The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 18-033

Application of the BOARD OF EDUCATION OF THE ARLINGTON CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Michael K. Lambert, Esq.

Barbara J. Ebenstein, Esq., attorney for respondents

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 found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Kildonan School (Kildonan) for the 2017-18 school year. The appeal must be sustained.

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 student has been the subject of a prior appeal (Application of the Bd. of Educ., Appeal No. 16-023). Accordingly, the parties' familiarity with the facts and procedural history is presumed and will not be repeated here in detail. The prior State Review Officer's decision, dated June 22, 2016, determined that Kildonan was an appropriate unilateral placement for the student for the 2014-15 school year, subsequent to finding that the district's recommendation for integrated co-teaching services was inappropriate and denied the student a FAPE (id.). It appears that the district and parents entered into settlement agreements for the 2015-16 and 2016-17 school years, providing for tuition at Kildonan at public expense (see Parent Ex. B at p. 3; Tr. pp. 35-36).

For the 2016-17 school year the student attended fifth grade at Kildonan (see Dist. Ex. 32 at p. 1). On March 16, 2017, the student's mother provided written consent for the district to conduct an educational evaluation and classroom observation of the student, as requested by the district (Dist. Ex. 21).[1] Administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III), yielded standard scores ranging from 124 in reading comprehension to 52 in math fluency for multiplication, with the remaining subtest sores scattered in between (Dist. Ex. 12 at p. 1). The student's composite score for written expression was characterized as "[b]elow [a]verage and his scores for mathematics and math fluency were characterized as "[l]ow" (id.). On the Test of Written Language, Fourth Edition (TOWL-4), the student "obtained a poor score" for the contrived writing and spontaneous writing quotients, with weaknesses noted in vocabulary, spelling and punctuation (Dist. Ex. 15). Observations of the student, conducted in three of his Kildonan classes, indicated that the student was attentive to the instructor, responded appropriately to praise and correction, appeared prepared and organized for activities, and tried hard across settings (Dist. Ex. 14 at pp. 1-6).

On May 19, 2017, the CSE convened to conduct the student's annual review and to develop an IEP for the 2017-18 school year (Dist. Ex. 3 at p. 1). The CSE found the student eligible for special education as a student with a learning disability and recommended he be placed in 12:1+1 special classes for ELA, math, science, and social studies (id. at pp. 1, 12-13). The CSE further recommended placement in a 5:1 special class in reading for 45 minutes daily and a daily 5:1 resource room program to address math goals (id. at pp. 1, 3, 12). The CSE recommended the student receive the related services of individual counseling, individual OT, and group OT, for one 30-minute session each, weekly (id. at p. 1, 13). The CSE also recommended supports for school personnel on behalf of the student including psychological consultation ten times per year, to support the student in the special class and mainstream settings; OT consultation six times per year, to be provided within the classroom and mainstream settings; and assistive technology consultation six times per year, to be provided within the classroom with the student and teacher (id. at p. 14). Recommended program modifications included a shared aide for mainstreaming opportunities (id. at pp. 1, 3, 14). In addition, the CSE found the student eligible for extended school year (ESY) services and recommended that, during summer 2017, the student be placed in a 12:1+1 special class, with a 5:1 special class in reading for 60 minutes three times per week, and

[1] A neuropsychological evaluation of the student was completed in January 2016 (Dist. Ex. 5). Assessment of the student's intellectual functioning estimated his cognitive abilities to be in the borderline range (full scale IQ 76) (id. at p. 3). The student's performance on a measure of academic achievement yielded reading scores at a second-grade level and math scores at the kindergarten and first grade levels (id. at p. 8). The student demonstrated deficits in executive functioning skills, particularly in his ability to sequence information (id. at p. 9). With regard to social/emotional development, the student exhibited significant symptoms of anxiety and depression and struggled to connect with peers socially (id.). In addition, the student had difficulty comprehending non-literal language, was often rigid in his application of rules and struggled to gauge how his actions were perceived by others (id.). The student demonstrated poor visual processing skills, poor fine motor skills and significant deficits in math (id.). In contrast, the student demonstrated significant strengths in vocabulary, verbal abstract reasoning, and verbal memory (id.). The evaluator offered the following diagnoses of the student: specific learning disorder in written expression, including in spelling and in clarity or organization of written expression; specific learning disorder with impairment in mathematics including number sense, memorization of arithmetic facts and accurate or fluent calculation; specific learning disorder with impairment in reading including reading accuracy and fluency; and generalized anxiety disorder (Dist. Ex. 5 at p. 9).

the related services of individual counseling and OT for one 30-minute session each, per week (id. at pp. 1, 3).

