



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-090

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Cuddy Law Firm, PLLC, attorneys for petitioner, by Michael J. Cuddy, Jr., Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for his son's tuition costs at the Rebecca School for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with the facts and procedural history of the case is presumed and will not be recited in detail here. Briefly, the student presents with significant delays in his cognitive, academic, communication, receptive and expressive language, play, fine motor, sensory processing, self-regulation, self-help, and visual-motor skills (Dist. Exs. 5 at p. 6; 6 at p. 6; 7 at p. 5). He has received the diagnosis of autism spectrum disorder (ASD) (Dist. Ex. 6 at p. 1).

The CSE convened on March 29, 2019, to develop the student's IEP for the 2019-20 school year (Dist. Ex. 9 at p. 15). Finding that the student was eligible for special education and related services as a student with autism, the March 2019 CSE recommended that the student attend a 12-month program in an 8:1+1 special class placement in a specialized school with the related services

of two 30-minute sessions per week of occupational therapy (OT) in a small group, two 30-minute sessions per week of speech-language therapy in a small group, one 30-minute session per week of individual speech-language therapy, and one 60-minute session per week of parent counseling and training for five weeks (id. at pp. 10-11).¹

The district sent the parent a prior written notice dated June 17, 2019 describing the program recommended by the March 2019 CSE and identifying the public school where the student would receive the recommended program and services (Parent Ex. R. at pp. 1-2).²

In a letter dated August 27, 2019, the parent advised the district that he disagreed with the recommendations contained in the March 2019 IEP, and, as a result, notified the district of his intent to place the student at the Rebecca School for the 2019-20 school year at public expense (Parent Ex. B).³

A. Due Process Complaint Notice

In a due process complaint notice dated February 19, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A). Specifically, the parent alleged that the March 2019 CSE failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) (id. at p. 2). Next, the parent argued that the March 2019 IEP did not provide the student with appropriate, measurable annual goals that addressed all of his areas of need; specialized, research-based methodology; and sufficiently intensive services—including sufficient OT—or supports to address the student's sensory needs (id. at pp. 2-3). Further, the parent asserted that the 8:1+1 special class recommendation lacked sufficient adult support, and that the public school the student was assigned to attend for the 2019-20 school year "pose[d] a heightened risk of lead poisoning," and did not have a sensory gym (id. at p. 2).

The parent argued that the Rebecca School was an appropriate unilateral placement for the student and requested reimbursement and/or direct payment of the student's tuition and related expenses including transportation for the 2019-20 school year (Parent Ex. A at p. 4).

B. IHO Decision

After a prehearing conference was held with the parties on August 4, 2020, an impartial hearing convened on October 8, 2020 and concluded on January 6, 2021 after three hearing days (Tr. pp. 1-310).⁴ In a decision dated March 9, 2021, the IHO determined that the district offered

¹ The student's eligibility for special education and related services as a student with autism is not in dispute (34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

² The district previously sent a prior written notice dated May 24, 2019 (Parent Ex. Q at p. 1; Dist. Ex. 13 at p. 1).

³ The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

⁴ During the hearing, the IHO decided that this proceeding would not be consolidated with another proceeding regarding the student's program for the 2020-21 school year (September 15, 2020 Interim IHO Decision).

the student a free appropriate public education (FAPE) for the 2019-20 school year (IHO Decision at p. 12). As such, the IHO did not address whether the Rebecca School was an appropriate unilateral placement or whether equitable considerations favored the parent and denied the parent's request for relief (id.).⁵

Specifically, the IHO determined that "no dispute exist[ed] that the IEP meeting was timely conducted for the 2019-2020 school year," a prior written notice was provided to the parent after the CSE meeting, and that the student was offered a placement at the assigned public school site in a timely manner (IHO Decision at p. 6). Next, the IHO found that the CSE "considered all of the evaluative data which was then incorporated in the IEP" (id. at pp. 6-7). Further, the IHO determined that the school psychologist persuasively testified that the CSE did not feel that an FBA was warranted, as there was not one target discreet behavior that was interfering with his learning to be addressed via an FBA (id. at pp. 11-12).⁶

