30 minutes per session in a 1:1 setting, and speech-language therapy, twice per week for 30 minutes per session in a 1:1 setting (Dist. Ex. 15 at pp. 1-4, 8, 10). Academically, the CSE noted that the student required a structured, minimally distracting environment with adult support, and indicated that he demonstrated delays in abstract reasoning skills, language processing, and fine and gross motor skills (*id.* at pp. 3, 8). Socially/emotionally, the CSE commented that the student demonstrated anxiety, struggled with ongoing reciprocal peer relationships, exhibited receptive and expressive language delays, and needed assistance "naming his emotions" and developing coping strategies (*id.* at p. 4). The hearing record reflects that the March 2010 CSE considered recommending a general education setting with special education teacher support services (SETSS) and related services consisting of speech-language, OT, and counseling for the student, but rejected this option because it concluded the program would not have addressed the student's delays in language processing and social/emotional skills (Tr. pp. 37-38; Dist. Ex. 15 at pp. 8-9). Additionally, the school psychologist reported that the March 2010 CSE also considered recommending a special class in a specialized school, but after considering the student's overall abilities and cognitive strengths, rejected that option as being too restrictive for him (Tr. p. 38).³

In a final notice of recommendation (FNR) dated June 15, 2010, the district summarized the CSE's recommendations in the March 2010 IEP, and identified the specific school to which the district assigned the student (Dist. Ex. 22). The FNR noted that a copy of the March 2010 IEP and the parents' due process rights notice were attached to the letter (Tr. p. 221; Dist. Ex. 22 at p. 1). On June 23, 2010, the student's father visited the assigned school for approximately 15 to 20 minutes and observed the assigned 12:1+1 special class (Tr. pp. 222-23). The parent reported that he did not have an opportunity to "get a good sense" of the 12:1+1 class he visited, nor was the principal of the assigned school able to answer his questions about the assigned school and the 12:1+1 special class (Tr. pp. 223-25).

In an undated letter to the district, the parents asserted that the assigned school was inappropriate for the student (Parent Ex. G). The parents alleged that they were not provided with any information about the functional levels of the students in the 12:1+1 special class, that the assigned school appeared to be too large for the student "to attend any mainstream activities," and that the classroom was not appropriately structured to allow the student to learn (*id.*). However, the parents advised that they were "open to reassessing" the district's recommendation upon receipt of a class profile documenting the cognitive, academic, behavioral, social, and emotional functioning of each student in the 12:1+1 special class for the 2010-11 school year (*id.*). By August 15, 2010, the parents had fully paid the student's tuition covering his 2010-11 school year at Churchill (Tr. pp. 238-39).

By letter dated August 24, 2010 to the district, the parents rejected the district's recommended program and advised of their intention to enroll their son at Churchill for the 2010-11 school year at public expense (Parent Ex. C). They alleged that the district had denied

³ The March 2010 CSE's consideration of this alternative program is not reflected in the March 2010 IEP (*see* Tr. pp. 52-53; Dist. Ex. 15 at p. 9).

the student a free appropriate public education (FAPE) on various procedural and substantive grounds, including but not limited to denying the parents an opportunity to meaningfully participate in the development of their son's March 2010 IEP and recommending a special education program that did not address his individualized needs (id.).

In September 2010, the student began kindergarten at Churchill in a 12:1+1 class where he also received OT once per week for 30 minutes per session in a 3:1 setting, speech-language therapy twice per week in a 3:1 setting, and a health and human relations class (counseling) once per week for 30 minutes per session in a 6:1 setting (Tr. pp. 165, 180, 229; Dist. Ex. 24 at pp. 16-19).⁴

By letter dated October 6, 2010 to the district, the parents referenced "multiple calls to the [assigned] school which were rebuffed and ignored," reiterated their request "for any and all information from the CSE about the program that they relied upon in determining whether the [assigned] school was appropriate," and requested that the CSE "do anything they can to try and get us in to visit the [assigned] school" (Parent Ex. E). According to the student's father, the parents received no response from the district to either of their letters requesting information about the assigned school and 12:1+1 special class, or to subsequent telephone follow-up requests for this information (Tr. pp. 226-29; see Parent Exs. E; G).