In a letter dated August 14, 2017, the parents provided the district with notice of their intention to unilaterally place the student at Kildonan for the 2017-18 school year and seek reimbursement for the costs of the student's tuition based on the district's failure to offer the student a free appropriate public education (FAPE) (Parent Ex. A).[2] The letter notified the district of the parents' concerns that the student would not be able to make progress in the proposed program, and more specifically that there was no individual reading instruction, classes were too big, and it was "not a unified program" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 7, 2017, the parents alleged that the district failed to offer the student a FAPE for the 2017-18 school year and requested an impartial hearing (Parent Ex. B at pp. 5-6). The parents also requested an interim order regarding pendency that directed the district to continue paying for Kildonan pending final resolution of the impartial hearing (id. at pp. 6-7). The parents alleged that the evaluations considered by the CSE were insufficient to assess all areas of the student's disabilities, and that the CSE particularly failed to offer appropriate assistive technology devices or services, including an assistive technology assessment (id. at p. 6). The parents also alleged that the May 2017 IEP failed to offer sufficient individual instruction and that the district's classes were too large for the student (id.). The parents claimed that "the District's proposed placements fail[ed] to appropriately group [the student] in special education classes and group related services with students who ha[d] similar needs" (id.). As relief, the parents requested reimbursement for the cost of the student's tuition and counseling services at Kildonan for the 2017-18 school year (id. at p. 8).

B. Impartial Hearing Officer Decision

After a prehearing conference held on October 17, 2017, the parties proceeded to an impartial hearing on November 30, 2017, which concluded on February 15, 2018, after four days of proceedings (see Tr. pp. 1-874; IHO Ex. I). In a decision rendered March 5, 2018, the IHO found that the district failed to offer the student a FAPE for the 2017-18 school year (IHO Decision at p. 33).[3] With respect to an interim decision regarding pendency, the IHO noted that after the district recognized Kildonan as the student's pendency placement, the parents withdrew their request for a pendency order (id. at p. 4).

The IHO determined that the district conducted an "exhaustive evaluation" of the student in all areas related to his suspected disability prior to the May 2017 CSE meeting, including academics and written language, psychological functioning, and occupational therapy (OT) (IHO Decision at p. 28). The IHO further noted that the "only aspect of the evaluation process" that the

[2] On January 31, 2017, the parents had executed an enrollment contract with Kildonan for the student's attendance for the 2017-18 school year (Parent Ex. F).

[3] The IHO issued a corrected decision on March 6, 2018; all changes appear to have been to the exhibit list annexed to the decision.

parents challenged was the district's failure to update the March 2016 assistive technology evaluation and the IHO stated that she did "not agree" that an updated assistive technology evaluation "was indicated" (id.). The IHO found that the recommended program, "which combined a small special class (12:1:1), with small group instruction (5:1) in reading and math," as well as related services, was reasonably calculated to enable the student to make educational progress (id. at p. 29). She further determined the hearing record did not support the parents' argument that a 12:1:1 special class would be too large for the student as his classes at Kildonan were taught in a 10:1 ratio and Kildonan classes ranged from three to twelve students (id.). The IHO also noted that the hearing record did not support the parents' contention that the student needed 1:1 daily tutoring in reading, as testing of the student revealed average scores in reading comprehension and fluency (id.). The IHO "d[id] not find that the district's failure to recommend that [the student] be assigned his own iPad constituted a denial of FAPE," as the hearing record indicated that the IEP provided for access to a word processor, different forms of technology to aid with reading and writing, and six assistive technology consultations (id.).[4] Despite the parents' concerns, the IHO did not find that the district's recommendation of a "shared aide" constituted a denial of FAPE, as the parents were free to decline this service while accepting the rest of the program (IHO Decision at pp. 29-30).

Next, the IHO found that "the parents' challenge to the appropriateness of the class grouping" included the "challenge to the ages and grades of the student" and was within the IHO's jurisdiction (IHO Decision at pp. 30-31). The IHO also found that third and fourth grade students would have had different levels of social and physical development than the student and that the district's proposed placement would not have provided appropriate grouping (id. at p. 32). Further, the IHO determined that "it does not require speculation to conclude" that placing the student who is "chronologically" a sixth grader, with third grade students would "most likely" violate the 36 month age range requirement, but agreed with the district that the parents' other challenges to the class grouping (based on the classifications of the students, their need for a 1:1 aide, or their gross motor needs) were speculative and not a basis for her to find a denial of FAPE (id. at pp. 32-33). The IHO found that the district failed to meet its burden of proving the appropriateness of its decision to place the student in a third to fifth grade special class within an elementary school and that therefore the student was denied a FAPE (id. at p. 33).