Regarding the March 2019 IEP, the IHO determined that the annual goals were adequate, citing the school psychologist's testimony in support of the goals as being "persuasive" (IHO Decision at pp. 7-9). Regarding the parent's argument that the IEP failed to offer a FAPE because it lacked an appropriate instructional methodology, which the parent asserted was a factor in whether the IEP was reasonably calculated to enable the student to receive educational benefits, the IHO determined that reasoning was "not convincing," and that in general, CSEs are not required to specify a particular methodology on an IEP, absent evidence that a specific methodology is necessary (id. at p. 10). Additionally, the IHO determined that the IEP appropriately addressed the student's sensory needs as it recommended OT twice weekly for 30-minute sessions in a group of two students (id. at p. 11). He further found that the student's social skills were "addressed by the recommended use of a formal program, Lakeshore, which aids with social skills development" (id.). The IHO next determined that there was evidence in the hearing record that the 8:1+1 special class "generally provided sufficient adult support," and was a placement "of a more restrictive setting than the [s]tudent previously received" (id.). As for the parent's contention that the 8:1+1 special class recommendation was deficient because it lacked "an appropriate composition of students with similar learning profiles," the IHO determined that when the parent rejected the placement and enrolled the student in a unilaterally selected private school, such action precluded any specific class profile or functional grouping claim, although he went on to find that the assigned school would have had a seat available for the student at the start of the 2019-20 school year (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals, asserting that that IHO erred in determining that the district sustained its burden of proving that the recommended program and placement for the student for the 2019-20 school year offered a FAPE. First, the parent alleges that the IHO erred when he found that the annual goals in the March 2019 IEP were adequate, despite the omission of goals addressing the

⁵ In a decision dated September 15, 2020, the IHO declined to consolidate the instant matter with a due process complaint proceeding regarding the 2020-21 school year (see September 15, 2020 IHO Decision).

⁶ The school psychologist at the March 2019 CSE meeting also participated in the meeting as a district representative (Tr. p. 82; Dist. Ex. 10).

student's academic, social/emotional, and behavioral functioning. Next, the parent argued that the IHO "misapprehended the facts when he determined that the [p]arent was seeking a particular methodology," and by suggesting that the student was receiving instruction according to a methodology referenced in a two-year old report. The parent further argued that the IHO erred by determining that the student's social skills would be addressed by the "Lakeshore" program, as the testimony to that effect was retrospective regarding the program the student would have received if he had attended the public school. Also, the parent alleged that the IHO erred by finding that no procedural violations had occurred, as the district 1) failed to convene a resolution session, 2) the March 2019 CSE failed to include a person knowledgeable about the recommended program and a regular education teacher, and 3) the CSE failed to reconvene to consider a psychoeducational evaluation that was conducted after the March 2019 CSE meeting. Additionally, the parent asserted that the IHO misapplied the "Burlington/Carter standard and erred in concluding that the recommended placement was appropriate, and failed to issue determinations regarding the appropriateness of the Rebecca School and equitable considerations.

As relief, the parent requests that the undersigned find that the district did not meet its burden of proof with respect to the appropriateness of the recommended program and placement, that the Rebecca School was an appropriate unilateral placement, and that there were no equitable bars to public funding for that unilateral placement.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural

errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁷

⁷ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately

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).

VI. Discussion

A. Compliance with Practice Regulations

At the outset, I note that the parent's request for review does not comply with the form requirements of Part 279 of the practice regulations.

State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally a request for review must provide a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" 8 NYCRR 279.8[c][2]). Further, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Section 279.8 requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript,

ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c]).

The request for review fails to comply with these requirements, opting instead to list a mixture of factual allegations and allegations of district wrongdoing together, without, for the most part, describing how the IHO erred on specific issues. Initially, the request for review simply numbers every paragraph instead of following the requirement for "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately" (8 NYCRR 279.4[c][2], [4] [emphasis added]; see also 8 NYCRR 279.4[a], [f]). Additionally, the first allegation of IHO error occurs in paragraph 31 on the seventh page of the request for review, in which the parent asserts that the IHO erred in finding the student's annual goals were adequate "despite the omission of annual goals for important areas of academic, social-emotional and behavioral functioning" (Req. for Rev. 31). At first blush this seems a general, but permissible, objection to the IHO's decision; however, review of the IHO Decision reveals that the IHO dedicated approximately two pages worth of his decision to addressing the specific allegations related to annual goals that were raised in the parent's due process complaint notice, including noting that the school psychologist's testimony in support of the annual goals was "persuasive" and finding that the annual goals were measurable and they addressed the student's receptive language deficits, as well as his pragmatic language and social communication deficits (compare IHO Decision at pp. 7-9, with Parent Ex. A at p. 3). Rather than attacking these specific findings by the IHO, which directly addressed the allegations raised by the parent in the due process complaint notice—on appeal, the parent merely raises a general allegation that the annual goals omitted certain areas of the student's needs, areas that were not mentioned in the parent's due process complaint notice (compare Req. for Rev. ¶31, with Parent Ex. A at p. 3).

