



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-036

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:

Harris Beach, PLLC, attorneys for petitioner, David W. Oakes, Esq., of counsel

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondent, Vanessa Jachzel, Esq., of counsel

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2013-14 school year were not appropriate. The appeal must be dismissed.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision, and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

From December 2007 through the conclusion of the 2010-11 school year, the student attended a 12:1+4 special class placement located in a Board of Cooperative Educational Services program (BOCES 2), and received individual (1:1) bilingual (Spanish) aide services (see Parent Exs. C at pp. 1-4; D at pp. 1-4; E-F; K-T; Y at p. 1; CC; GG at p. 2; HH at p. 1; II; KK). During that time, the student communicated verbally—although "limited"—in both English and Spanish (see Dist. Ex. 13 at p. 1). For the 2011-12 school year, the student

transferred to a 12:1+4 special class placement at BOCES 1; however, prior to issuing a "start date" for the student, BOCES 1 staff indicated in an e-mail dated June 22, 2011, the following, in part, with respect to modifications needed to the student's 2011-12 IEP: "3. Please remove all references for a bilingual aide and instruction in both Spanish and English" (Parent Ex. G; see Parent Ex. U at pp. 1-3).<sup>1</sup> The student continued to attend a 12:1+4 special class placement at BOCES 1 for the 2012-13 school year (see Parent Exs. V at pp. 1-2; X at pp. 1-11; LL at pp. 1-2; PP at p. 1).

On March 1, 2013, a subcommittee of the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Dist. Ex. 19 at pp. 1, 11-15). Finding that the student remained eligible for special education and related services as student with multiple disabilities, the March 2013 CSE subcommittee recommended a 12-month school year program in a 12:1+4 special class placement at BOCES 1, in conjunction with the services of a full-time, 1:1 aide to assist the student with refocusing, redirection, and communicating with his Dynavox (id. at pp. 1, 12).<sup>2, 3</sup> Related services recommendations included the provision of one 30-minute session per week of individual music therapy, five 15-minute sessions per week of individual skilled nursing services, two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a small group, two 30-minute sessions per week of individual physical therapy (PT), and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1, 11). The March 2013 CSE subcommittee also recommended program modifications, such as special seating arrangements, and access to an augmentative communicator and picture communication symbols (id. at pp. 11-12). Finally, the March 2013 CSE subcommittee recommended 20 hours of autism and behavior consultation services on an as needed basis, testing accommodations, and special transportation (small bus with an attendant) (id. at pp. 12-13, 15).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated May 4, 2013, the parent disagreed with the district's failure to offer the student a "bilingual Spanish education" for the 2013-14 school year (see Dist. Ex. 1 at pp. 1-7). The parent described previous impartial due process proceedings she undertook to secure a bilingual special education program, which resulted in a modification to the student's IEP (id. at pp. 3, 8-20). With respect to the 2013-14 school year, the parent indicated that "day by day" the absence of a bilingual program for the student "negatively" affected his communication skills (id. at p. 3). In pertinent part, the parent requested that the district provide the student with a "Spanish speaking teacher" and sought to amend the student's IEP (id.). The parent asserted that if the district "fix[ed] [the student's] education program," the

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<sup>1</sup> In a handwritten notation on an IEP Amendment Agreement and Consent Form, the parent rejected this particular recommendation but indicated her willingness to discuss it at a meeting (compare Parent Ex. H, with Parent Ex. G).

<sup>2</sup> The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

<sup>3</sup> A Dynavox is an augmentative communication device; in this case, the student's Dynavox initially included a "Spanish program" (see Tr. pp. 149-54; Dist. Ex. 1 at p. 4).

student's communication skills would progress and the behaviors that developed due to student's inability to communicate would also decrease in frequency (*id.*). The parent further indicated that the student experienced "regression in his learning/communication skills" (*id.* at pp. 3-4). According to the parent, the student knew Spanish (the "basic[s]"); however, given the student's deficits, the parent found it unfair that the district required the student to learn a "second language" (*id.* at pp. 4-5). The parent further alleged that placing the student in an "English only setting" was not appropriate for the student, and although she had expressed disagreement with the district in the past regarding the student's IEP, the district failed to document her disagreements (*id.* at p. 5). As relief, the parent requested the provision of a bilingual teaching assistant or paraprofessional in the classroom, speech-language therapy services to make up for the services not provided, the provision of a bilingual bus attendant, and "ESOL" services (*id.* at pp. 6-7).<sup>4</sup>

## **B. Impartial Hearing Officer Decision**

On June 20, 2013, the IHO conducted a prehearing conference where the parties agreed upon the following issues to be resolved by the IHO: whether the district must provide a bilingual teaching assistant and a bilingual bus attendant for the student (June 20, 2013 Tr. pp. 3-4, 21-28, 40-41).<sup>5, 6</sup> On July 18, 2013, the parties proceeded to an impartial hearing, which concluded on November 19, 2013, after three days of proceedings (*see* Tr. pp. 1-436).