Due Process Complaint Notice

By due process complaint notice dated January 18, 2010, the parents alleged, among other things, that the district denied the student a FAPE for the 2010-11 school year because the March 2010 CSE lacked an additional parent member,⁵ that the district failed to conduct any new evaluations prior to developing the March 2010 IEP, that the March 2010 IEP did not describe the student's present levels of performance, that the March 2010 CSE did not discuss the annual goals or short-term objectives, and that the goals were generic, vague, and lacked a baseline from which to measure student progress (Dist. Ex. 1 at pp. 2-3). The parents further argued that the March 2010 CSE did not explain to the parents how the recommended 12:1+1 special class would address the student's deficits or identify which related services the student would receive (id.). According to the parents, the district issued an untimely FNR, rendering the student eligible for a Nickerson letter,⁶ Churchill was an appropriate placement for the student for the 2010-11 school year, and equitable considerations favored an award of tuition reimbursement to the parents (id. at pp. 2-4). The parents sought the issuance of a Nickerson

⁴ The hearing record reflects that the student was also receiving private speech-language therapy once per week for 30 minutes per session "since he was probably about four or three;" and in May 2011, he began attending a private "socialization group" outside of school once per week for an unspecified time per session (Tr. pp. 234-35, 244-46).

⁵ The hearing record indicates that the parents declined, in writing, the participation of an additional parent member at the March 2010 CSE meeting (Dist. Ex. 21; see Tr. pp. 18-19, 41; Dist. Ex. 15 at p. 2).

⁶ A "Nickerson letter" is a letter from the district authorizing a parent to place a student in a New York State approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a "Nickerson letter" is intended to address the situation in which a student has not been evaluated or placed in a timely manner (see Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 09-114; Application of a Student with a Disability, Appeal No. 08-020; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

letter for the student's placement at Churchill for the 2010-11 school year, or alternatively, reimbursement for the student's tuition costs at Churchill for the 2010-11 school year (id. at p. 4).

Impartial Hearing Officer Decision

On May 9, 2011, the parties proceeded to an impartial hearing, which concluded on May 27, 2011 after two days of proceedings (Tr. pp. 1, 108). On July 27, 2011, the impartial hearing officer issued a decision. First, the impartial hearing officer addressed the March 2010 IEP and determined that although there were procedural errors made by the district in developing the student's IEP, none of the procedural errors, either individually or collectively, impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (IHO Decision at pp. 17-22). Specifically, the impartial hearing officer found that the CSE conducted and/or relied upon appropriate evaluations of the student's needs in preparation of the IEP (id. at p. 17). Next, he determined that although the descriptions of the student's present levels of performance contained in the March 2010 IEP were inadequate, this inadequacy did not rise to the level of a denial of a FAPE, adding that the description of the student's social/emotional needs contained in the IEP was adequate (id. at pp. 17-18). The impartial hearing officer then examined the annual goals contained in the March IEP and found that they sufficiently addressed the student's needs, except there was no annual goal to address the student's sensory processing difficulties (id. at pp. 18-19). However, he declined to find that the lack of a sensory processing goal rose to the level of a denial of a FAPE (id. at p. 20). Although the impartial hearing officer then found that the goals were vague, did not provide a baseline from which to measure student progress, did not identify methods of measurement, and resulted from inadequate parental participation in their development, he declined to find that these deficiencies rose to the level of a denial of a FAPE (id. at pp. 20-21).

Next, the impartial hearing officer addressed the appropriateness of the March 2010 CSE's recommendation that the student be placed in a 12:1+1 special class in a community school (IHO Decision at pp. 22-24). The impartial hearing officer concluded that the hearing record lacked sufficient evidence demonstrating that the student could make meaningful progress or function appropriately in a general education environment that was less restrictive than the special class in which he was enrolled at Churchill, particularly because the student would be interacting with large groups of students in the hallways and during assemblies, lunch, and recess (id. at p. 23). Consequently, the impartial hearing officer concluded that the district's recommendation that the student attend a 12:1+1 special class in a community school was inappropriate and denied the student a FAPE (id. at pp. 23-24). He further found that the district denied the student a FAPE by precluding the parents from an opportunity to discuss the particular 12:1+1 special class and school that it had assigned the student at the March 2010 CSE meeting, or shortly after the CSE meeting (id. at pp. 24-25).

