



# The University of the State of New York

The State Education Department  
State Review Officer  
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No. 11-040

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

**Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Neha Dewan, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondent, Alexandra Hinds, 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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Churchill School (Churchill) for the 2010-11 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending Churchill, an ungraded 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. p. 326; Dist. Ex. 6 at p. 1). 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. 330-31). 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]).

## Background

A review of the student's educational history reflects that the student was initially evaluated through the Early Intervention Program (EIP) at 22 months of age and subsequently received speech-language therapy (Dist. Ex. 4 at p. 3). The parent continued the student's speech-language

therapy at private cost when the student turned three years of age and his EIP services ended (*id.*). From ages four to five years old, after undergoing evaluations conducted through the Committee on Preschool Special Education (CPSE), the student received speech-language therapy and occupational therapy (OT) twice per week, as well as special education itinerant teacher (SEIT) services five times per week in a private parochial preschool (*id.*). The student began attending Churchill in kindergarten (Tr. p. 332; Dist. Ex. 4 at p. 3).<sup>1</sup>

The hearing record reflects that during the 2008-09 school year (first grade), the student received an individualized education program (IEP) through the district that recommended a collaborative team teaching (CTT) classroom with a 12:1+1 student-to-teacher ratio at Churchill and related services of OT and speech-language therapy (Parent Ex. A at pp. 1, 14).

On February 4, 2009, a district special education teacher conducted an observation of the student in his classroom at Churchill (Dist. Ex. 11 at p. 1). The February 2009 report reflected that during the observation, the student exhibited a short attention span requiring some redirection, impulsivity (calling out answers out of turn and talking to a peer), and required more time to complete a number facts worksheet than most of his classmates (*id.* at pp. 1-2). The observer also noted language concerns in the student's verbal response and that he frequently requested assistance in completing a worksheet related to the lesson (*id.* at p. 2). The student's teacher indicated that the student was making steady progress in reading, but demonstrated weaknesses in math and encoding (*id.* at pp. 1, 2).

The student underwent a private psychoeducational evaluation in February 2009 to assist in his educational planning for the 2009-10 school year (Dist. Ex. 3 at p. 1). The resultant report reflected that the student's cognitive ability was generally within the low average range of intellectual functioning (full scale IQ 87) according to results of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), and that his academic achievement levels varied from the low average to the average range on various subtests of the Woodcock-Johnson Tests of Achievement - Third Edition (WJ-III ACH), the Wechsler Individual Achievement Test - Second Edition (WIAT-II), and the Gray Oral Reading Tests - Fourth Edition (GORT-4) (*id.* at pp. 7, 11). The report further reflected the student's history of difficulty with sustained attention and impulsive behavior, confirmed by his scores on the Conners' Continuous Performance Test II (CPT-II), and that previous school reports indicated among other things, that the student demonstrated continued difficulty with expressive and pragmatic language skills and motivation (*id.* at pp. 8, 12). The parent's responses on the Behavior Assessment System for Children-Second Edition (BASC-2) Parent Form yielded scores indicating that no clinically significant problems or difficulties were interfering with the student's social, behavioral, or emotional daily functioning (*id.* at pp. 7, 13). However, the student was observed and reported to present as a sensitive child who may withdraw when presented with frustration or challenges related to his language, learning, or attention

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<sup>1</sup> The hearing record reflects that the student attended Churchill pursuant to a Nickerson letter during kindergarten and first grade (Dist. Ex. 4 at p. 3). A "Nickerson letter" is a letter from the district authorizing a parent to place a student in a State approved non public 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 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).

difficulties (id. at p. 7). The psychoeducational report included numerous recommendations regarding strategies to address the student's deficits and recommended continuation in a small, private special education program with a structured, therapeutic, and language-based setting, such as his current placement at Churchill (id. at pp. 8-10). The psychologist also included a description of the student's participation in his classroom setting at Churchill, which reflected that the student was initially distractible and needed teacher prompts to participate in activities, but that he became increasingly more involved after prompting and in general was "on par" with the class regarding material involved with the day's reading lesson (id. at p. 3). He added that the student benefited significantly from the structure and support provided in his classroom and opined that with less individualized attention the student would not have participated or learned as much (id.).

The hearing record does not include an IEP for the student's 2009-10 (second grade) school year. The hearing record reflects, however, that for the 2009-10 school year, the district recommended a 12:1+1 special class in a district school (Tr. p. 32). In addition, the student's progress from September 2009 to December 2009 was described in reports prepared by his related services therapists at Churchill (Dist. Exs. 7; 8; 9).

In a speech-language progress report dated September 2009 through December 2009, the student's speech-language pathologist indicated that with regard to receptive language skills, the student had improved in single word vocabulary comprehension, and in the ability to independently utilize supportive listening strategies, advocate for himself by asking for repetition, follow multiple step commands, and answer a variety of "WH" questions pertaining to contextual information (Dist. Ex. 8). The progress report reflected that the student continued to have difficulty retaining linguistic information as the complexity of a task increased and in answering higher level "when" and "why" questions (id.). Regarding expressive language skills, the speech-language pathologist indicated that categorization and description of critical features had been targeted in order to aid word selection and precision, and that the student's categorization skills had improved, but that he continued to focus on less meaningful information when describing words and missed the most important information (id.). The student also continued to demonstrate difficulty formulating grammatically correct sentences and made errors in verb tense and prepositions but had improved in his ability to repeat the correct forms (id.). He continued to provide minimal responses and needed encouragement and prompts to expand and embellish his descriptions (id.). The student was reportedly cooperative, pleasant, and worked hard in his language group (id.). The speech-language pathologist recommended that the student continue language services twice weekly for 30-minute sessions in a group of three (id.).

The student's occupational therapist indicated in the student's December 2009 progress report that she had reevaluated the student in November 2009 (Dist. Ex. 7). At that time, the student was able to write 96 percent of the lower case letters correctly from memory, as well as the numbers one through ten, copy a nine word sentence with "outstanding" quality, and he demonstrated good in-hand manipulation and cutting skills (id.). The progress report reflected that the student needed to continue to work on balancing the speed and quality of his writing and cutting, decrease the gradation of force on his pencil, and on tying his shoelaces (id.). The occupational therapist indicated that although the student's gross motor skills were adequate for functioning in school, she would continue to address increasing the student's core strength and bilateral coordination (id.). She noted that the student was generally cooperative and worked hard in OT sessions and also noted that the student's teacher reported that he was typically calmer after

participating in a mid-day movement group (id.). The progress report included a recommendation for the 2010-11 school year of two 30-minute sessions of OT per week in a group of six students (id.).