By decision dated January 21, 2014, the IHO concluded that the district did not offer the student a free appropriate public education (FAPE) for the 2013-14 school year (*see* IHO Decision at pp. 6-23). Initially, the IHO granted the district's request to take judicial notice of "English" as the "language of the United States and of instruction in U.S. schools," while sua sponte taking judicial notice of "clearly enunciated, and readily available, written policies of the New York State Education Department regarding the issue of FAPE and bilingual education" (*id.* at pp. 7-8). Based upon the IHO's interpretation of the State guidance document issued in March 2011 and related State regulations, the IHO determined that the student qualified for—and was entitled to receive—bilingual services as a student with limited English proficiency "when he entered the school district" and that bilingual instruction could be construed as an issue related to whether the district offered the student a FAPE (*id.* at pp. 8-10). The IHO also rejected the district's assertion that the student did not have a dominant language or that his dominant language was English; upon review of the evidence, the IHO determined that regardless of the

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<sup>4</sup> As described in the hearing record, "ESOL" referred to an "English to Speakers of Other Languages" program or instruction; the IHO alternatively indicated that "ESOL" referred to "English for Speakers of Other Languages" (Tr. pp. 76, 176-77; *see* IHO Decision at pp. 12 & n.6, 17).

<sup>5</sup> Because the hearing record includes two transcripts that are not consecutively paginated, the decision will only refer to the transcript of the prehearing conference by both the date and page numbers in citations (i.e., June 20, 2013 Tr. pp. 1-70).

<sup>6</sup> It appears that the parties also resolved two additional issues prior to the prehearing conference, including that the district must provide the student with a communication device when the student's Dynavox was in disrepair and that the district must provide the student with the services of a bilingual speech-language therapy provider and amend the student's IEP to reflect the same (*see* June 20, 2013 Tr. 31-33).

student's severe delays with respect to language and communication, the student's dominant language was—and continued to be—Spanish (see *id.* at pp. 10-17). In addition, the IHO indicated that while attending BOCES 2 and receiving bilingual services—including the services of a 1:1 bilingual aide and bilingual speech-language therapy services—the student verbally communicated at school and at home, but after the district removed "all references to bilingual services from [the student's] IEP," he "lost all verbal skills when he entered BOCES 1 in 2011" and only received monolingual services (*id.* at pp. 10, 13-14). Given the student's progress while enrolled at BOCES 2 with a 1:1 bilingual aide and bilingual speech-language therapy services, the IHO characterized the student's loss of verbal skills during his enrollment at BOCES 1 as a "serious regression in skills" and rejected the district's assertion that the student made progress at BOCES 1 (*id.* at pp. 17-19). Moreover, the IHO found that as the student's ability to communicate declined, he exhibited an increased frequency of self-injurious behaviors, which the IHO directly linked to the loss of language skills and the student's enrollment in a monolingual program (*id.* at pp. 17-19).

Based upon the evidence, the IHO determined that the March 2013 CSE subcommittee had no reasonable basis upon which to conclude that the "appropriate way to teach the [s]tudent English (to transition him from Spanish to English) was to place him in a monolingual program without bilingual support or ESOL services" (IHO Decision at p. 17). The IHO further concluded that the March 2013 CSE subcommittee's determination to transition the student from "Spanish to English"—without bilingual supports—was not appropriate given the student's "severe cognitive delays" (*id.* at pp. 17-19). The IHO also concluded that the March 2013 CSE subcommittee's decision to recommend a program without bilingual supports was not reasonably calculated to enable the student to receive educational benefits, and furthermore, the March 2013 CSE subcommittee failed to consider the student's "language needs" in the development of the March 2013 IEP (*id.* at p. 19).