The impartial hearing officer also concluded that Churchill was an appropriate placement for the student for the 2010-11 school year and that equitable considerations favored the parents (IHO Decision at pp. 25-30). The impartial hearing officer ordered the district to reimburse the parents for the costs of the student's tuition at Churchill for the 2010-11 school year, and although acknowledging that "it [was] not necessary for a decision in this case" because he had found the parents were entitled to tuition reimbursement for the placement of the student at Churchill, the impartial hearing officer commented "that the parents were entitled to a Nickerson

[l]etter authorizing them to place [the student] in an approved non-public school at the [district's] expense for the 2010/11 school year" (*id.* at pp. 30-31).⁷

Appeal for State-Level Review

The district appeals from the impartial hearing officer's decision, arguing, among other things, that the impartial hearing officer's determinations that the district failed to offer the student a FAPE for the 2010-11 school year, that the parents met their burden of proving that Churchill was an appropriate placement for the student, that equitable considerations favored the parents, and that the parents were entitled to tuition reimbursement and a Nickerson letter, were erroneous, and it seeks annulment of those portions of the impartial hearing officer's decision. Specifically, the district alleges that the March 2010 CSE had sufficient evaluative data to support its recommendation that the student be placed in a 12:1+1 special class, that the student could have been appropriately educated with general education peers, and that the recommended placement was the student's least restrictive environment (LRE). The district further argues that the goals used at Churchill were not individualized to the student and that the placement was too restrictive. Lastly, the district argues that the parents did not intend to accept a public school placement for the student.

The parents answer, contending that the impartial hearing officer's decision was legally and substantively sufficient in all aspects and should be upheld on all findings. Specifically, the parents allege that the impartial hearing officer correctly found that the March 2010 CSE did not have before it evaluations that supported a finding that the student could make progress in a less restrictive setting in a "regular public school," and that the hearing record shows that a 12:1+1 special class in a community school was not an appropriate placement to meet the student's unique needs. The parents further assert that Churchill was an appropriate placement for the student because it was reasonably calculated to enable the student to receive educational benefits, provided individualized instruction to the student, was likely to produce progress, and also satisfied the LRE requirements for a unilateral placement. Lastly, the parents contend that because the student attended a State-approved nonpublic school, "equitable considerations should not be a factor in this decision."

Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the

⁷ The impartial hearing officer did not order the district to issue a Nickerson letter in this case, as the relief he awarded was limited to tuition reimbursement for the student's 2010-11 school year at Churchill (*see* IHO Decision at pp. 30-31).

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 C.F.R. § 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], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; 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 impartial hearing officer'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 LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 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 accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 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]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of

Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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 C.F.R. § 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]).

Discussion

Scope of Review

Initially, I note that the district did not appeal, nor did the parents cross-appeal, the impartial hearing officer's findings that the March 2010 IEP failed to specifically reference the student's present levels of performance, that there was insufficient parental input in the development of the March 2010 IEP goals, that the goals were vague and not measurable, and that these deficiencies did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (Pet. ¶¶ 2, 5; see IHO Decision at pp. 17-18, 20-22). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Consequently, these determinations by the impartial hearing officer have become final and binding upon the parties and will not be further addressed in this decision.

March 2010 IEP – 12:1+1 Special Class Placement

The district argues that the impartial hearing officer erred in finding that there was no evaluation or report before the March 2010 CSE indicating that the student would be able to make meaningful progress in a 12:1+1 special class placement in a community school where he would be interacting with large groups of students in the hallways, assemblies, lunch, and recess. The district contends that the hearing record supports the appropriateness of the March 2010 CSE's recommendation and demonstrates that the student's placement in a 12:1+1 special class in a community school was the student's LRE. The district further contends that the student-teacher ratio of the special class recommended in the March 2010 IEP and that of the special class at

Churchill in which the student was enrolled for the 2010-11 school year (and which the impartial hearing officer determined was appropriate for the student) were both 12:1+1 (compare Tr. p. 159, with Dist. Ex. 15 at pp. 1-2; see IHO Decision at pp. 25-28). However, Churchill is only for students with special education needs, while the district's recommended placement was in a community school, which is populated with regular education students (Tr. p. 139). According to the district, the impartial hearing officer erred by providing no basis for his conclusion that the student should be segregated from regular education students.