On December 10, 2009 a classroom observation of the student at Churchill was conducted by a district special education teacher (Dist. Ex. 10 at p. 1).<sup>2</sup> The special education teacher completed an observation checklist which reflected that the student was observed for one hour in a class with 12 students and two adults during a writing activity (id.). The checklist reflected that although the student was "slightly shy," he was cooperative, able to participate in group play, take turns and share, and that he responded positively to teacher direction, praise, and affection (id.). Although it was noted that the student easily engaged with the teacher, his ability to work independently was described as "fair" and required prompting (id. at pp. 1-2). According to the classroom teacher, the student had difficulty with concept formation in math and required further concrete examples and guided review at times (id. at p. 2). The checklist indicated that the student was easily distracted visually, but not by auditory stimuli (id. at p. 1). Overall, the student was described as well behaved, quiet, and respectful (id. at p. 2).

On December 30, 2009 the parent signed consent for the district's reevaluation of the student and participated as the informant in the completion of a social history of the student (Dist. Exs. 4 at pp. 1-4; 5). The social history reiterated the student's educational history as described above and reflected the student's auditory processing delays, his need for repeated explanations and breakdown of tasks into small steps, and his difficulty with sequencing and organizing (id. at pp. 1, 3). The parent also indicated that the student continued to be somewhat "fidgety" and benefited from redirection and assistance with transitions (id. at p. 3). The parent's responses also reflected that the student's deficits had a negative effect on his confidence (id.). Although the parent described her son as "painfully shy and insecure," she indicated that he was a "social magnet" with many friends; was sensitive, was helpful when someone else was hurting, got along well with his brother, and had many indoor and outdoor interests (id. at pp. 3, 4).<sup>3</sup>

In a progress report dated January 4, 2010, the social worker who provided the student's counseling services summarized the student's participation in both group and individual sessions (Dist. Ex. 9 at pp. 1-2). The report reflected that the student was an enthusiastic participant in group activities and discussions and was always willing to share his experiences (id. at p. 1). According to the report, the student became distracted by peers and engaged in off-task behavior at times, but responded well to limit setting (id.). In contrast, during individual sessions the student presented as cautious and hesitant to open up and required significant prompting and questioning to sustain involvement in dialogue (id.). The social worker recommended that the student's counseling services be modified to one 45-minute session per week in a group of six for the 2010-11 school year and identified a goal to increase the student's impulse control in social situations and to identify when his behavior is "silly" and off task (id. at p. 2).

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<sup>2</sup> The hearing record indicates that the person who conducted this observation later participated in the February 22, 2010 CSE meeting as the district's special education teacher and also as the district representative (Tr. p. 29).

<sup>3</sup> Attached to the social history were present levels of social/emotional performance and health and physical development pages from an undated IEP that included further information regarding the student (Dist. Ex. 4 at pp. 5, 6).

On January 11, 2010, the student underwent a psychoeducational evaluation at the request of the district (Dist. Ex. 2 at pp. 1, 4). The resultant report included behavioral observations indicating that the student demonstrated a somewhat limited affect and sluggish responsiveness, which his parent opined may have been due to a recent illness (id. at p. 1). However, the evaluating psychologist indicated that the student's task approaches were thoughtful in that he listened carefully to directions, watched demonstrations, and was generally able to grasp directions and proceed in an effective, slow, and deliberate manner (id.). The psychologist also indicated that the student's response when presented with difficult tasks suggested that he may become easily overwhelmed as work becomes more challenging and may withdraw effort that might have led to greater success (id. at p. 2).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ of 84, in the low average range, and index scores ranging from the low average range in working memory and processing speed to the average range in verbal comprehension and perceptual reasoning (Dist. Ex. 2 at p. 2). Specific areas of weakness were noted in the vocabulary subtest regarding the student's ability to find appropriately detailed language to define a word and in his lack of familiarity with some words, in the abstract reasoning subtest regarding his ability to focus on relevant details when detecting subtle but regular changes in patterns, in the working memory subtest regarding his ability to perform a mental manipulation with information he is attempting to hold in short term memory, and in processing speed regarding his ability to efficiently copy abstract visual material (id. at pp. 1-2). The psychologist opined that the scatter among the various subtests suggested the potential for higher functioning (id. at p. 4).

The student's academic achievement was assessed via administration of the Wechsler Individual Achievement Test- Second Edition (WIAT-II), which yielded a reading composite standard score in the average range and a mathematics composite standard score in the low average range (Dist. Ex. 2 at p. 3). The psychologist indicated that the discrepancy between the student's reading and math skills was statistically significant and that although the student's decoding and phonemic awareness were his strengths, his reading comprehension performance may have improved if he had looked back at the material when he had difficulty responding to a question (id. at p. 4). The psychologist also noted that the student was somewhat hesitant to engage interpersonally (id.).

On February 22, 2010, the student's teacher at Churchill completed a teacher report for the Committee on Special Education (CSE) that included a summary of the student's current functioning in all domains (Dist. Ex. 6 at p. 1). The report reflected the student's instructional and independent grade level estimates in mathematics (2.0 and 1.5, respectively) and in reading (2.0 and 2.0) (id.). The teacher report noted the student's strengths in mathematics including solving one-step word problems and telling time to the hour and half hour, and his areas of need in mathematics including having a weak number sense, difficulty understanding math vocabulary and concepts, and difficulty remembering basic addition and subtraction facts (id.). Regarding reading, the report reflected that the student's strengths included strong comprehension of literal details and ability to blend sounds to make words, and that his areas of need included reading fluency, making inferences and predictions, and extracting implicit information (id.). When describing the student's ability to follow directions, the teacher indicated that the student had difficulty following verbal directions, especially multi-step directions, and needed directions to be repeated several times (id.). She further indicated that gaining the student's eye contact was necessary in order to ensure that

he was paying attention, and heard and understood the directions (id.). The student was reported to work best in a small group setting as he required frequent check ins to be sure he understood the directions and the information given (id.).