Additionally, the IHO rejected the district's contention that the student would not benefit from the provision of bilingual instruction, noting specifically that the bilingual aide who worked with the student for approximately "one week per month" during the 2011-12 school year and a portion of the 2012-13 school year only engaged with the student in Spanish "when the teacher instructed her to do so" (IHO Decision at p. 20). As a result, the IHO found the bilingual aide's testimony unpersuasive and not supportive of the district's contention (*id.*). In addition, the IHO noted that the student's loss of language skills, minimal progress, and increased behavior issues "should have alerted" the district that "problems" existed with the student's 2012-13 program and that the "exclusively monolingual program" was not appropriate for the student (*id.* at p. 21). While agreeing with the district's assertion that the "ultimate goal of bilingual services" was to enable the student to learn English so he could function in an English-speaking classroom, the IHO found it was not reasonable to expect the student to make meaningful educational progress in an "exclusively English educational setting" (*id.*). Further, the IHO determined that the March 2013 CSE subcommittee did not consider "how bilingual, or appropriate language arts instruction" would be made available to the student in the 12:1+4 special class placement at BOCES 1 (*id.*). .

Based upon the foregoing, the IHO ordered the district to provide the student with the services of a full-time, 1:1 bilingual teaching assistant for the 2013-14 school year, to amend the

student's IEP to reflect this service, and to amend the student's IEP to identify the student as limited English proficient and as requiring special education services to address his language needs (see IHO Decision at pp. 22-23). In addition, the IHO ordered the district to amend the student's IEP to reflect a recommendation for bilingual speech-language therapy services (*id.*). Finally, the IHO denied the parent's request for the provision of a bilingual bus attendant (*id.* at pp. 23-24).

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

The district appeals, and asserts that the IHO erred in finding that it failed to offer the student a FAPE for the 2013-14 school year. The district argues that the IHO erred in finding that the student's dominant language was Spanish. The district asserts that the IHO erred in finding that the student's verbal language skills declined as a result of his enrollment at BOCES 1, and argues that the student made progress at BOCES 1, albeit slowly. Moreover, the district further argues that the IHO erred in ordering the district to provide the student with the services of a 1:1 bilingual teaching assistant, and in finding that the student would benefit from having a 1:1 bilingual teaching assistant. The district also argues that the IHO erred in finding that the student was limited English proficient given that the student never had a dominant or primary language. As a remedy, the district seeks to reverse the IHO's decision ordering it to provide the student with a 1:1 bilingual teaching assistant and to amend the student's IEP to reflect this service and to identify his status as limited English proficient.

In an answer, the parent responds generally to the district's allegations and argues to uphold the IHO's decision in its entirety.<sup>7</sup>

#### **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch.

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<sup>7</sup> As neither party appeals from the IHO's determination denying the parent's request for a bilingual bus attendant, such finding is final and binding on the parties and will not be addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 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 procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [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, 361 Fed. App'x 156, 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, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. March 2013 IEP**

#### **1. Bilingual Supports or Services**

Generally, the district asserts that the IHO erred in ordering the district to provide the student with the services of a 1:1 bilingual teaching assistant and in finding that the student was

limited English proficient and would benefit from having a 1:1 bilingual teaching assistant. As more fully explained below, the hearing record supports the IHO's finding that the March 2013 IEP, without bilingual supports or services, was not reasonably calculated to enable the student to receive educational benefits and resulted in the district's failure to offer the student a FAPE for the 2013-14 school year.

In the present case, the hearing record indicates that the March 2013 CSE subcommittee considered several sources of evaluative information in the development of the student's March 2013 IEP, including: an October 2009 psychological evaluation, a December 2012 Level 1 Assessment, a January 2013 educational transition plan, a January 2013 music therapy progress report, a January 2013 OT annual review report, a January 2013 PT annual review report, a January 2013 speech-language annual review report, a January 2013 nursing assessment, a January 2013 12-month justification, and a January 2013 staff rationale (1:1 aide) (see Dist. Ex. 19 at p. 3; see also Dist. Exs. 9-13).<sup>8</sup> In addition, the hearing record reveals that the following individuals attended the March 2013 CSE subcommittee meeting: the district coordinator of special education (district coordinator), the student's then-current special education teacher, the assistant principal from BOCES 1, a "coordinator," a "service coordinator," two representatives from the district transportation office, the parent, and the student (compare Tr. pp. 110, 114-15, 134, 136-37, 223-28, 232, 252, with Dist. Ex. 19 at p. 1).