Additionally, the parent makes no reference to the hearing record in support of the allegation that the annual goals were deficient, other than to the IHO's finding to the contrary (Req. for Rev. ¶31). In fact, despite asserting that the March 2019 IEP omitted annual goals in the "areas of academic, social-emotional and behavioral functioning," the only citation, related to the substance of the annual goals, in the entire request for review was for the proposition that the March 2019 IEP "did not include specific services, annual goals, or reporting requirements regarding social skills training" and refers to the testimony of the school psychologist in which she explained that the March 2019 IEP included a behavioral goal (Req. for Rev. ¶¶ 10, 31; see Tr. p. 122).⁸

For the most part, the remaining allegations identifying IHO error are similarly muddled and disorganized, without citation to the hearing record for support (Req. for Rev. ¶¶ 32-37). These allegations appear to relate to the IHO's decisions regarding methodology (id. at ¶32),

⁸ The request for review contains an additional general allegation that the March 2019 IEP did not include "meaningful and measurable annual goals in all areas of demonstrated need"; however, again, there is no citation to the hearing record in support of this point (Req. for Rev. ¶ 9). The only citation in this paragraph is to the testimony of the school psychologist, in which she testified that she did not recall if annual goals were discussed with the parent during the CSE meeting (id.; see Tr. pp. 87, 91).

reliance on retrospective evidence as to the appropriateness of the March 2019 IEP (*id.* at ¶ 33-34), the application of the legal standard used by the IHO, and the failure to find procedural violations based on the lack of a resolution meeting and the lack of a psychoeducational evaluation at the March 2019 CSE meeting (*id.* at ¶ 35).⁹

Compounding the problems with the request for review, in addition to the above allegations, the parent's memorandum of law, filed with the request for review, included allegations related to CSE composition, the appropriateness of the evaluations available to the March 2019 CSE, the lack of an FBA, and the lack of behavioral supports (Parent Mem. of Law at pp. 14-19). However, it has long been held that a memorandum of law is not a substitute for a pleading, which is expected to set forth the appealing party's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[c][3]; [d]; *see, e.g., Application of a Student with a Disability*, Appeal No. 15-070). Accordingly, any issue identified solely in the parent's memorandum of law, without an allegation of IHO error contained in the request for review, is outside of the scope of review.

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]-[b]; *see Davis v. Carranza*, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; *M.C. v. Mamaroneck Union Free Sch. Dist.*, 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; *T.W. v. Spencerport Cent. Sch. Dist.*, 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]).

Based on the above, far from providing a clear and concise statement of the issues presented for review, the parent's request for review, either intentionally or unintentionally, obfuscates the issues on appeal, avoiding the clear, specific findings made by the IHO in favor of generalized statements that only serve to muddy the waters as to what is at issue. Accordingly, the request for review is not in compliance with the practice regulations as it does not provide a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately" (8 NYCRR 279.4[a], 279.8[c][2]). Additionally, as discussed above, the request for review also fails to identify relevant citations to the hearing record in support of the parent's allegations (8 NYCRR 279.8[c][3]).

⁹ One specific allegation of IHO error was raised by the parent, in an allegation that the IHO erred in finding that the district would have addressed the student's social skill needs using a specific program, with reference to the same testimony relied on by the IHO in finding the opposite (Req. for Rev. ¶34; *see* IHO Decision at p. 11; Tr. p. 62). It is unclear if this allegation is connected to the next paragraph, in which the parent alleges that the IHO erred in relying on retrospective testimony; however, review of the parent's memorandum of law indicates that they are part of the same argument that the IHO relied on testimony about services that were not included on the IEP (*see* Parent Mem. of Law at p. 22).