With regard to the student's ability to communicate verbally, the teacher report indicated that the student struggled to express himself due to difficulties organizing and sequencing his thoughts, which resulted in sentences that did not reflect complete thoughts or ideas (Dist. Ex. 6 at p. 1). The student was also reportedly hesitant to participate orally in class and often lacked details and complete ideas when talking with his peers (id.). In the area of written language, the report indicated that the student had good ideas, was able to write good simple sentences, used ending punctuation, and attempted to apply learned spelling rules to his writing, but needed to work on writing more complex sentences by including more details and descriptive language; using correct subject-verb agreement; and learning strategies to self-edit his work (id. at p. 2). Regarding motor skills, the report indicated that the student's gross and fine motor skills were below that of his peers; he pressed very hard when writing with a pencil causing fatigue, had difficulty cutting and gluing, and in gross motor movement, had difficulty controlling his body and performing coordinated movements (id. at p. 2). The student's interaction with his peers was described as kind, compassionate, cooperative, and friendly (id.). His relationship to authority was described as very respectful, although he occasionally tested limits and he benefited from clear expectations and positive reinforcement (id.). Regarding the student's reaction to frustration or failure, the teacher indicated that when the student became "frustrated and perceive[d] a task as difficult, he shut[] down and [became] quiet" (id.). However, the teacher also noted that the student had a great work ethic and was able to return to the task and continue working when given teacher support (id.). The teacher indicated that successful strategies for the student included a small group environment, repetition, and teacher support in order to complete his work, use of hands-on manipulatives and visual aids when learning abstract concepts, and the provision of clear expectations and boundaries (id.).

The CSE convened on February 22, 2010 for an annual review of the student and to develop his IEP for the 2010-11 school year (Dist. Ex. 1 at pp. 1, 2). Meeting attendees included a district special education teacher who also functioned as the district representative, a district school psychologist, the parent, and telephonically from Churchill, the director of admissions and the student's special education teacher at that time (Tr. p. 29; Dist. Ex. 1 at p. 2). The February 2010 CSE discussed the student's needs and developed a statement of present levels of performance in the areas of academics, social/emotional needs, and health and physical performance (Tr. pp. 41-47; Dist. Ex. 1 at pp. 3-7). The CSE developed statements of academic and social/emotional management needs (Tr. pp. 47-55; Dist. Ex. 1 at pp. 3, 4, 5) and annual goals to address the student's needs in reading, mathematics, following directions, writing, organization, attending, speech-language, graphomotor skills, balance, and social/emotional skills (Dist. Ex. 1 at pp. 8-18).<sup>4</sup> The IEP also included testing accommodations and modified curriculum criteria (id. at p. 21).

The February 2010 CSE determined that the student was eligible for special education services as a student with a speech or language impairment and recommended that the student be placed in a 12:1+1 special class in a community school with related services including two 30-

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<sup>4</sup> I note that page 12 of the student's February 2010 IEP is a duplicate of page 11 (see Dist. Ex. 1 at pp. 11, 12).

minute group (of six) OT sessions per week, two 30-minute group (of three) speech-language therapy sessions per week, and one 30-minute individual and one 30-minute group (of six) counseling sessions per week (Dist. Ex. 1 at pp. 1, 21). The IEP also recommended full participation in nonacademic school activities with nondisabled students (id. at p. 21). The February 2010 IEP reflected that the CSE also considered a general education program with related services, Special Education Teacher Support Services (SETSS), CTT, and a 12:1 special class in a community school, but rejected them because they did not offer the student enough support to meet his goals (id. at p. 20).

Minutes taken at the February 2010 CSE meeting indicated that the parent related her concerns to the CSE regarding the student's educational needs, including that she wanted the student to be with "the people who could motivate him and push him ahead academically" (Dist. Ex. 12 at p. 1). The minutes further reflected that discussion took place with regard to the student's abilities as indicated by the February 2009 and January 2010 psychoeducational evaluation results as well as through report from his teacher (id. at pp. 2, 6). According to the minutes, the student's attention, motivation, management needs, social/emotional needs, and speech-language needs were also discussed at the CSE meeting (id. at pp. 2, 3, 4, 5, 6). The minutes reflected that the parent and Churchill staff disagreed with the CSE's recommendation of a 12:1+1 special class in a community school and that the parent stated she had viewed two other classes in previous years and did not agree with the placements (id. at p. 4). The minutes further reflected that the parent was given an explanation of her due process rights (id. at p. 1).

On March 9, 2010 the parent signed a contract with Churchill for the 2010-11 school year (Parent Ex. H at pp. 1-2).

By letter dated June 28, 2010 the district notified the parent of the location of the student's assigned school and summarized the program and related services recommendations made in the February 2010 IEP (Dist. Ex. 13).

The parent responded to the district by letter dated July 5, 2010 (Parent Ex. B at pp. 1-3). In her letter, the parent informed the district that receipt of the placement notice after the close of the school year resulted in her inability to contact the assigned school to obtain information (id. at p. 1). The parent further indicated that she had concerns regarding the large community school environment and the functional grouping in a 12:1+1 class, as well as the IEP created for the student for the 2010-11 school year (id.). The parent requested information about the assigned school and the offered program including a class profile and indicated that until she was able to determine its appropriateness, the student would begin the 2010-11 school year at Churchill (id.). She further indicated that if she deemed the offered program and IEP inappropriate, the student would continue at Churchill and she would seek reimbursement for the cost (id.).

In a letter and facsimile dated August 25, 2010, the parent wrote to the district again, indicating that because she had not received the requested information regarding the assigned school and based on concerns raised in her previous letter dated July 5, 2010, she was unable to accept the IEP and the offered placement (Parent Ex. C at pp. 1-2). The parent added that upon the start of the 2010-11 school year, she would again attempt to visit and obtain information regarding the assigned school; however, unless an appropriate IEP and program were offered, she would seek reimbursement for the cost of Churchill (id.).