Having found that the May 2017 IEP failed to offer the student a FAPE, the IHO turned to the appropriateness of the parents' unilateral placement at Kildonan (IHO Decision at p. 33). The IHO found that, "overall" the school was meeting the student's unique needs and he was benefiting from the instruction provided, thus, the parental placement was appropriate (id. at p. 35). The IHO noted that the evidence established that the student received individual daily tutoring for reading and writing, math instruction in a small class geared to the student's level of functioning, counseling when needed, and placement in classes with students close to his chronological age (id. at p. 34). In addition, the IHO noted that progress reports demonstrated that the student was

[4] With respect to the parents' assistive technology and other claims alleging defects in the CSE process and IEP, neither party challenged those portions of the IHO's decision and, consequently, they have become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, these determinations will not be reviewed on appeal.

progressing in the math curriculum, in reading and writing, and socially and emotionally with counseling support (id.).[5] The IHO further stated that, although testing indicated the student would benefit from OT, the fact that Kildonan did not provide OT did not render the program inappropriate to meet the student's needs (id.). Likewise, the IHO indicated that the restrictiveness of the unilateral placement did not render it inappropriate (id. at p. 35). Finally, while finding the placement appropriate, the IHO noted that she shared the district's concern about the type of instruction given in the student's humanities class (e.g., being read to from a graphic novel when the student demonstrated reading skills close to grade level) (id.).

With respect to equitable considerations, the IHO found that the parents' conduct did not support reducing the award of tuition reimbursement at Kildonan for the 2017-18 school year (IHO Decision at p. 37). The IHO noted that the parents shared their private evaluations with the district, made the student available for testing by the district, and the student's mother participated in the CSE review and gave the required 10-day notice (id. at p. 36). The IHO also stated that, while she found that the parents should have provided notice of their objections to the proposed school, she did not find that their failure to do so should defeat their right to reimbursement (id.). The IHO noted that the parents were required to sign a contract and pay a deposit to secure a placement for the student but that there would be no obligation if the student was offered a FAPE by June 30, 2017 (id.). The IHO found that the Kildonan tuition was reasonable given the individual tutoring, small classes, and counseling provided by the school (id.).

As relief, the IHO directed the district to reimburse the parents for tuition at Kildonan for the 2017-18 school year, to the extent not already funded pursuant to the student's pendency placement entitlement (IHO Decision at p. 37).[6]

IV. Appeal for State-Level Review

The district appeals from the IHO's determination that the classroom in which the recommended program would have been implemented would have been inappropriate and denied the student a FAPE because it would have included third and fourth grade students. The district also challenged the IHO's determination that the parents met their burden of demonstrating the appropriateness of Kildonan.

Initially, the district asserts that the IHO exceeded her jurisdiction by addressing issues not raised in the due process complaint notice. Specifically, the district asserts that the IHO erred in addressing the parent's claims that placing the student in a class with third and fourth grade students was not appropriate; that the student's placement in a "multi-graded class" would be detrimental to him; that a 5:1 aide to support the student in a larger mainstream setting was inappropriate; and

[5] In terms of staff qualifications, the IHO determined that although the student's counselor at Kildonan was not a licensed mental health counselor in New York, he was qualified to provide counseling and social skills training (IHO Decision at p. 34).

[6] The IHO noted that she denied the parents' request for the cost of counseling at Kildonan because no evidence was submitted to indicate the parents were billed for counseling services (IHO Decision at p. 37). That determination is also unappealed.

that it would be inappropriate to place the student in fifth grade or any program in the district elementary school.

The district then argues that the IHO erred in issuing a decision based on claims that were impermissibly speculative. The district contends that the parents' claims regarding grouping were speculative because the parent made no attempt to visit or obtain information regarding the class and if she had, the class was "not yet finalized." The district further contends that the IHO engaged in "absolute speculation" in assessing "whether the class would have been out of compliance with the regulatory requirement that the ages of the students in the class not be greater than 36 months." The district further argues that the IHO erred in relying on grouping as the sole determinant for finding that the otherwise appropriate IEP would not have been appropriately implemented, as State regulations caution against using the grouping of students based on the student's social development as the sole determinant.

The district next contends that the IHO erred in finding that the parents met their burden of demonstrating the appropriateness of Kildonan because the Kildonan students are all classified or classifiable, providing no opportunity for students at the school to interact with typically developing peers. The district further contends that no evidence was provided regarding the profiles of the other students in the student's class at Kildonan or what the student's cognitive functioning levels were relative to the other students in his class. In addition, the district asserts that no evidence was presented that the student received OT or speech-language therapy. Finally, the district calls into question the qualifications and relevant knowledge of the Kildonan witnesses and further appears to question the quality of the instruction and curriculum delivered to the student at Kildonan.[7]

The parents answer and assert that the IHO correctly found that issues concerning the composition of the class, as well as all issues on which the IHO based her decision, were properly before her. The parents also assert that the IHO did not engage in impermissible speculation with respect to the parents' right to information to be able to evaluate the proposed school, ability to visit, and the proposed class's violation of the age range requirement. Finally, the parents argue that the IHO correctly found that Kildonan is an appropriate placement for the 2017-18 school year as the hearing record supports the IHO's findings that Kildonan addressed the student's individual needs and the student made progress.

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.

[7] With respect to the district's arguments relating to the appropriateness of Kildonan for the student, it is noted that the Part 200 regulations do not apply to private schools, particularly with respect to grouping requirements (see 8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]).