Moreover, it is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

Based on the above, for the parent's failures to comply with the practice regulations, the request for review is dismissed.

Additionally, it should be noted that this is not the lone example of the law firm representing the parent failing to comply with the practice regulations in filing a request for review (see Application of a Student with a Disability, Appeal No. 21-094; Application of a Student with a Disability, Appeal No. 21-085; Application of a Student with a Disability, Appeal No. 21-062). Although the pleadings in those prior matters were not ultimately dismissed due to noncompliance with the practice regulations, the lack of clarity in the request for review in this matter is much more pronounced. Further, at this point, counsel for the parent is now well-aware of the requirements included in the practice regulations and is cautioned that if noncompliance with the requirements continues, the firm will risk dismissal of their clients' claims without a determination on the merits.

In this instance, even assuming for the sake of argument that the parent's failure to comply with the practice regulations did not warrant a dismissal of this appeal, the evidence in the hearing record does not support overturning the IHO's findings that the district did not deny the student a FAPE (see generally Req. for Rev.). In an abundance of caution, therefore, I will discuss the general FAPE claims alleging IHO error that can be gleaned from the parent's request for review and which, as discussed above, include allegations regarding the appropriateness of the annual goals contained in the March 2019 IEP, the methodology on the IEP, and how the IEP addressed the student's need for social skills intervention.

B. Annual Goals

Turning first to the issue of whether the annual goals in the March 2019 IEP were appropriate, the IDEA provides that an IEP must include a written 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 CFR 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 CFR 300.320[a][3]).

Although not an issue on appeal, a discussion of the evaluative information available to the March 2019 CSE, which identified the student's needs, is necessary to resolve the parties' dispute about the appropriateness of the March 2019 IEP annual goals. Here, the school psychologist testified that the March 2019 CSE reviewed "all the preschool documentation available," which included the student's January 2019 educational update report, a March 2019 OT therapy progress report, and a March 2019 private speech-language evaluation report (Tr. pp. 70, 76, 81; Dist. Exs. 4; 5; 7; 10 at p. 1).¹⁰ The March 2019 CSE determined that additional information regarding the student's academic and cognitive abilities was needed and a psychoeducational evaluation was conducted in April 2019 (Tr. p. 76; Dist. Ex. 6).¹¹

According to the January 2019 educational update report the student attended a 12:1+2 special education program, where he reportedly had difficulty following through with some of the morning routine and most often would find a "comfortable corner of the classroom to play all by himself" (Dist. Ex. 4 at p. 1). The report indicated that the student's first task each morning was to arrange the alphabet cards and then arrange the number cards from one to 20 (*id.*). With regard to cognitive and language skills, the evaluator reported that the student could identify letters of the alphabet, give their corresponding sounds, and find words with the same beginning sounds (*id.*). Additionally, the student knew primary colors and some secondary ones, and could identify and name regular shapes (*id.*). It was reported that the student did not talk much in class and was most often heard naming letters and their sounds, counting one to 20, and naming colors or shapes (*id.*). The evaluator reported that the student did not ask or answer questions or respond to directives; however, he had been heard making utterances such as "[t]his is amazing" and "I don't understand" (*id.*). Additionally, the student would "self-talk" when he wanted something, for example if he wanted water he would say "I want water" as he was pouring water into a cup (*id.*).

With regard to social/emotional skills, the January 2019 educational update report indicated that the student was functioning in the developmental age range of 2.2 to 2.4 years (Dist. Ex. 4 at p. 2). The evaluator described that the student would try to play with friends; however, he did not share toys with them or readily greet them (*id.*). Additionally, the student could readily greet his teachers, but only when prompted (*id.*). The evaluator indicated that the student had difficulty following rules, routines, and transitions, was "somewhat self-directed," and had not yet learned how to be cooperative (*id.*).

The January 2019 educational update report indicated that the student was operating at the developmental age range of 3.3 to 3.6 years in his gross motor skills (Dist. Ex. 4 at p. 2). Additionally, the evaluator reported that the student liked to play outdoors, and would run, jump and climb on the playground equipment, as well as hop and balance on one foot for four to five

¹⁰ According to the school psychologist, at the March 2019 CSE meeting the CSE also reviewed a classroom observation and a social history; however, those documents were not included in the hearing record (Tr. p. 76; Dist. Ex. 10).