In a letter to the district dated September 23, 2010, the parent indicated that she had visited the recommended program at the assigned school and found it inappropriate to meet the student's needs (Parent Ex. D at pp. 1-2). The letter reflected that the parent did not believe the offered placement provided an appropriate academic or social/emotional peer group for the student; that the reading and math levels of the class were well below that of the student; that the paraprofessional, who did not speak English as her first language, would be too difficult for the student to understand given the student's language impairment and difficulty processing and understanding information; that the paraprofessional did not have adequate academic and professional training to meet the student's needs; that the class would not target the student's specific language and learning needs; the school was too large and too loud and the student would be overwhelmed and over stimulated in the environment; and that the student would be unable to handle the social demands of mainstreamed lunch, recess, and gym which would result in the exacerbation of his self-esteem deficits (*id.* at p. 1). In her letter, the parent noted that she and Churchill staff believed that the student required a "CBST placement" and that since the CSE provided no reasonable explanation as to why they did not recommend a "CBST," she disagreed with the IEP, the process by which it was created, and the offered placement that resulted from the February 2010 CSE meeting (*id.*).<sup>5</sup> Accordingly, the letter indicated that the student would remain at Churchill and the parent would be seeking reimbursement of the costs, as the parent alleged that it was the "last agreed upon program" for the student (*id.*).

### **Due Process Complaint Notice**

In a due process complaint notice dated September 27, 2010, the parent asserted that the composition of the February 22, 2010 CSE was improper because the CSE did not include a teacher that was teaching in a district program (Dist. Ex. 14). In addition, the parent asserted that the CSE did not comply with proper procedure because it failed to appropriately review and consider documentation and opinions that the student required a small full-time special education class in a small school environment, and that Churchill met the student's needs (*id.*). The parent further asserted that the CSE's recommendations failed to offer the student special education on a continuous basis throughout the day, a behavior management system and positive reward system, and an assistant teacher rather than a teacher assistant (*id.*). In addition, the parent asserted that the district failed to offer the supports necessary for the student to meet his goals (*id.*). The parent further asserted that the students in the assigned class did not provide an appropriate academic or social grouping, that the student required "two trained teachers," that the large school would heighten his attentional issues, and that mainstreaming for certain activities was inappropriate and would exacerbate his self-esteem issues (*id.*). As relief, the parent sought continuation of the student's program at Churchill "by funding or placement in th[e] program, or in the alternative, tuition reimbursement" (*id.*).

### **Impartial Hearing Officer Decision**

In a decision dated March 8, 2011, the impartial hearing officer found that the district failed to establish that the student was offered a free appropriate public education (FAPE) for the 2010-

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<sup>5</sup> Although not described in the hearing record, the "CBST" appears to refer to the district's "Central Based Support Team" (see e.g., Application of a Student with a Disability, Appeal No. 09-134; Application of a Student with a Disability, Appeal No. 09-097; Application of the Dep't of Educ., Appeal No. 08-058).



11 school year (IHO Decision at p. 27).<sup>6</sup> The impartial hearing officer specifically found that the 12:1+1 placement at a district school was not appropriate because none of the documentary evidence supported the appropriateness of the 12:1+1 placement (id. at p. 26). The impartial hearing officer found that the failure of the CSE to consider the recommendations by the parent and the student's teacher for a full-time special education setting significantly impeded the parent's opportunity to participate in the decision-making process (id. at pp. 26-27). Moreover, the impartial hearing officer found that the CSE did not have evaluations that supported the elimination of adapted physical education or special education services during non-academic periods such as lunch, recess or gym, which were necessary to support the student's emotional needs (id. at pp. 25-26). In addition, the impartial hearing officer found that the lack of appropriate academic goals to address the student's language processing and social/emotional needs deprived the student of a FAPE and significantly impeded the parent's opportunity to participate in the decision-making process (id. at p. 26).

The impartial hearing officer further found that the district failed to establish that the parent and the student's teacher meaningfully participated in the decision-making process and that the lack of CSE evaluations to support the reduction of special education services significantly impeded the parent's opportunity to participate in the decision-making process (IHO Decision at p. 26). In particular, the impartial hearing officer found that the student's teacher and the director from Churchill who participated in the CSE meeting by telephone, were not provided with copies of the assessments including the psychological evaluation and the classroom observation that the CSE relied on to develop the February 22, 2010 IEP (id.). In addition, the impartial hearing officer found that the student would not be grouped with children with similar academic needs for reading and math in the assigned class, that the grouping in that class was not similar as to the student's management needs, and that it was not appropriate to have two students in that class who were classified as students with an emotional disturbance (id. at p. 27).

As to the appropriateness of the parent's unilateral placement, the impartial hearing officer found that the hearing record contained sufficient evidence showing that the program at Churchill met the student's individual needs (IHO Decision at pp. 27-28). As to equitable considerations, the impartial hearing officer found that the equitable considerations supported the parent's claim for reimbursement (id. at pp. 28-29). As relief, the impartial hearing officer ordered the district to continue to fund the student's placement at Churchill, or in the alternative provide tuition reimbursement for the 2010-11 school year (id. at p. 29).

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

In its petition, the district asserts that the impartial hearing officer failed to set forth the reasons and a factual basis for some of her determinations, and that the impartial hearing officer based part of her decision on issues not raised by the parent in the due process complaint notice. In addition, the district asserts that the CSE was properly composed, and that the district reviewed the appropriate documentation and offered the student an appropriate program. The district also

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<sup>6</sup> On December 6, 2010, the impartial hearing officer issued an interim decision effective from September 27, 2010, providing that Churchill constituted the student's pendency placement (IHO Interim Order at p. 2).

asserts that the parent's unilateral placement was inappropriate and that the equitable considerations favored the district.

In her answer, the parent denies that the impartial hearing officer failed to provide a legal basis for her decision, and asserts that the impartial hearing officer's conclusions were not "general statements," but rather based on testimony and credibility findings. In addition, the parent denies that the impartial hearing officer based her decision on issues not raised in the parent's due process complaint notice, and moreover, asserts that the issues were not objected to at the impartial hearing, in the district's closing brief or post-reply brief and that by failing to object, the district waived any objection regarding the appropriateness of and procedural and substantive errors associated with the goals and alleged alteration of the IEP by the district. In addition, the parent admits and denies other allegations made by the district and asserts that the impartial hearing officer properly found that the district denied the student a FAPE for the 2010-11 school year, that the parent's unilateral placement was appropriate, and that equitable considerations favored the parent.