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" (Endrew 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 Endrew 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]).[8]

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. Preliminary Matters - Scope of the Impartial Hearing

As a preliminary matter, it is necessary to determine which claims are properly before me. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing

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

regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y 2013]; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 2014 WL 2748756, at *1-*2 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

The district asserts that the IHO exceeded her jurisdiction by addressing issues not raised in the due process complaint notice, including claims regarding placement of the student in "a multi-graded class" and that it would be inappropriate to place the student in an elementary school or in a fifth grade class. The IHO found that the parents' challenge to the appropriateness of the class groupings "include[d] the challenge to the ages and grades of the student" and was within the IHO's jurisdiction. The IHO decision further stated that "a class that combines" the student who is "chronologically a sixth grader," together with third grade students would "most likely run afoul" of the 36-month age range requirement.[9]

The parents' due process complaint notice included an allegation that "the District's proposed placements fail to appropriately group [the student] in special education classes and group related services with students who have similar needs" and specifically cited the State regulations related to functional grouping (Parent Ex. B at p. 6; see 8 NYCRR 200.1[ww][3][ii]; 200.6[a][3]). To the extent that the parents argue that placement of the student in an elementary school or a different grade is an indication the student would not be placed with students with similar needs, that argument was not specifically raised in the due process complaint notice. Additionally, the parents' due process complaint notice contained no claims related to the age range of the students in the proposed class or mention of the State regulation limiting the age range of students in special classes to 36-months (8 NYCRR 200.6[h][5] [The chronological age range within special classes of students with disabilities who are less than 16 years of age shall not exceed 36 months]).

In addition to the grouping claim issues above, the district also asserts that the IHO exceeded her jurisdiction by addressing the "belated claim" not raised in the due process complaint

[9] To the extent that the IHO's decision raises grouping by grade level as an indication the student would not have been grouped with other students with similar needs, it is more fully discussed below.

notice, that a 5:1 aide to support the student in a larger mainstream setting was inappropriate. Despite the parents' concerns, the IHO did not find that the district's recommendation of a "shared aide" constituted a denial of FAPE, as the parents were free to decline this service while accepting the rest of the program. The parents' due process complaint notice contains no mention of this claim either.

Upon review of the hearing record, the district did not subsequently agree to add issues related to the grade or age ranges of the students in the proposed class or the recommendation for a shared aide and the parents did not attempt to amend the due process complaint notice to include these issues. Accordingly, these issues raised for the first time on appeal are outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]".

Nevertheless, since the IHO drew conclusions on these issues notwithstanding the fact that the parents' due process complaint notice did not include them, the next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education, (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). The issue of the age range of the students in the proposed class first appeared during cross-examination, when counsel for the parent questioned the district's director of special education about a class profile that she had prepared in spring 2017, in advance of the May 2017 CSE meeting (Tr. pp. 165-67). While the district's director of special education testified about the class profile during direct examination, as the district's first witness, she did not testify as to the age range of the students in the class (Tr. pp. 121-22). Accordingly, to the extent that the district witness testified about the issue, it arose as a part of routine questioning developing general background information and the district did not open the door to the parents' challenges (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). Additionally, the first time counsel for the parents raised an argument related to the age range of the students in the proposed class, and the possibility that the class would not have complied with State regulation, was in the parents' post-hearing brief, in which the parents asserted that "the district did not establish that placing [the student] in the proposed class complies with the requirement" (IHO Ex. VII at pp. 10-11). However, during direct, district counsel questioned the director of special education regarding why the district considered the student to be in a different grade than he was in at Kildonan (Tr. pp. 76-77). A similar question regarding the student's grade was posed to the special education teacher who observed the student (Tr. pp. 212-13). Consequently, while I have serious concerns about whether the IHO's findings regarding the age range and grades of the students in the proposed class were within the scope of the hearing, because they were at least in part raised during direct examination, and because they ended up being so integral to the IHO's decision, they are addressed below.

With respect to the issue of the appropriateness of the "shared aide," this issue first arose during cross-examination, when counsel for the parent questioned the district's director of special

education (Tr. pp. 156-58). While the district's director of special education testified about the shared aide during direct examination, the questions asked by the district counsel were directed at developing background on the student's history and on the recommended program in the IEP (Tr. pp. 112-13). Based on the above, to the extent that district witnesses testified about the shared aide, the issue either was not introduced by the district or arose as a part of routine questioning developing general background; accordingly, the district did not open the door to the parents' challenge and it is outside the scope of the hearing (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9).[10]

B. IEP Implementation - Assigned Public School Site

At the outset, the parties' dispute over FAPE now centers on the permissibility of claims involving the prospective implementation of the student's programing in conformance with the IEP as set forth in State regulations, and there is no longer a dispute about the appropriateness of the May 2017 IEP's design. Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[11]

However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ.,

[10] To the extent that the parents argue that the shared aide claim is related to their allegations concerning the student's anxiety and perceived stigmatization, it is further discussed below.