¹¹ Portions of the April 2019 psychoeducational reevaluation report appear in the March 2019 IEP, at times verbatim throughout the present levels of performance (compare Dist. Ex. 6 at pp. 1-6, with Dist. Ex. 9 at pp. 1-5). However, this reevaluation post-dated the March 2019 CSE meeting, therefore, only the evaluative information available to the March 2019 CSE will be discussed in determining the appropriateness of the annual goals.

seconds (id.). Furthermore, the student could walk in a straight line for a short distance and walk up and down the stairs alternating feet with adult assistance (id.). The evaluator reported that the student could not yet pedal a tricycle independently or throw and catch a ball from a distance of five feet (id.).

With regard to fine motor skills, the January 2019 educational update report indicated that the student was functioning in the 2.3 to 2.6-year age range (Dist. Ex. 4 at p. 2). Additionally, the evaluator reported that the student could feed himself with a spoon or fork with very little spillage, assemble a 10 to 12 piece puzzle, and was learning how to use scissors to cut a straight line on a sheet of paper (id.). The evaluator reported that the student liked to play in a make-shift house where he would set up the kitchen and that he used sensory sand to make castles and other buildings (id.). The evaluator further reported that the student could not yet use three-point grip to hold a pencil, marker, or crayon; however, he used a paintbrush to paint (id.).

In the area of self-help, the January 2019 educational update report indicated that the student was functioning in the 2.0 to 2.3 age range (Dist. Ex. 4 at p. 2). According to the evaluator, the student could take care of some of his personal needs; however, he was unable to manipulate buttons and zippers, or dress and undress himself (id.). Finally, the evaluator reported that the student was learning to put away his personal belongings as well as classroom materials and toys with adult assistance (id.).

According to the summary contained in the January 2019 educational update report, the student had shown some progress in various domains; however, he continued to require help with the development of speech and language, social/emotional, fine motor, and self-help skills (Dist. Ex. 4 at p. 2). The evaluator opined that the student would benefit from a structured environment with typically developing peers to help him achieve his developmental goals (id.).

According to the March 2019 OT progress report, the student exhibited significant delays in his fine motor, visual-motor integration, sensory processing, self-regulation, and self-help skills (Dist. Ex. 5 at p. 6).¹² Results from an administration of the Peabody Developmental Motor Scales - 2 (PDMS-2) indicated that the student was functioning at a 20 month level in his fine motor skills and at a 33 month age level in his visual-motor skills (id.). The evaluator opined that those delays "combined with challenges in his sensory processing, poor self-regulation, and decreased attending skills impact[ed] negatively on [the student's] ability to retain newly learned skills, build on them, and interact on an age-appropriate level with his teachers and peers in the classroom" (id.).

The March 2019 private speech-language evaluation report indicated that the student began receiving speech-language therapy as a young child (Dist. Ex. 7 at p. 1). The evaluator reported the results of the administration of the Comprehensive Assessment of Spoken Language - Second Edition (CASL-2), which assessed the student's oral language skills needed to become literate and to succeed in school and work environments (id. at pp. 1-2). The report indicated that the student exhibited below average skills in receptive vocabulary, expressive vocabulary, sentence expression, and grammaticality judgment, and that his skills were deficient in pragmatic judgment (id. at p. 2). The March 2019 private speech-language evaluation reported the results of the

¹² In the March 2019 OT progress report, the evaluator noted that the report reflected the student's skills beginning on January 8, 2019, which was the student's initial OT session with the evaluator (Dist. Ex. 5 at p. 6).