According to the hearing record, the March 2010 CSE considered the following documents during the meeting: the January 2, 2010 speech-language progress report (Dist. Ex. 4); the two undated related service progress reports relative to the student's speech-language therapy (Dist. Ex. 6) and play therapy (Dist. Ex. 7) at his preschool placement; the November 2, 2009 psychological evaluation (Dist. Ex. 8); the May 14, 2009 health examination form (Dist. Ex. 9); the December 17, 2009 OT checklist (Dist. Ex. 10); the undated parent survey (Dist. Ex. 11); the December 14, 2009 educational progress report (Dist. Ex. 12) and the December 15, 2009 OT progress report (Dist. Ex. 13), both from the student's preschool placement; the February 4, 2010 classroom observation report (Dist. Ex. 19); and the February 4, 2010 PES-SV report (Dist. Ex. 20; see Dist. Ex. 19 at p. 2) (Tr. pp. 20-24).⁸

Regarding the impartial hearing officer's finding that there were no evaluations or reports to support the CSE's recommended 12:1+1 special class placement in a community school, I note that the student's needs and abilities described in the above reports that were considered by the March 2010 CSE are consistent with those reflected in the student's March 2010 IEP and are also consistent with the recommendation for a 12:1+1 special class in a community school. Among other things, and as described in greater detail above, the November 2009 psychological evaluation report indicated that the student showed interest in other children, was responsive to peers, and took pleasure in his interactions with other children (Dist. Ex. 8 at p. 9). The February 4, 2010 classroom observation stated that the student did not mimic some excitable peer behaviors; instead he remained seated focusing on the teacher and lesson and was not fazed by peer distraction (Dist. Ex. 19 at p. 1).

The March 2010 IEP indicated that the student learned well when provided with a "structured, minimally distracting environment with supports from adults," and noted that the student demonstrated delays in abstract reasoning skills, language processing, and fine and gross motor skills (Dist. Ex. 15 at p. 3). Regarding his social/emotional present levels of performance, the March 2010 IEP acknowledged that the student's "functioning [was] impacted by his anxiety, leading to rigid and repetitive play and verbalizations" (id. at p. 4). While acknowledging that the student was "well related," the March 2010 IEP documented his struggles with ongoing reciprocal interaction with peers, his receptive and expressive language delays and their effect on his ability to interact socially and to process his experiences, and his need for help in "naming his emotions" and "developing coping strategies" (id.). The March 2010 IEP also identified the student's management needs for a special class, OT, speech-language therapy, and counseling services in order to address his various delays (id. at pp. 3-4).

⁸ The school psychologist also identified a September 1, 2010 OT evaluation report (Dist. Ex. 27) and a September 2010 speech-language pathology evaluation report (Dist. Ex. 28), as documents considered by the March 2010 CSE (Tr. p. 21). However, these evaluations were conducted more than five months after the March 2010 CSE review meeting.

The district's school psychologist, who participated in the March 2010 CSE meeting, testified that in addition to information gleaned from the February 4, 2010 classroom observation and teacher reports, the CSE relied upon the student's preschool teacher's participation during the meeting (Tr. pp. 29-30). The school psychologist recounted the preschool teacher's identification of the student's deficits and need for support specific to abstract reasoning, answering "wh" questions and open-ended questions, and expanding on detail, as well as her description of the student as "smart" in that his cognitive ability was in the average range for a preschooler entering kindergarten (*id.*). Regarding the academic management needs contained in the March 2010 IEP, the school psychologist explained that the recommended 12:1+1 special class was designed to address the student's academic deficits and enable him to achieve educational benefits through its self-contained and smaller size environment, the presence of a special education teacher and a paraprofessional, and the breaking down of classwork into smaller "chunks" (Tr. pp. 30-31; *see* Dist. Ex. 15 at p. 3). OT was recommended to address the student's fine and gross motor deficits, particularly his handwriting skills (Tr. p. 31). The school psychologist further noted that speech-language therapy was recommended to address the student's pragmatic language, his social interactions, his self-expression with peers, and his ability to follow multistep directions (Tr. pp. 31-32; *see* Dist. Ex. 15 at p. 3).

According to the school psychologist, the counseling services recommended in the March 2010 IEP were designed to address the student's deficits in building social interactions with peers and his social/emotional deficits specific to his struggles with anxiety, his reciprocal interaction with peers, his receptive and expressive language delays, and his inability to name emotions or express his feelings when upset, and to assist him in developing coping strategies (Tr. pp. 32-33; *see* Dist. Ex. 15 at p. 3). She opined that counseling services, implemented in conjunction with speech-language therapy, were designed to support the student's needs in the areas of building interactions and appropriate play with peers, identifying emotions when upset and naming those things that upset him, and in improving his ability to express himself with peers and adults (Tr. pp. 33-34). The school psychologist advised that the levels of these recommended related services contained in the March 2010 IEP were based upon the reports received from the student's preschool providers and preschool special education teacher, and that the CSE took into consideration the number of times the student would be pulled out of class (Tr. p. 38). She also explained that the CSE recommended a 12:1+1 special class in a community school because the student was "very bright;" his readiness skills, according to discussions with the student's preschool special education teacher, were "on point" for kindergarten; and the CSE's responsibility was to make a program recommendation in the LRE (Tr. pp. 36-37, 45-46).