### **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 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]; 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 least restrictive environment (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**

### **Adequacy of the Impartial Hearing Officer Decision**

As an initial matter, I will address the adequacy of the impartial hearing officer's decision. The district alleges that the impartial hearing officer's decision does not comport with the appropriate standard of legal practice. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). Moreover, State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable legal standards are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision (see Application of a Student with a Disability, Appeal No. 11-002; Application of the Dep't of Educ., Appeal No. 09-092; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-064).

Here, the impartial hearing officer offered a summary of the testimonial evidence in the hearing record with appropriate citations, and identified documentary exhibits entered into evidence (IHO Decision at pp. 3-22). The impartial hearing officer also set forth some applicable legal standards with citations (*id.* at pp. 22-24). Accordingly, there is no need in this particular instance to disturb the impartial hearing officer's findings on the basis of the adequacy of her decision.

### **February 2010 CSE**

#### **Composition – Special Education Teacher**

I will next consider whether the February 2010 CSE was improperly composed because the district's special education teacher who participated at the CSE meeting was not teaching in a district program at the time of the meeting.<sup>7</sup> The IDEA requires a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 C.F.R. § 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicate that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

The hearing record reflects that a special education teacher from the district and the student's special education classroom teacher from Churchill participated in the February 2010 CSE meeting (Tr. p. 29; Dist. Ex. 1 at p. 2). The hearing record reflects that the district's special education teacher previously taught special education, but was not teaching within a classroom at the time of the February 2010 CSE meeting (Tr. pp. 106-07). Although I find that the February

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<sup>7</sup> I note that the impartial hearing officer did not address this issue (see IHO Decision), but that it was raised in the parent's due process complaint notice (see District Ex. 14) and by the parties on appeal (Pet. ¶¶ 60-61; Answer ¶ 60).

2010 CSE lacked a special education teacher who could have personally implemented the student's IEP had the student attended the district's proposed program, I decline to find that this constituted a procedural violation, as the language of the IDEA and State regulations do not require that the special education teacher "of the student" at the CSE meeting be a district employee, and the language used in the comment to the applicable federal regulation (34 C.F.R. § 300.321[a][2]-[3]) indicating that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (see IEP Team, 71 Fed. Reg. 46670), does not constitute a binding requirement and appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement. Although the parent asserts that there was no CSE participant who was able to explain how the CSE's recommendation for a 12:1+1 class in a district school would appropriately meet the student's needs, the hearing record reflects that the district's psychologist, who testified at the impartial hearing, could explain the curriculum and supports of a 12:1+1 program (Tr. p. 32). In addition, I find that the hearing record demonstrates the active participation of the student's then-current Churchill special education classroom teacher at the February 2010 CSE meeting; specifically, that the Churchill special education teacher discussed with the CSE the student's needs and developed a statement of present levels of performance in the areas of academic, social/emotional, and health and physical performance (Tr. pp. 41-47, 47-55; Dist. Ex. 1 at pp. 3-7). Moreover, the hearing record reflects that at the February 2010 CSE meeting, the CSE considered a teacher report dated February 22, 2010, prepared by the student's Churchill teacher (Tr. pp. 61-62; Dist. Ex. 6). In addition, a review of the hearing record reflects that the concerns of the parent and the student's Churchill teacher were considered by the February 2010 CSE (Tr. p. 162).

Upon review, I find that although the hearing record demonstrates that there was no individual present at the February 2010 CSE meeting who could have personally implemented the student's proposed IEP, the fact that the special education teacher of the student was from the private school does not negate the appropriateness of her participation as the special education teacher of the student. Accordingly, I am not persuaded by the evidence in the hearing record that this was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]), particularly in light of the participation of the student's private school special education teacher at the February 2010 CSE meeting (see Application of the Dep't of Educ., Appeal No. 08-105).

### **Telephonic Participation at CSE Meeting**

Regarding the finding by the impartial hearing officer that the telephone participants at the CSE meeting did not have all documents that were available to the CSE and that such denied the parent meaningful participation (see IHO Decision at p. 26), when conducting a CSE meeting, the parent and district representative of the CSE may agree to use alternative means of meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]; see 34 C.F.R. § 300.328). Initially, I find that there is no indication in the hearing record that the parent objected to any CSE member's telephonic participation at the time of the CSE meeting. Moreover, although testimony by the director of Churchill reflected that she did not recall whether she received documents from the CSE prior to the February 2010 CSE meeting, she also testified that

she believed that the results of the district's psychoeducational evaluation and the classroom observation were read at the CSE meeting (Tr. pp. 353-54). Furthermore, testimony by the student's 2009-10 Churchill teacher indicated that she had the district's psychoeducational evaluation in front of her during the CSE meeting and was following along with the discussion regarding grade levels and scores (Tr. pp. 633-34). She further testified that she also had the teacher report that she had written, the draft IEP pages, and the evaluations from the student's Churchill speech-language pathologist, occupational therapist, and counselor (Tr. p. 633). I note also that the classroom observation that the CSE relied on to develop the February 2010 IEP was conducted in the student's then-current Churchill classroom and as such, the Churchill teacher would have been familiar with what took place during the observation (Tr. pp. 28, 114; Dist. Ex. 10 at pp. 1-2). Accordingly, I find that the hearing record does not show that the telephonic participation at the February 2010 CSE meeting was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 2005]; see also E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419).

## **February 2010 IEP**

### **Annual Goals**

Regarding the parties' dispute over the adequacy of the annual goals, an IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

Although the impartial hearing officer found that the parent and the student's teacher from Churchill did not participate in the development of IEP goals that were specific to a 12:1+1 placement in a community school, but rather participated in the development of goals specific to a full-time special education class with "2 trained teachers" in a special education school (see IHO Decision at p. 24), I find that the annual goals were drafted to correlate with the student's needs and abilities as legally required (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). The hearing record reflects that the academic goals were written by the student's then-current special education teacher at Churchill;<sup>8</sup> and that the speech-language, OT, and counseling goals reflected in the IEP were written by the student's then-current speech-language pathologist, occupational therapist, and social worker at Churchill

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<sup>8</sup> The district's school psychologist testified that the student's February 2010 IEP contained additional academic goals developed by the psychologist who conducted the January 2010 psychoeducational evaluation of the student that were "in keeping with Churchill goals" and reflected the student's performance during the evaluation (Tr. p. 133).