Expressive One-Word Picture Vocabulary Test (EOWPVT), which indicated that the student attained a standard score of 86 with a corresponding percentile of 18, placing him at an age equivalent of 3 years 3 months (*id.*). The results of the Receptive One-Word Picture Vocabulary Test (ROWPVT) showed the student attained a standard score of 94 with a corresponding percentile of 34, placing him at an age equivalent of 3 years 9 months (*id.* at pp. 3-4). The evaluator explained that the student's family completed the Pragmatic Profile from the Clinical Evaluation of Language Fundamentals Preschool - 2nd Edition (CELF Preschool-2), which showed strengths in nonverbal communication because the student was "responding and displaying appropriate feelings in specific situations" (*id.* at p. 4). In the area of conversation routine and skills, the evaluator reported that the student was showing inconsistent levels, and would "sometimes" take-turns, join games, maintain attention when others spoke, and wait for other routines to end (*id.*). The March 2019 private speech-language evaluation report reflected that the student had the most difficulty with asking, giving, and responding to information, specifically when asking questions and telling details (*id.*). The evaluator explained that there were inconsistencies with asking for help and stopping behaviors when asked (*id.*). According to the evaluator, the student had the ability to request, comment, reject, and greet with minimal to no prompting and he was developing strong relationships with adults in his life, but had difficulty with peers (*id.*). The evaluator concluded that the student displayed a severe expressive-receptive language delay, and had made significant growth since inception of receiving services (*id.* at p. 5). Finally, the evaluator described the student's areas of strength that included vocabulary and forming short phrases, and areas of need including pragmatic or social type communication, comprehension, and sentence formation (*id.*).

The March 2019 IEP contained approximately seven annual goals to address the student's needs in the areas of receptive and expressive language, sensory processing, graphomotor/visual motor, English language arts (ELA), math, and following classroom routines (Dist. Ex. 9 at pp. 6-9). Specifically, the IEP contained one annual goal designed to address the student's receptive language deficits by improving his ability to comprehend basic classroom directions and participate independently in daily routines, and one annual goal to improve his use of expressive language for a variety of purposes including communicative intent, participation in daily routines, and demonstration of functional academic skills (*id.* at pp. 6-7). Next, the IEP contained one annual goal designed to improve the student's sensory processing by improving his ability to remain seated and calm within a six inch radius of his "spot," and not collide with his classmates, lie down, or roll on the floor (*id.* at p. 7). To improve the student's graphomotor and visual-motor skills, the IEP included an annual goal to improve the student's ability to independently draw shapes and letters to resemble a model (*id.*). In academics, the March 2019 IEP contained two annual goals designed to improve the student's skills in ELA; specifically, by improving the student's ability to point to the correct key detail from a set of four choices after listening to a teacher read a familiar independent or instructional text with illustrations, and his ability to produce the sound of a phoneme after being given an alphabet line and verbal prompt such as "what sound does the letter B make?" and a picture of an object or animal that starts with the target sound (*id.* at pp. 7-8). Further, the IEP contained two math annual goals designed to improve the student's ability to complete simple addition problems using manipulatives and sort short and long objects into two groups based on length after given a verbal prompt (*id.* at pp. 8-9). Finally, the classroom behavior annual goal addressed the student's ability to independently identify the correct step given a three-step familiar classroom routine on a visual schedule in response to three questions about the sequence of tasks (*id.* at p. 9). For each annual goal, the March 2019 CSE included the

evaluative criteria (80 percent accuracy, four out of five activities/trials/sessions, three out of four observed trials), the evaluation procedures (class activities, teacher/provider observations, performance assessment task), and the schedule to be used to measure progress toward meeting the annual goal (one time per month) (*id.* at pp. 6-9).

The school psychologist testified that the March 2019 IEP addressed the student's specific deficits via the program recommendations, including speech-language therapy, and by developing individualized academic goals to target those areas (Tr. p. 86; Dist. Ex. 10).

As set forth above, the hearing record shows that the annual goals addressed the student's needs as identified in the evaluative information that was available to the March 2019 CSE. Contrary to the parents' assertion, the March 2019 IEP did include annual goals to address the student's ELA and math skill deficits, social/emotional needs to the extent the IEP included goals to improve his receptive and expressive language skills in order for the student to be able to participate in activities with peers, and classroom behavior needs so he could appropriately follow along with classroom routines (*see* Tr. pp. 86, 122; Dist. Ex. 9 at pp. 6-9). Additionally, review of the annual goals shows that they were sufficiently measurable to guide an educator in providing instruction to the student, and as such, any deficiencies in the annual goals do not rise to the level of a denial of a FAPE.