[11] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 2016 WL 4470948, at *2). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

1. Grouping—Chronological Grade

Initially, I will address an issue that has influenced both the parties and the IHO's reasoning in this case but for which there is little if any authority. The district claims that the IHO erred in finding that the student's placement in a district elementary school in a 12:1+1 special class designated for students in grades three through five, was inappropriate because "third and fourth grade students would have different levels of social and physical development than the student" and the decision to "place the student in a third to fifth grade special class within an elementary school" was a denial of FAPE (IHO Decision at pp. 32-33). The district asserts that this finding was impermissibly speculative.

Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school district's must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than sixteen years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). In addition, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8

NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students must be considered to ensure beneficial growth for each student, although neither may be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary, so long as the modifications, adaptations, and other resources provided to students do not "consistently detract from the opportunities of other students" in the class to benefit from instruction (8 NYCRR 200.6[a][3][iv]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

In contrast to the State regulations which relate to chronological age and functional abilities for special classes, the parties and the IHO focus more predominantly on the particular grade that the student had been or should have been attending at the time of the May 2017 CSE meeting.[12] In particular, Kildonan perceived the student to be a sixth grader for the 2017-18 school year, which is in alignment with the parents' view of the student's chronological grade. However, the district perceived the student as a fifth grader for the 2017-18 school year. The manner in which this disparate view came about is described below.

The student attended a Montessori school for kindergarten and first grade (Tr. p. 764). According to the student's mother, the student had "difficulty with the academic learning piece" of kindergarten and in first grade "the academic challenges became more" and the parents sought a neuropsychological evaluation of the student (Tr. pp. 764-65). The parents contacted the CSE and decided to bring the student back to the district (Tr. pp. 766-67).[13] The student's mother testified that, although the student was chronologically eligible for second grade, he was "so far behind" that the parents, in collaboration with the district, determined that the student should repeat first grade (Tr. pp. 279, 767-768; see Dist. Ex. 5 at p. 1).[14] The following school year (2014-15), the

[12] The district also contends the IHO's finding that placing the student who is chronologically a sixth grader, with third grade students would "most likely" violate the 36 month age range requirement is "absolute speculation." Initially, the district is correct as just because the proposed class could include students from grades three through five does not mean the class would have included students more than three years younger than the student. The teacher of the proposed class testified that three students joined her class for the 2017-18 school year and there were third, fourth, and fifth grade students in the class (Tr. pp. 380, 384-85), accordingly there were at most three students who were chronologically third grade students in the class (see Parent Ex. G). Nevertheless, even if there were three students in the class who were outside of the 36 month age range requirement set forth in State regulations, such a violation would not amount to a denial of FAPE (E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012], citing M.P.G. v. N.Y.C. Dep't of Educ., 2010 WL 3398256, at *10 [S.D.N.Y. Aug. 27, 2010] ["'failure to adhere to the age-related guidelines is not always fatal ... if the students are grouped appropriately in terms of functional needs.'"]). As noted in note 25, infra, the Commissioner also allows school districts to seek variances from the age requirements. Accordingly, whether the potential violation of the regulations regarding age range resulted in a denial of FAPE, turns on the same analysis as that undertaken with respect to the IHO's finding regarding chronological grade level and is not discussed further.

[13] The parent's testimony reflected that the district's kindergarten program was a half-day program (Tr. p. 764).

[14] According to the parent, the student was placed in a co-taught or inclusion class (Tr. p. 768).

parents enrolled the student at Kildonan (Tr. p. 769). According to the student's mother, for the 2014-15 school year, the student would have been in second grade had he stayed in the district; however, Kildonan saw him "chronologically as a third grader" and he entered the private school as a third-grade student for the 2014-15 school year (id.).[15]

In contrast, the CSE chairperson testified that for the 2017-18 school year the district considered the student to be a fifth grader (Tr. pp. 146-47, 162-63). She explained that the student had repeated first grade in the district and that, had he stayed in the district, he would have been a fifth grader (Tr. pp. 146-47, 162-63). The CSE chairperson testified that it was her understanding that, when the student entered Kildonan, the school did not have an appropriate grade grouping for him so they "put him in with the next year's group of students," which she indicated "is his age because he repeated first grade" (Tr. p. 146). As such, she testified that, despite the student having been "bumped" up a grade at Kildonan, for the student's May 2017 annual review, the CSE "programmed for him as [it] would if he were in [its] public schools making progress year to year," and accordingly, "as a fifth grader" (Tr. p. 163).

Based on the above, the parents perceived that the student was appropriately grouped according to his age when he initially enrolled at Kildonan, that he had already completed fifth grade at Kildonan, and that it would have been be inappropriate, if not "demoraliz[ing]," to place the student with students as young as third and fourth graders (Tr. pp. 778-79). The parents assert that the student should not be in elementary school, but rather should be in middle school with sixth grade students (see Tr. pp. 778-80). In contrast, the district takes the position that the student was inappropriately moved up a grade when he was initially placed by Kildonan in a third-grade class and that he should be in fifth grade for the 2017-18 school year.