(Tr. p. 612). Moreover, the district's school psychologist who participated in the February 2010 CSE meeting testified that she reviewed the annual goals included in the student's February 2010 IEP that were written by the student's Churchill special education teacher and providers prior to the CSE meeting, and that they were consistent with the student's needs as described in the reports prepared for the CSE meeting (Tr. pp. 62-63). Her testimony further indicated that the goals were discussed generally at the CSE meeting and that at the CSE meeting there was no disagreement or indication by any of the CSE participants that any of the goals were inappropriate, inadequate, or required development or deletion (Tr. pp. 62-63).<sup>9,10</sup>

### **Revision of Draft IEP**

Regarding the impartial hearing officer's finding that the CSE made revisions to the student's February 2010 IEP without parental participation by crossing out certain provisions contained in the student's February 2010 IEP, including the need for a behavioral management program, a teacher assistant and adapted physical education (see IHO decision at p. 25), I note that the hearing record reflects that a "draft" or "proposed" IEP was created for the student prior to the CSE meeting, which reflected a combination of proposals from different people who took part in the CSE meeting, including information provided by the student's Churchill teacher and the student's related services providers, and information contained in the student's January 2010 district psychoeducational evaluation (Tr. pp. 28-29, 43, 63, 609-12).<sup>11</sup> Moreover, the hearing record reflects that the district's school psychologist crossed out or edited and initialed portions of the proposed IEP during the February 2010 CSE meeting after the CSE review of appropriate evaluative material, parental participation and participation of staff from Churchill (Tr. pp. 40-42, 42-43, 60, 61-62, 135, 136, 140, 155-56, 162-64; Dist. Ex. 1 at pp. 6, 7, 19, 21). As discussed in this decision, the recommendations in the IEP reflected the student's needs. Therefore, the revisions made to the IEP did not deprive the student of a FAPE and instead show that development of the IEP occurred through the collaborative process that was envisioned under the IDEA (A.H., 2010 WL 3242234, at \*2; J.C. v. Reg. Sch. Dist. 10, 278 F.3d 119, 121 [2d Cir. 2002]).

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<sup>9</sup> With regard to the impartial hearing officer's finding that the lack of goals on the IEP addressing language processing deprived the student of a FAPE, I note that at least 11 of the student's goals addressed the student's language processing deficits either within the goals themselves or through the method of instruction and the strategies utilized to accomplish the goals (Dist. Ex. 1 at pp. 8, 9, 10, 11, 13, 14, 15, 16). Additionally, the IEP also included academic management strategies to aid the student's language processing and thereby assist the student in achieving his goals, including the provision of frequent prompting, rewording, repetition, guided review, multisensory learning, visual cues, simplified oral instruction, and consistent review of key ideas (id. at pp. 3, 4).

<sup>10</sup> With regard to the impartial hearing officer's finding that the lack of goals to address the student's social/emotional needs deprived the student of a FAPE, I note that the February 2010 IEP included a goal to address the student's impulse-control in social situations, as recommended by the student's Churchill social worker (Dist. Exs. 1 at p. 18; 9 at p. 2). The CSE meeting minutes and testimony by the director of Churchill indicate that there was "strong discussion" regarding the student's social needs at the CSE meeting (Tr. p. 396; Dist. Ex. 12 at pp. 4, 5, 6), and the hearing record supports a finding that the social/emotional goal in the student's IEP adequately addressed the student's needs as depicted in the Churchill staff reports (Dist. Exs. 6 at p. 2; 8; 9 at pp. 1-2).

<sup>11</sup> The impartial hearing officer incorrectly referred to adapted physical education as "adaptive physical therapy" (see Dist. Ex. 1 at p. 7).

## The Student's Needs and Special Class Placement

Upon review, and as more fully described below, I find that the hearing record reflects that the February 2010 IEP accurately reflected the student's needs, and that the February 2010 CSE developed an appropriate placement for the student with appropriate related services in the LRE for the 2010-11 school year.

Regarding the student's needs, the hearing record reflects that the student exhibited deficits in receptive and expressive language processing, including the intake of information or directions and ability to express himself verbally or in writing (Tr. pp. 406-07; Dist. Ex. 2 at p. 2). The student's needs required that language for instruction and directions be broken down (Tr. p. 407; Dist. Ex. 6 at p. 1). Although the student was able to immediately recall orally presented material, he had difficulty when required to perform a mental manipulation of the information that he was attempting to hold in his short term memory (Dist. Ex. 2 at p. 2). Moreover, the student became anxious when he perceived tasks as difficult (Tr. p. 444; Dist. Ex. 2 at pp. 2-3). The student also demonstrated deficits in social pragmatics, specifically in initiating interactions with peers (Tr. pp. 407-08). Upon review, I find that the hearing record reflects that the student's February 2010 IEP appropriately identified and addressed the student's needs, as discussed below.

Regarding the finding by the impartial hearing officer that the February 2010 CSE did not rely on any assessments or evaluations to determine that the recommended 12:1+1 district placement was appropriate, I note that the needs and abilities described in the student's February 2009 private psychoeducational report are consistent with those reflected in the student's February 2010 IEP and are also consistent with the recommendation for a 12:1+1 special class in a community school. The February 2009 psychoeducational evaluation included many recommendations for the student that correlate closely with the academic management strategies delineated on the student's February 2010 IEP including among other things, a small, structured, language-based special education program; frequent directives to attend (prompting, visual cues); frequent review of learned material to make overt connections to previously learned material or associations to assist with new learning (consistent review of key ideas, guided review, repetition); and clearly stated expectations (simplified oral instruction, rewording) (see Dist. Ex. 3 at pp. 8-10; see also Dist. Ex. 1 at pp. 3, 4). I note that although the evaluators indicated that "any less of a restrictive academic environment would lead to regression of skills," they did not indicate that the student would be unable to participate in a less restrictive nonacademic environment (Dist. Ex. 3 at p. 9). Additionally, although the evaluators recommended that the student should continue to receive related services of speech-language therapy and OT, they did not include in their recommendations that the student required adapted physical education (id.).