C. Methodology in the IEP

The parent's due process complaint notice alleged that the student required "a specialized, research-based methodology to address needs stemming from his autism spectrum disorder," noting that the March 2019 IEP did not designate such a methodology (Parent Ex. A at p. 2). The IHO found this allegation unconvincing, noting that a CSE is not generally required to recommend a specific methodology on an IEP (IHO Decision at p. 10). In addition, the IHO found that the March 2019 IEP did refer to the applied behavior analysis (ABA) methodology and noted that a July 2017 speech-language evaluation and a July 2017 social history indicated the student had received instruction using ABA methods in the past (*id.* at pp. 10-11). The IHO further found that there was nothing in the hearing record that indicated the student required a different methodology other than ABA (*id.* at p. 11).

The precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (*see, e.g., R.E.*, 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a

particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

On appeal the parent does not challenge the IHO's determination that the evidence in the hearing record did not show that the CSE was required to recommend a specific methodology for the student. In fact, the parent states that he was not "single-mindedly pursuing an ABA program," as indicated by the decision to enroll the student in the Rebecca School, which used the Developmental Individual Difference Relationship-based (DIR) model (Parent Mem. of Law at pp. 23-24; see Parent Ex. KK at p. 1). The parent only asserts that the methodology used by the school should be research-based; accordingly, the parent's assertion alone is not sufficient to overturn the IHO's determination that the March 2019 CSE was not required to specify a specific methodology in the student's IEP.

Additionally, rather than directly challenging any of the IHO's findings, the parent asserts on appeal that the IHO "misapprehended the facts when he determined that the [p]arent was seeking a particular methodology" and when he suggested the student was still receiving instruction using ABA methods (Req. for Rev. ¶32). In his memorandum of law, the parent explains that he did not request a specific methodology, but only sought information about what instructional methodologies would have been used with the student at the district public school (Parent Mem. of Law at pp. 23-24). Accordingly, while the parent asserts on appeal that "the IHO misapprehended the facts," the parent's memorandum of law makes it clear that he is reframing his claim from the due process complaint notice, in which he clearly asserted that the March 2019 IEP did not include a research-based methodology, into a claim about the sufficiency of the information he received regarding the methodology used at the assigned public school. To the extent the parent is making an allegation regarding the assigned public school site, that claim must fail, as there is nothing in the hearing record to suggest that the assigned public school site was incapable of implementing the March 2019 IEP.

More specifically, it is unreasonable to assume that a State-certified special education teacher would be simply be unable or unwilling to implement appropriate educational methodologies for a student with a disability, especially where a specific methodology is not required, because any determination that the district would not have implemented the March 2019 IEP would require speculation as to potentially employing unqualified teachers at the assigned school or how a teacher of the student at the assigned school might have approached implementation of the IEP, either of which would be inappropriate speculation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015] ["[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement"], quoting

R.E., 694 F.3d at 195; G.B. v. New York City Dep't of Educ., 2015 WL 7351582, at *13-*14 [S.D.N.Y. Nov. 5, 2015]).

D. Social Skills Instruction and Retrospective Testimony

On appeal, the parent argues that the IHO erred when he determined that the student's social skill needs would be addressed by "use of a formal program, Lakeshore" because the assigned public school representative testified that she was not certain the school used the Lakeshore program, and because the IHO relied on retrospective testimony about the program the student would have received had he attended the assigned public school site. For the reasons stated below, review of the March 2019 IEP shows that it addressed the student's social skill needs, independent of the potential use of the Lakeshore program.

Review of the March 2019 IEP shows that the student's social/emotional needs were identified and appropriately addressed by the annual goals, management needs, and adult supports provided by the adults in the 8:1+1 special class and speech-language therapy. Specifically, the March 2019 IEP indicated that the student exhibited "moderately abnormal verbal communication characterized by a mixture of meaningful and peculiar speech" (Dist. Ex. 9 at p. 3). Additionally, the IEP indicated that the student "exhibit[ed] moderately abnormal listening responses and visual responses," and the student's teacher reported that the student could be self-directed, and had difficulty following classroom rules, routines, and transitions (id.). Furthermore, the March 2019 IEP reflected teacher reports that the student did not readily greet peers, even with prompts; however, he was able to greet teachers with prompting (id.). Finally, the IEP indicated that the teachers were modeling appropriate play with the student and that he could play independently alongside peers; however, he had not yet learned to share toys (id.). Additionally, the March 2019 IEP reflected information from the March 2019 private speech-language evaluation report that the student's areas of need included "pragmatic or social type communication, comprehension, and sentence formation" (id. at p. 2).