It is important to emphasize that there is a fundamental difference between the concept of a student's chronological grade—i.e., the label assigned by the school as part of an administrative function based, at least in part on the number of years the student has been in school—and the concept of a student's functional grade level—i.e., the student's level of academic achievement or the grade level that correlates to the academic skills that the student is able to perform or the curriculum in which the student requires instruction. The chronological grade of a student is the

[15] The approach to grouping taken at Kildonan shares some similarities with the grouping by individual needs approach taken by the district. For example, the parent's testimony indicated that Kildonan taught students according to their "individual level" and that they would teach the student at "whatever his level of need was" (Tr. p. 769). In addition, the hearing record reflects that at Kildonan, students were grouped according to grade level for courses other than math and 1:1 language tutoring (Tr. p. 434). The Kildonan headmaster testified that in these subject matter classes the teachers got to know each student's skills, communicate with the students' tutors, find out what the students already knew in that subject, and build on it (Tr. pp. 485-86). He further testified that assignments were differentiated (Tr. p. 486). The headmaster explained that in this instance, given the student's writing skills, "[the student's] assignments from his subject matter teachers [we]re supposed to be calibrated according to that skill level as opposed to the student sitting next to him," who "may have a different output that [he] is supposed to produce for a given assignment" (Tr. p. 486). However, for math, the headmaster indicated that grouping is usually based on skill level and that as a result, "a given student might be in a math class with [students] two grade levels below and two grade levels above" his own (chronological) grade level (Tr. p. 435). He further testified that there had been times when the school has grouped a very advanced math student, for example in eighth grade, with tenth and eleventh graders and other times where a different eighth grade student might be grouped with fifth or sixth graders depending on their skill level (Tr. pp. 435-36).

sort of determination that falls within the broad authority granted to the district by State law "[t]o prescribe the course of study by which the pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant" (Educ. Law §§ 1709[3]; 2554[1]; 2590-h[17]). Accordingly, matters relating to a student's promotion from grade to grade are committed to the discretion of the district (see Appeal of A.R., 54 Ed. Dep't Rep., Decision No. 16,665 [2014], available at http://www.counsel.nysed.gov/Decisions/volume54/d16665; Appeal of Y.R., 51 Ed. Dep't Rep., Decision No. 16,270, available at http://www.counsel.nysed.gov/Decisions/volume51/d16270; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013]; Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955] ["After a child is admitted to a public school, the board of education has the power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability"]).

Moreover, the student's chronological grade is akin to a categorical label of the sort that has been deemed irrelevant under the IDEA (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). That is, the IDEA provides that a student's special education programming, services, and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; Heather S. v. Wisconsin, 125 F.3d 1045, 1055 [7th Cir.1997] ["The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child"], citing Rowley, 458 U.S. at 181, and Board of Educ. of Murphysboro Community Unit Sch. Dist. No. 186 v. Illinois State Bd. of Educ.,41 F.3d 1162, 1166 [7th Cir.1994]; M.R. v S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (emphasis in original)]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis" in an IEP "will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]; see generally In re: Student with a Disability, 110 LRP 23554 [SEA VA 2010]).

Although it was important to the parents that the student be placed in a class that included sixth graders—as opposed to third through fifth graders as in the proposed class—State regulations do not dictate grouping based on chronological grade. As such, the IHO erred in finding a violation of State regulations on this basis.

What is pertinent to the grouping issue, however, are the estimated grade level(s) at which the student is actually functioning.[16] While the merits of the functional grouping issue may be too speculative to reach in this instance, it is instructive to review the student's functional level, if for no other reason than to compare the sort of evidence relevant to such an analysis. That is, the evidence in the hearing record pertaining to the student's functional grade levels comes from results of testing administered with the student or the student's academic achievements and struggles; in

[16] While grade level functioning in the district is tied to the Common Core, at Kildonan, grade level functioning is tied to the International Baccalaureate (Tr. pp. 428-33).

other words, it relates to objective evidence about the student's unique special education needs. This is in contrast to the more categorical, generalized and subjective determinations made by the district and Kildonan in labeling the student with a particular chronological grade based in part on the student's needs, but also on the different aspects of the public and private educational programs, the composition of the different schools, and administrative considerations.

The hearing record reflects that for the upcoming 2017-18 school year, while Kildonan considered the student to be a sixth grader chronologically, he was not performing academically at a sixth-grade level during the months leading up to that school year. Specifically, the district's March 28, 2017 testing revealed scores on various subtests of the WIAT-III related to math, writing, reading, and spelling, which indicated the student's academic functioning levels for 12 of the 14 subtests were between a <1.0 grade equivalent and a 4.3 grade equivalent, with most of the scores falling below the third-grade level (Dist. Ex. 12 at p. 1).[17]

Similarly, testing completed by Kildonan in May 2017 also revealed that the student's functioning on a variety of academic tests, which assessed reading skills (word attack, word identification, accuracy, rate, fluency, vocabulary, and comprehension), as well as spelling and mathematics (problem solving and procedures), ranged between a 1.4 grade equivalent in spelling and a 5.3 grade equivalent in vocabulary, with the majority of the student's scores falling below the third grade level (Parent Ex. D).