The evaluative information available to the March 2013 CSE subcommittee consistently showed that the student demonstrated severe deficits in communication, academics, activities of daily living (ADL) skills, and social and behavioral functioning (see Dist. Ex. 9 at pp. 1-3; 10 at pp. 1-2; 13 at pp. 1-4). With the parent serving as informant for an administration of the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), the student attained the following standard scores: communication, 45; daily living skills, 38; and socialization, 40, which all indicated significant delays (see Dist. Ex. 13 at p. 3).<sup>9</sup> According to Vineland-II results, the student could not "effectively communicate in either English or Spanish" (id.). The evaluator reported that the student often said "random words" and described his speech as "unintelligible" (id.). At that time, the student was learning "sign language" to communicate his needs, and according to the parent, the student showed interest in interacting with adults and peers (id.). With respect to ADL skills, the parent reported the student could eat and drink independently, but the parent fed him because he would not otherwise eat (id.).

Based upon observational impressions, the evaluator indicated that the student identified cartoon characters and "random items," such as "ball, spider, pencil, mother, candy, and bubbles" (Dist. Ex. 13 at p. 3). The October 2009 psychological evaluation also indicated that the student used a "Total Communications approach" at school, including sign language and pictures to express his needs and wants (id. at p. 1). During the evaluation session, the student used English, Spanish, sign language, gestures, and vocalizations of words to communicate with the evaluator,

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<sup>8</sup> Of the documents relied upon by the March 2013 CSE subcommittee to develop the March 2011 IEP, only the following were submitted as evidence in the hearing record: the October 2009 psychological evaluation, the December 2012 Level 1 Assessment, the January 2013 educational transition plan, the January 2013 speech-language annual review report, and the January 2013 staff rationale (1:1 aide) (see Dist. Exs. 9-13).

<sup>9</sup> The Vineland-II was administered as part of the student's October 2009 psychological evaluation (see Dist. Ex. at pp. 1-4).

and the evaluator primarily conducted the evaluation speaking in Spanish to the student, but she also used English (id. at pp. 1-3). The student responded in both Spanish and English, and at times, used sign language (id. at p. 2).

With respect to academic and social skills, the October 2009 psychological evaluation reported information from the student's teacher, who indicated that the student followed directions in class, was learning new words and was working on letter identification and sounds, and could count the calendar days in both Spanish and English (see Dist. Ex. 13 at p. 3). At that time, the student was learning addition with the use of manipulatives (id.). According to the student's teacher, the student spoke both English and Spanish in class and used sign language as a "bridge between the two languages" (id.). The parent indicated that although satisfied with the level of support the student currently received, she believed he needed "more bilingual support," and she expressed concerns that the "two languages [were] conflicting with [the student's] communication and learning abilities" and confused the student (id. at p. 2).

According to the January 2013 speech-language annual review report, the student received speech-language therapy services both in the classroom and in the community (see Dist. Ex. 9 at p. 10). At that time, the student's therapy focused on improving his receptive and expressive language skills, and the report indicated that the student was working on effectively communicating at school using multiple modalities, including his Dynavox, basic sign language, gestures, facial expressions, and picture symbols (id.). With respect to his Dynavox, the student could put together "two message elements to form a simple sentence;" however, the student did not initiate communication with the device (id.). The January 2013 speech-language annual review report also indicated that the student followed verbal directions in English with increasing accuracy (id.). In addition, when motivated, the student followed most simple staff directives (id.). The evaluator recommended that the student receive two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of speech-language therapy in a small group for the 2013-14 school year (id. at p. 2).

In the January 2013 staff rationale for a 1:1 aide, the background information section indicated that the student demonstrated "considerable communication needs and require[d] multi-modal communication" (Dist. Ex. 10 at p. 1). The report further indicated that the student performed at a "pre-academic level," and could write numbers, write and identify his name, and compute math activities with prompts, but the student could not consistently identify all letters and single digit numbers (id.). The report also noted that the student was not toilet trained and he engaged in parallel play with peers (id.). In addition, the report identified the student's primary modes of communication as sign language and the use of his Dynavox (id.). However, the student exhibited difficulties navigating the Dynavox when attempting to communicate his needs and because his sign language was not consistently accurate, the student required one-to-one assistance in order to communicate (id.).