To address the student's social/emotional needs, the March 2019 CSE recommended that the student receive two 30-minute sessions of speech-language therapy per week in a small group of two and one 30-minute session per week of individual speech-language therapy (Dist. Ex. 9 at pp. 10-11). Additionally, as described above, the CSE developed several annual goals that would address the student's communication needs in order to improve his social/emotional skills (see id. at pp. 6-7, 9). For example, the March 2019 IEP contained two annual goals designed to improve the student's language skills in order for him to comprehend basic classroom directions and independently participate in daily routines, and to improve his expressive language skills for a variety of purposes, some of which were social in nature; i.e. communicative intent (e.g. greetings and expressing needs), participation in daily routines, and demonstration of functional academic skills (e.g. sing along) (id. at pp. 6-7). Additionally, the IEP contained an annual goal designed to improve the student's ability to remain still and calm for up to 10 minutes during a classroom activity and a behavioral goal designed to improve the student's understanding of a three-step classroom routine (id. at p. 9). To further support the student's social/emotional needs, the March 2019 IEP provided numerous management needs including, but not limited to: a highly structured environment with clear rules and routines; higher staff to student ratio to support individual needs and support adaptive functioning delays; social skills explicitly taught, modeled, and reinforced on a daily basis; specialized instruction to target an increase of functional language and a decrease

of maladaptive behaviors; a language rich classroom environment with exposure to age-appropriate vocabulary; continued speech-language therapy to address receptive and expressive language delays; and rehearsal and reinforcement of new concepts to promote retention and support working memory and application of taught skills (id. at p. 4).

The school psychologist testified that the March 2019 CSE developed annual goals to address the student's social/emotional needs, including one to improve his pragmatic language skills because it targeted communicative intent, and the classroom behavior goal which addressed his ability to follow the classroom routine using visual aids (Tr. pp. 86, 122). Within the student's special class and related services program, according to the school psychologist, the classroom teacher, paraprofessional, and speech-language therapist would be responsible for "imparting social skills training" to the student pursuant to the IEP (Tr. pp. 62, 122-23; Dist. Ex 9 at pp. 4, 10-11). The school psychologist further explained that the IEP indicated that social skills were to be explicitly taught and reinforced on a daily basis (Tr. p. 141; see Dist. Ex. 9 at p. 4). Furthermore, the school psychologist described that "there was a big focus on the functional performance . . . and being able to join classroom routines, and participate more readily in basic greetings, such as greeting peers and adults, transitioning from one activity to the other, also specialized instruction to increase functional language" (Tr. p. 141).

Although the IHO stated that the student's social skills were "addressed by the recommended use of a formal program, Lakeshore, which aid[ed] with social skills development," review of the assigned school representative's testimony on this issue was less clear (compare IHO Decision at p. 11, with Tr. p. 62). The assigned school representative stated that within the school's 8:1+1 special class staff did "work on social skills" and when pressed, testified that she "believed" the primary grades at the assigned school used the Lakeshore program, but also that she was not certain (see Tr. p. 62). Review of the March 2019 IEP shows that it did not include reference to the Lakeshore program (see Dist. Ex. 9). Assuming without deciding that it was improper for the IHO to rely on "retrospective" testimony from the assigned school representative that the student would have been provided with the Lakeshore social skills program at the assigned school although it was not a program/service recommended in the March 2019 IEP, as described above, the March 2019 IEP identified the student's social skills deficits and provided annual goals, management needs, and program supports that adequately addressed those needs apart from a recommendation for the Lakeshore social skills program (id. at pp. 4, 6-7, 9-11). As such, the evidence in the hearing record does not afford a sufficient basis to reverse the hearing officer's determination based solely on his statement regarding Lakeshore or find that the district denied the student a FAPE on this issue.

VII. Conclusion

The parent's failure to comply with the practice regulations of Part 279 warrants dismissal of this appeal under the factual circumstances described in this decision. Even assuming for the sake of argument that dismissal was not warranted on procedural grounds, the parent would not have prevailed because the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2019-20 school year. Accordingly, the necessary inquiry is at an end and there is no need to reach the issues of whether the Rebecca School was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 10, 2021**

**JUSTYN P. BATES
STATE REVIEW OFFICER**