A district special education teacher also administered the Test of Written Language, Fourth Edition (TOWL-4) to the student in April 2017, on which the student's performance yielded a score in the "poor" range on both the contrived writing and the spontaneous writing quotients (Dist. Ex. 15; see Tr. pp. 224-27). The district special education teacher testified that the student's scores on this test were based on age alone, and that his standard scores were characterized by the test as "poor," which meant below average or significantly below average (Tr. pp. 226-27, 259-60; Dist. Ex. 15). As such, the student was not demonstrating the ability to function successfully at his chronological age or grade, with regard to written language.[18]

The district special education teacher also observed the student on April 21, 2017, at Kildonan in his fifth-grade class (Tr. p. 209; Dist. Ex. 14 at p. 1). The special education teacher testified that the level of math work performed by the fifth-grade students in the Kildonan classroom was "significantly less" compared to the fourth-grade curriculum in the district (Tr. p. 213).

At the time of the May 2017 CSE meeting when the student's program for the 2017-18 school year was being developed, the student was in a fifth-grade class at Kildonan (Dist. Ex. 3 at p. 1). However, based on the above he was not performing skills commonly associated with that grade level. Thus, testimony such as that offered by the student's Kildonan counselor—that the

[17] On the other two subtests (reading comprehension and listening comprehension), the student attained grade equivalents of >12.9 and 9.3 (Dist. Ex. 12 at p. 1).

[18] The special education teacher's report indicated that the TOWL-4 assesses written language skills including "[m]echanics (spelling, punctuation, etc.), language (vocabulary and sentence structure), and theme development (story sequence, plot, prose)" (Dist. Ex. 15).

student had "earned the right to be in sixth grade" because he had taken a full load of courses in fifth grade and passed them well and moved on" and was now "doing sixth grade work" (Tr. p. 689)—fails to take into account that a special education student's functional grade level may not equate with his or her chronological grade level.

In summary, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade. Rather, State regulations require that students in special classes must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]).[19] Accordingly, the IHO erred in determining that, because Kildonan planned to place the student in a classroom designated as sixth grade, the district violated State regulation by planning to place the student in a 12:1+1 special class designated as grades three through five.

C. Parents' Prospective Challenge to Grouping

Turning next to the district's arguments that IHO erred because the parents' prospective grouping challenges were impermissibly speculative, since M.O. was decided by the Second Circuit, as counsel for the parents astutely points out, the law regarding which challenges to a district's assignment of a student to a particular classroom are speculative, and which ones are not, has been "in flux" (M.O., 793 F.3d 236). On one hand, are cases which find that grouping claims are barred as impermissibly speculative. On the other hand, are cases which find that grouping claims may be permissible non-speculative claims for which the courts will consider evidence submitted by the parties as to the appropriateness of the proposed classroom placement, including information obtained by the parents. I will address the facts of this case using both approaches in greater detail below. However, as this appeal focuses on the narrow issue of the extent to which student grouping affects the student's right to a FAPE, it should be noted that there is a State educational policy regarding grouping and that the State procedures to address grouping have evolved considerably over time. It appears that no case law either prior to or after M.O. has considered the State's policy approach to the State grouping regulations.[20] A review of these State policy determinations development of and modifications to State educational policy as it relates to the State regulations that govern the grouping of students in special class settings is instructive.

[19] As further described below, if a district operates a special class wherein the range of achievement in reading and mathematics exceeds three years, the district shall provide the CSE, parents, and teacher of the students in the class with "a description of the range of achievement in reading and mathematics, and the general levels of social development, physical development and management needs in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]).

[20] I find it unsurprising that a court has not addressed the State's policy approach and suspect it is because no one has presented it. SROs have, even pre-dating R.E., briefly stated the effect that the current policy has upon certain cases (see, e.g., Application of the Dep't of Educ., Appeal No. 11-066 [explaining in a unilateral placement case that "neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate"]), but there has been little need until now to detail why it is no longer practical or appropriate in light of the State policy determinations that were made long before tuition reimbursement cases became commonplace.