In this case, the March 2013 CSE subcommittee developed the present levels of performance and individual needs section of the IEP, which described the student's communication, academic, and behavioral needs, based upon the evaluative information (compare Dist. Ex. 19 at pp. 3-5, with Dist. Exs. 9-10; 13). However, although the March 2013 CSE subcommittee accurately identified the student's needs, developed annual goals to address

the student's needs, and recommended a 12:1+4 special class placement together with the services of a full-time, 1:1 aide and other related services, the March 2013 CSE subcommittee did not recommend bilingual supports or services in the March 2013 IEP, such as an individual (1:1) bilingual teacher assistant (see Dist. Ex. 19 at pp. 4-15). According to the March 2013 IEP, the parent requested that the student participate in academics using both English and Spanish, as Spanish was the primary language spoken at home, and most notably, the March 2013 CSE subcommittee identified the student's native language as Spanish (id. at pp. 1, 5). However, in the section of the March 2013 IEP designated for identifying "Student Needs Relating to Special Factors," the March 2013 CSE subcommittee checked "Not Applicable" with regard to whether the student required a "special education service to address his/her language needs as they relate[d] to the IEP" if the student was, in fact, limited English proficient (id. at p. 7).<sup>10</sup>

According to the district coordinator's testimony, the March 2013 CSE subcommittee did not recommend any bilingual supports or services—and specifically, a bilingual teaching assistant—in the March 2013 IEP because the March 2013 CSE subcommittee did not identify a "need" for such, as the student was "non-verbal" and communicated "primarily through gestures and sign language" (Tr. pp. 110, 114-16). Similarly, the district special education teacher testified that she did not recommend the services of a bilingual teaching assistant during the March 2013 CSE subcommittee meeting, in part, because "it would be confusing to have two things going on at once within the classroom," the student was "low functioning," the student "responded to [staff] in English," and the programs the student would likely enter upon aging out were "in English" (see Tr. pp. 223-24, 226-28, 252-53).

However, regardless of his delayed verbal skills, the evidence in the hearing record indicates that the student verbally communicated—while limited in both English and Spanish—prior to entering BOCES 1 and prior to the removal of the services of the 1:1 bilingual aide and bilingual speech-language therapy services the student received while attending BOCES 2 (see Tr. pp. 170-71, 197-98, 385; Dist. Ex. 13 at pp. 1-2; see also Parent Exs. C at pp. 1-4; D at pp. 1-4; E-F; K-T; U at pp. 1-3; Y at p. 1; CC; GG at p. 2; HH at p. 1; II; KK ). In this particular instance, the hearing record supports the conclusion that there was a decline in the student's verbal skills without the provision of bilingual services (see Tr. pp. 93, 95-98, 227, 229-30).<sup>11</sup> For example, the hearing record further reflects that during the 2011-12 and 2012-13 school years at BOCES 1, the student communicated solely through his Dynavox, basic sign language, gestures, facial expressions, and picture symbols (see Tr. p. 244). The speech-language pathologist, who began working with the student in September 2012, testified that she had never known the student to utilize verbal language (see Tr. pp. 51-52). According to the speech-language pathologist, the student required prompts to initiate communication with his Dynavox, and if the device was on and at the student's desk, the student initiated pushing the buttons, but did not engage in meaningful communication (see Tr. p. 36; Dist. Ex. 9 at p. 1). Rather, the speech-language pathologist explained that the student's use of his Dynavox stemmed more from

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<sup>10</sup> See 8 NYCRR 200.4(d)(ii) (indicating that in the case of a student with limited English proficiency, the CSE shall "consider the language needs of the student as such needs relate to the student's IEP").

<sup>11</sup> During the 2012-13 school year, the hearing record shows the student was absent 52 days and tardy 52 days, which the assistant principal and special education teacher testified, may have affected his learning and retention of material (see Tr. pp. 144, 259-61). The hearing record also shows that the student was absent 25 days and tardy 35 days during the 2011-12 school year (see Tr. p. 147).

a need to gain attention or to be silly and was not typically in context with what was going on in the classroom (see Tr. pp. 33, 35-36). Additionally, the evidence in the hearing record also indicates that when the student attended BOCES 1 without bilingual supports, the student's self-injurious behaviors increased, which the parent attributed to the student's inability to communicate in Spanish (see Tr. pp. 356-57; Dist. Ex. 19 at p. 5).<sup>12</sup>