Furthermore, the hearing record demonstrates that the district offered the student a program designed to provide him with access to his nondisabled peers while at the same time tailoring the recommended program to the student's unique needs. The March 2010 IEP recommended student participation in school activities related to lunch, assemblies, trips, and/or other school activities with nondisabled students (Dist. Ex. 15 at p. 10). During the impartial hearing, the special education teacher of the assigned 12:1+1 special class testified that students in the recommended class were taught the "proper" way to socialize and behave during lunch and recess, adding that interaction with regular education students benefited her students because "[w]atching other students in the school can also assist them, both in how to do the right thing, and also, if necessary, if they do see it, how not to do the wrong thing," and concluding "[t]hey're able to see a clear concrete example of behaviors" (Tr. pp. 80, 88-89). I also note that the

hearing record shows that the student had a "clear interest in other children" (Tr. pp. 169-71; Dist. Exs. 7; 8 at p. 9; 12 at p. 6; 24 at p. 4). Based on the foregoing, I find that at the time of the March 2010 CSE meeting, the district's recommended placement was designed to mainstream the student to the maximum extent appropriate and therefore, satisfied the mandate that the student be offered a placement by the district in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d 111). I therefore find that the hearing record reflects that the March 2010 CSE developed an appropriate placement for the student with appropriate related services in the LRE for the 2010-11 school year and that the district offered the student a FAPE as a result of its educational placement recommendation (see Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Placement Meeting

The district asserts that the impartial hearing officer improperly determined, sua sponte, that the district failed to hold a "placement meeting" and erred in finding the parents were eligible for a Nickerson letter due to the district's violation of a stipulation from a federal class action suit, Jose P. v. Ambach (553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982] aff'd 669 F.2d 865 [2d Cir. 1982]).

The IDEA requires parental participation in determining the educational placement of a student (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]). Under the IDEA, a placement team, which is a group of persons including the parents, who are knowledgeable about the child, the meaning of the evaluation data, and the placement options; is responsible for selecting an educational placement that is consistent with the student's IEP (see 34 C.F.R. § 300.116). Although not required under federal law, certain states such as New York permissibly assign this function to the "IEP team" or, in other words, the CSE (see 8 NYCRR 200.4[d][2]–[4]).⁹ However, the assignment of a particular school may be an administrative decision, provided that it is made in conformance with the CSE's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]). The Second Circuit has established that "'educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortar' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see A.L. v. New York City Dept. of Educ., 2011 WL 4001074, at *11 [S.D.N.Y. Aug. 19, 2011], R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII], 34 C.F.R. § 320[a][7], 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 2011 WL 4001074, at *11).

⁹ Although no longer formally applicable, this point was also addressed by the United States Department of Education in federal regulations implementing IDEA 1997, which explained that it was permissible to use the IEP team as the placement team (see prior 34 C.F.R. Part 300, Appendix A, Question 37 [implementing the Individuals with Disabilities Act Amendments of 1997, Pub.L.No.105-17, 111 Stat. 37 amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub.L.No.108-446, 118 Stat. 2647]).

Here, the district formulated an IEP for the student that specifically identified a placement on the continuum of placement options, a 12:1+1 special class in a community school (see 8 NYCRR 200.6[h][4]). At the time of the March 2010 CSE meeting, the parents disagreed with the CSE's proposed placement, but expressed a willingness "to look at and understand what the [12:1+1] class would offer" (Tr. pp. 217-18). The hearing record reflects that the March 2010 CSE considered a general education setting with SETSS and related services, and a special class in a specialized school, but rejected both, considering the former inappropriate to address the student's language processing and social/emotional skills, and concluding that the latter was too restrictive, given the student's overall cognitive functioning (Tr. pp. 37-38; Dist. Ex. 15 at pp. 8-9). On June 15, 2010, the district offered the student a specific assigned school (Dist. Ex. 22). The student's father visited the assigned school on June 23, 2010 (Tr. pp. 222-23). By letter to the CSE dated August 24, 2010, the parents formally rejected the district's recommended program as inappropriate for the student, alleging that they had been denied an opportunity to meaningfully participate in the development of their son's March 2010 IEP (Parent Ex. C). Thus, the evidence in the hearing record shows that the parents had input into and participated in the development of the student's IEP, which, as discussed above, included the student's educational placement recommendation. Therefore, I find that the impartial hearing officer's decision that the district violated the federal regulations by failing to hold a placement meeting was incorrect (see IHO Decision at pp. 24, 30-31).