With regard to the impartial hearing officer's finding that the February 2010 CSE did not consider the recommendation made by the parent and the Churchill staff for placement at Churchill (IHO Decision at pp. 26-27), as discussed above, I find that the hearing record supports the district's recommendation to place the student in a 12:1+1 placement in a community school (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that the underlying judgment of those having primary responsibility for formulating a student IEP is given considerable weight]; Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641, [7th Cir. 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]) see Rowley, 458 U.S. at 207; Watson, 325 F.Supp.2d at 145). The district's school psychologist



testified that during the CSE meeting she took what the parent and the Churchill teacher were saying seriously, "absolutely" considered it, and that although the CSE works toward a consensus, the aim of the meeting is to make the most appropriate recommendation for the student (Tr. pp. 159, 160, 162). She further testified that when a parent provides information that indicates a student would not benefit from instruction in the program recommended by the CSE, another program can be considered based on that information (Tr. p. 163). Here, the hearing record demonstrates that the CSE considered the parent and Churchill's recommendation, but ultimately disagreed with it as an appropriate program based on the totality of information before them (Tr. pp. 159-62). Although the parent may have understandably preferred the Churchill program over the February 2010 CSE's placement recommendation, the fact that the parent or Churchill expressed a different viewpoint does not mean that the district failed in its obligation to offer an appropriate IEP.

Regarding the parent's assertion that the student requires an "assistant teacher" and that a "teacher assistant" (or paraprofessional) as reflected on the student's IEP was therefore not appropriate, the district's school psychologist testified that during the CSE meeting, she discussed with Churchill staff the student's need for an assistant teacher as opposed to a paraprofessional (Tr. p. 135).<sup>12</sup> She testified that contrary to the district's belief that the student would be appropriately supported by a paraprofessional, Churchill staff felt that the student required more support than a paraprofessional and that the student required two teachers in the classroom (Tr. p. 136). Upon review of the hearing record, I note that the student's Churchill teacher testified that the assistant teacher in the student's Churchill class was responsible only for teaching the student reading under the support of the classroom teacher and that she participated in the planning and designing the curriculum with the classroom teacher (Tr. p. 601). Testimony by the district's school psychologist indicated that the role of the paraprofessional is to provide extra support for the students, to help the teacher implement the students' goals, and to work with some of the students in small groups while the teacher provides instruction to another small group of students (Tr. p. 33). She further testified that the management needs on the student's IEP could be implemented in a classroom with a teacher and a paraprofessional as opposed to two special education teachers (Tr. pp. 164-65). Additionally, the teacher of the district's proposed classroom explained that the role of a paraprofessional is to reinforce the curriculum to students in small group instruction, support students emotionally, provide extra attention to students if needed, and to provide students with "time alone" (Tr. p. 191). Based on the evidence in this case, the hearing record supports that the student's needs could be appropriately addressed by a classroom staffed with a special education teacher and a paraprofessional and that he did not require a minimum of two teachers in order to be offered a FAPE.

### **Behavior Management Program**

Regarding the student's social/emotional performance, I note that the CSE accurately described the student's present levels of performance as including the student's distractibility, inability to take risks, and pragmatic needs interfering with his social interactions with peers and adjustment to school and community environments (Dist. Ex. 1 at p. 6). The CSE appropriately found that the student's behavior did not seriously interfere with instruction and could be addressed

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<sup>12</sup> In this case, the district's school psychologist testified that an assistant teacher is someone who is a certified teacher whereas a teacher assistant is a paraprofessional (Tr. p. 135).

by the special education teacher (*id.* at pp. 5, 6). With regard to the parent's assertion that the student needed a behavior management program, the school psychologist testified that the language on the IEP indicating that the student required a schoolwide behavior management program was crossed out during the CSE meeting because the IEP reflected that the student's behavior did not seriously interfere with instruction and could be addressed by the special education classroom teacher (Tr. pp. 60-61; Dist. Ex. 1 at p. 6). The school psychologist further testified that based on the information provided by the "psychoed, the social history, the teacher report, and the related service provider reports," the CSE believed that the student's social/emotional needs were not serious enough to warrant a behavior plan and that his needs could be addressed through his counseling goals and through the support of his teacher, the paraprofessional in the classroom, and his related services providers (Tr. pp. 61-62). The school psychologist further testified that the type of behavior management plan which is required to be included with the IEP is only generated for students who exhibit more serious behaviors such as self-injurious behavior, physical aggression, or verbal aggression and when the behaviors seriously interfere with instruction (Tr. pp. 60-61). Moreover, the school psychologist testified that even though the CSE did not include a behavior management plan in the student's IEP, it did not preclude a teacher from using some kind of behavior management plan in the classroom (Tr. p. 166). Upon review of this evidence, I find that the CSE's recommendation of the related service of counseling to address the student's social/emotional management needs was appropriate and that the hearing record supports a finding that the student did not need a behavior management program.

### **Adapted Physical Education**

Turning next to the student's health and physical development, I find that the CSE appropriately determined that the student does not have mobility limitations and that the student does not require adapted physical education (Dist. Ex. 1 at p. 7). I note that the school psychologist testified that the initial information reflected in the IEP, which indicated that the student required adapted physical education was written by the Churchill teacher because the student would have received adapted physical education at Churchill (Tr. pp. 43-44). She further testified that she crossed out the portion of the IEP indicating that the student required adapted physical education because based on the reports, the student's progress, and the fact that the student was "socially appropriate," a small adapted physical education class was not necessary (Tr. p. 43).

Regarding the determination by the impartial hearing officer that the hearing record does not support the appropriateness of the district's program because the student would not have received special education services during nonacademic periods, I find that such a finding is not supported by the hearing record. I note testimony by the school psychologist that she changed the IEP to reflect that the student would have "full participation" in general education in nonacademic areas because the description of the student by the parent and staff at Churchill did not indicate that the student would be unable to function with general education students for non-academic periods (Tr. pp. 140-41). In addition, I note that the student was described throughout the hearing record as a polite, well-mannered boy, who was cooperative and pleasant, kind and compassionate, friendly, easy to play with, respectful of authority, and notably, the parent described him in the December 2009 social history as a "social magnet" with lots of friends, very "huggy," and sociable (Dist. Exs. 3 at p. 3; 4 at pp. 1, 4; 6 at p. 2; 7; 8). I note also that the student was reported to enjoy activities such as soccer and art and participated in these activities both in and outside of

the special education school environment (Dist. Ex. 6 at p. 3). The school psychologist further testified that the student's social/emotional well being would be supported by the special education teacher, the paraprofessional, the occupational therapist, the speech-language pathologist, and by the group and individual counseling services recommended on the IEP (Tr. p. 59).<sup>13</sup> Based on the above, I find that the hearing record reflects that the student would have been able to participate in nonacademic general education activities.