However, despite identifying the student's native language as Spanish in the March 2013 IEP—as well as evaluative information indicating that the student previously communicated in both Spanish and English and the decline in the student's verbal communication skills—the hearing record is devoid of evidence demonstrating that the March 2013 CSE subcommittee engaged in any process to consider or determine the student's language needs or English proficiency prior to developing the March 2013 IEP consistent with State regulations (see Tr. pp. 1-436; Dist. Exs. 1-22; Parent Exs. A-Z; AA-PP; IHO Exs. I-V).<sup>13</sup> As explained in the State guidance document reviewed by the IHO, when a CSE develops an IEP for a student with a disability who is also limited English proficient or an English language learner, the CSE "must consider" the student's language needs as they relate to the student's IEP, "as well as the special education supports and services a student needs to address his or her disability and to support the student's participation and progress in the general education curriculum" ("Bilingual and English as a Second Language (ESL) Services for Limited English Proficient (LEP)/English Language Learners (ELLs) who are Students with Disabilities," Office of Spec. Educ. Memo. [March 2011], available at <http://www.p12.nysed.gov/specialed/publications/bilingualservices-311.pdf>). According to the guidance document, such considerations include, but are not limited to: the student's need for "special education programs and services to support the student's participation and progress in English language arts instruction, content area instruction in English and ESL instruction;" and "whether the student needs bilingual special education and/or related services" (*id.* at p. 2). Thus, a review of the evidence in the hearing record reveals that the March 2013 CSE subcommittee failed to adequately or sufficiently consider the student's language needs—as described above—or more specifically, whether the student required bilingual special education

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<sup>12</sup> According to the special education teacher, the student made progress during the 2011-12 and 2012-13 school years with respect to following directions in English, following along in a group setting, and answering questions through pictorial cues and pointing, and therefore, he did not require a bilingual teacher assistant (Tr. pp. 252-53, 258).

<sup>13</sup> Moreover, the hearing record is devoid of evidence that the district—at any time since the student's enrollment in 2007—took measures to determine whether the student was limited English proficient consistent with State regulations (see 8 NYCRR 154.2[a]-[b] [defining limited English proficiency and identifying various assessments used to determine such proficiency, including the Language Assessment Battery-Revised (LAB-R), the New York State Identification Test for English Language Learners (NYSITELL), and the New York State English as a Second Language Achievement Test (NYSELSAT)]; see also Tr. pp. 1-436; Dist. Exs. 1-22; Parent Exs. A-Z; AA-PP; IHO Exs. I-V). Under the circumstances of this case, it was critical for the district—after acknowledging the student's native language, prior receipt of bilingual services, and decline in language skills to demonstrate—to obtain appropriate assessment and then consider through the CSE process why the student did not require bilingual special education services where, as here, the available evidence in the record shows that it is beyond cavil that the student's communication and language needs were inextricably intertwined with his need for bilingual services. The rigorous State procedures in this area of regulation and accompanying guidance issued by the State to districts are fairly difficult to overlook, and it is troubling in this particular case because it appears to have been an obvious, significant need of the student.

or related services, resulting in the development of an IEP that was not reasonably calculated to enable the student to receive educational benefits.<sup>14</sup>

## **VII. Conclusion**

Having determined that the evidence in the hearing record demonstrates that the district failed to sustain its burden to establish that it offered the student a FAPE for the 2013-14 school year, there is no reason to disturb the IHO's decision.

### **THE APPEAL IS DISMISSED.**

**IT IS ORDERED** that, if it has not already done so and unless the parties otherwise agree, the district shall reconvene a CSE meeting within 30 days of the date of this decision to amend the student's 2013-14 IEP to include the services of a full-time, 1:1 bilingual teaching assistant, and, upon the consent of the parent, obtain and review a limited English proficiency assessment of the student in conformity with State regulations.

**Dated:**           **Albany, New York**  
                          **May 20, 2014**

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

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<sup>14</sup> As a final note, although the parent did not raise an issue on this basis, the hearing record does not include and does not otherwise indicate whether the district provided the parent with prior written notice; consequently, the district is reminded of its obligation to provide prior written notice consistent with State and federal regulations on the form prescribed for that purpose by the Commissioner (34 CFR 300.503; 8 NYCRR 200.5[a]; see also <http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html>). In this instance, inclusion of a prior written notice in the evidence from the district would have clarified this issue, as the district was required to provide written notice to the parent describing "each evaluation procedure, assessment, record, or report the [district] used as a basis for the proposed or refused action" (34 CFR 300.503[b][3]; 8 NYCRR 200.5[a][3][iv]).