Further, I concur with the district's assertion that the parents did not raise an issue regarding the lack of a placement meeting in their due process complaint notice or during the course of the impartial hearing (Dist. Ex. 1; see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *6 [S.D.N.Y. Mar. 15, 2011]). Upon review of the due process complaint notice, I find that while the parents sought a Nickerson letter to remedy the district's alleged failure to issue an FNR in a timely fashion, the due process complaint notice cannot be reasonably read to include an assertion that the district failed to provide them with an opportunity at the time of the March 2010 CSE meeting to discuss the school and classroom to which the district assigned the student (see Dist. Ex. 1). Further, the hearing record does not reflect that the parents requested, or that the impartial hearing officer authorized, an amendment to their January 2011 due process complaint notice to include an issue about the lack of a placement meeting. Accordingly, I further find that the impartial hearing officer exceeded his jurisdiction by basing his decision on issues that he raised *sua sponte* in his decision that were not identified in the parents' January 2011 due process complaint notice. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at an impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an impartial hearing officer has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the impartial hearing officer to raise issues that were not presented by the parties and then base his or her determination on the issues raised *sua sponte*. Thus, the impartial hearing officer should have confined his determination to issues raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][2], [f][3][B]; 34 C.F.R. §§ 300.508[b], [d][3], 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7], [j][1][ii]; R.B. v. Dep't of Educ. of City of New

York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

Moreover, even if the issue had been identified in the due process complaint notice, or the parties had agreed to expand the scope of the impartial hearing, jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services, 364 F.3d 925 [8th Cir. 2004]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; E.Z. v. New York City Dep't of Educ., 2011 WL 207974 *5 [S.D.N.Y. Jan. 24, 2011]). No provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal. Consequently, neither the impartial hearing officer, nor I for that matter, have jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K., 2011 WL 1131492, at *17 n.29; W.T., 716 F. Supp. 2d at 289-90 n.15; see M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents rights to enforce the Jose P. consent order]; Levine v. Greece Cent. School Dist., 2009 WL 261470, *9 [W.D.N.Y. 2009] [noting that the Second Circuit has consistently distinguished systemic violations such as those in Handberry v. Thompson (436 F.3d 52 [2d Cir. 2006]) and Jose P. to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators]; Application of a Student with a Disability, Appeal No. 10-115; see also R.E., 2011 WL 924895, at *12; E.Z.-L. v. New York City Dept. of Educ., 2011 WL 207974, at *5 [S.D.N.Y. Jan. 24, 2011]; Dean v. School Dist. of City of Niagara Falls, 615 F. Supp. 2d 63, 70 [W.D.N.Y. 2009]).¹⁰

In sum, I find that the impartial hearing officer reached an issue sua sponte over which he lacked jurisdiction and, therefore, I will annul that portion of his decision that determined the parents were eligible for a Nickerson letter based on his finding that the district failed to offer the parents a placement meeting (Application of a Child with a Disability, Appeal No. 07-130).

Conclusion

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to address the appropriateness of the student's unilateral placement at Churchill, and I need not consider whether equitable considerations support the parents'

¹⁰ Nothing precludes the parties to an administrative due process proceeding from developing a hearing record with regard to the individual needs of a student and asserting arguments regarding appropriate relief, which may, in some cases, be similar to the relief granted to individual plaintiffs in Jose P. (see Application of a Student with a Disability, Appeal No. 10-115).

reimbursement request; thus, the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 11-080; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-094; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated July 27, 2011 which determined that the parents were eligible for a Nickerson letter, determined that the district failed to offer the student a FAPE for the 2010-11 school year, and ordered the district to pay for the student's tuition costs at Churchill are annulled.

Dated: **Albany, New York**
 October 31, 2011


STEPHANIE DEYOE
STATE REVIEW OFFICER