### **Least Restrictive Environment**

The IDEA requires that a student's recommended program must 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 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993] J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

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<sup>13</sup> Although testimony by the student's 2009-10 Churchill teacher reflected that the student had significant social interaction deficits, including difficulty with social pragmatics to the extent that he was unable to have a reciprocal conversation or initiate social interaction, only had friends as a result of the teacher facilitation that she provided, was "very, very rigid," needed specific directions during unstructured times such as when lining up and during lunch or recess in order to know what to do and where to stand, and that the student was both afraid and unable to express himself and express his views, opinions, wants and needs (Tr. pp. 597-99, 629-30, 638-39), I note that none of the reports provided to the CSE by Churchill staff indicated that the student demonstrated significant deficits in social interaction or social pragmatics (Dist. Exs. 6 at pp. 1-3; 7; 8; 9 at pp. 1-2). Also, while testimony by the student's 2010-11 Churchill teacher indicated that she recognized that the student had deficits in the areas of language processing and social pragmatics (Tr. pp. 406-08), she also testified that the student's social skills were not interfering substantially in his education in any way and were not significantly affecting his academics (Tr. pp. 512, 517).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).<sup>14</sup>

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In this case, the evidence regarding the student's needs described above does not support the conclusion that the student can be educated satisfactorily in a general education environment for academic subjects, nor does either party suggest that such a placement would be appropriate. Consequently, the first prong of the Newington LRE test is resolved in favor of the district and I will therefore turn to the second prong, whether the district has provided mainstreaming opportunities to the student to the maximum extent appropriate (see J.G. v. Kiryas Joel Union Free Sch. Dist., 2011 WL 1346845, at \*33 [S.D.N.Y. Mar. 31, 2011]). While recognizing that the parent and staff at Churchill have asserted that the student requires a special class for nonacademic subjects, as previously noted in the discussion above, none of the reports provided to the CSE by Churchill staff indicated that the student demonstrated significant deficits in social interaction or social pragmatics (Dist. Exs. 6 at pp. 1-3; 7; 8; 9 at pp. 1-2). Also, while testimony by the student's current 2010-11 Churchill teacher indicated that she recognized that the student had deficits in the areas of language processing and social pragmatics, she also testified that the student's social skills were not interfering substantially with his education in any way and were not significantly affecting his academics (Tr. pp. 406-08, 512, 517). Accordingly, upon review of the hearing record, I find that at the time of the February 2010 CSE meeting, the district's recommended

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<sup>14</sup> The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

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. Having reached this conclusion, along with the previous conclusions above, I find that the district offered the student an IEP that was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

### **Assigned School**

#### **Assigned Class**

Next, with regard to the finding by the impartial hearing officer that implementation of the 40 periods of special education per week as reflected on the student's IEP would not be possible in a special class in a community school because the student would be mainstreamed for lunch, recess and gym (IHO Decision at p. 25), I note that the hearing record reflects that the 40 periods noted on the IEP was written by Churchill staff and likely reflected the schedule at Churchill (Tr. pp. 136-37). The hearing record reflects that a typical district special education class provides 35 hours per week of instruction, excluding lunch, recess, or gym, and that the 40 periods delineated on the IEP appeared to be an error (Tr. pp. 137, 198). Notwithstanding the error, I note that the student would have received all of his academic instruction within the special education environment, which was appropriate to meet his needs. I decline to hold that this error rose to the level of denying the student a FAPE.

#### **Functional Grouping**

I will next address the impartial hearing officer's finding that the student would not have been grouped with students with similar academic needs in reading and math, or with similar management needs, and that the student would not be grouped appropriately with two students in the assigned class who were classified as having an emotionally disturbance (IHO Decision at p. 27). State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range

of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, a meaningful analysis of the parent's claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at \*11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program in this case is determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at \*10 [S.D.N.Y. Mar. 15, 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Thus, in this case, the issue of the functional levels of the students in the assigned school is in part speculative because the parent did not accept the services recommended by the district in the IEP or enroll the student in the public school and the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 12:1+1 special class at the assigned district school provided the student with suitable grouping for instructional purposes that was designed to meet the student's needs. Testimony by the special education teacher of the assigned class shows that the student's instructional reading levels of grade 2.8 in decoding and 2.0 in reading comprehension, fell within the range of instructional reading levels in the class which ranged from grade 1.5 to 3, and that the student's instructional math levels of grade 1.8 in computation and 1.7 in problem solving fell within the range of the instructional math levels in the class which ranged from approximately grade 1.2 to grade 3 (Tr. pp. 186-87, 210-11; Dist. Ex. 1 at p. 3). Her testimony also shows that the student's academic performance was similar to students in her class because like the student in this case, the students in the assigned class also required similar academic management needs including frequent prompting, repetition, multisensory learning, individual attention, verbal and visual cues, and simplified oral instruction or rewording to address memory and processing deficits (Tr. pp. 210, 212-213). With regard to the two students who were classified as having an emotional disturbance, I note although the impartial hearing officer found that the student would not be appropriately grouped with students with that

classification, State regulations require students to be grouped based on similarity of individual needs and not on students' classifications (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]). Furthermore, I note that the teacher of the assigned class testified that the two students who had a classification of an emotional disturbance did not disrupt her ability to run the class (Tr. p. 185). Accordingly, I find that the hearing record, in its entirety, does not support the conclusion that, had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

For the above reasons, I find that the district offered the student a FAPE for the 2010-11 school year.

### **Conclusion**

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to reach the issue of whether Churchill was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a 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 reach them in light of my conclusions herein.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the portion of the impartial hearing officer's decision which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered that the district fund, or provide tuition reimbursement for the student's attendance at Churchill is hereby annulled.

**Dated:** Albany, New York  
June 8, 2011

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**