Ever since the predecessor of the IDEA, the Education for All Handicapped Children Act, was passed into law in 1975, New York regulations have defined a "special class" setting as "a class consisting of students with disabilities who have been grouped together because of similar individual needs" (8 NYCRR 200.1[uu]).[21] At that time, when a school district established a special class it was the policy of the State that "the formation of special classes, including grouping and numbers, shall depend upon the severity of the children's handicaps, capabilities and educational, social or emotional needs" (former 8 NYCRR 200.4[a] [as amended Nov. 1976]), and special class sizes often ranged from 10 to 18 students (former 8 NYCRR 200.4 [as amended Nov. 1976]). IEPs were developed at "planning conferences" that at a minimum included the student's teacher and the parent, and such IEP meetings were to occur "no later than 30 days after the child enters the special education programing" (former 8 NYCRR 200.4[j][2] [as amended Nov. 1976]). Thus, in alignment with the State's policy scheme in effect during the 1970s, it was common practice that a discussion regarding a student's grouping could take place between a parent and the student's current special education teacher after the student entered the program offered by the public agency, but before the student's IEP was finalized.[22]

In 1984, substantial revisions to Part 200 were made "in response to an extensive study of the Part 200 regulations which was conducted by the State Education Department and an independent private consulting agency during the 1982-83 and 1983-84 school years" (Notice of Proposed Rulemaking, Education of Children with Handicapping Conditions, N.Y. Reg. Mar. 21, 1984, at p. 6). At that time

> [t]he definition of special education [was] expanded to clarify that grouping for the purpose of special education shall be in accordance with the similarity of the individual needs of the pupils so grouped. The expanded definition describes "individual needs" in terms of the areas of academic or educational achievement and learning characteristics (rather than learning rate), social development, physical development and management needs of the pupil.

(id. at p. 4). The procedures for IEP development were further standardized under State policy to require a two-phase process for drafting IEPs for students with disabilities (see id. at p. 5). In addition, section 200.6 of State regulations was amended to include general standards governing how students with disabilities must be appropriately grouped together for special education instruction according to similarity of needs in each of four specified areas of educational interests described above (e.g. academic, social, physical, and management needs) and, further, specified

[21] In 1976 the regulation stated that "Special class means a class consisting of handicapped children who have been grouped together because of similar educational needs for the purpose of being provided a program of special education under the direction of a certified special education teacher" (former 8 NYCRR 200.1[m] [as amended Nov. 1, 1976]).

[22] At the time, the number of standard deviations that a student's IQ fell below the norm was a significant factor in determining the similarity between various students for grouping purposes.

that these grouping standard changes applied to special class and resource room settings (id.).[23] The State's two-phase IEP development policy and procedures persisted through the 1990-91 school year. At that time, section 200.4 [c] of the State regulations provided that

> Recommendation. Individualized education program (IEP) -phase I. For a pupil not previously identified as having a handicapping condition, the committee on special education shall provide a recommendation to the board of education within 30 days of the date of receipt of consent, or within 40 days of the date of receipt of referral, whichever period shall end earlier

(former 8 NYCRR 200.4[c] as amended June 1990). During phase I of IEP development

> (1) If the pupil has been determined to be ineligible for special education, the recommendation shall indicate the reasons the pupil was found ineligible.
>
> * * *
>
> (2) If the pupil has been determined to be eligible for special education services, the recommendation shall:

[23] In 1984, section 200.6 indicated, among other things, that

(3) Handicapped pupils placed together for purposes of special education shall be grouped by similarity of individual needs as defined in section 200.1(hh) of this Part, in accordance with the following:

> (i) The range of academic or educational achievement of such pupils shall be limited to assure that instruction provides each pupil appropriate opportunities to achieve his or her annual goals. The learning characteristics of pupils in the group shall be sufficiently similar to assure that this range of academic or educational achievement is at least maintained.
>
> (ii) The social development of each pupil shall be considered prior to placement in any instructional group to assure that the social interaction within the group is beneficial to each pupil, contributes to each pupil's social growth and maturity, and does not consistently interfere with the instruction being provided. The social needs of a pupil shall not be the sole determinant of such placement.
>
> (iii) The levels of physical development of such pupils may vary, provided that each pupil is provided appropriate opportunities to benefit from such instruction. Physical needs shall be considered prior to determining placement to assure access to appropriate programs. The physical needs of the pupil shall not be the sole basis for determining placement.
>
> (iv) The management needs of such pupils may vary, provided that environmental modifications, adaptations, or, human or material resources required to meet the needs of any one pupil in the group are provided and do not consistently detract from the opportunities of other pupils in the group to benefit from instruction.

(former 8 NYCRR 200.6[a][3] [as amended Nov 1984]).

(i) report the present levels of performance and indicate the individual needs of the pupil according to each of the four areas listed in section 200.1(kk) of this Part;

(ii) indicate the classification of the handicapping condition;

(iii) list annual goals that are consistent with the pupil's needs and abilities and instructional objectives and evaluative criteria to be followed during the period beginning with placement and ending with completion of phase II of IEP in accordance with subdivisions (d) and (e) of this section;

(iv) indicate the recommended program from the options set forth in section 200.6 of this Part, the class size, if appropriate . . . ;

(v) indicate the projected date for initiation of special education and related services . . .;

(vi) describe any specialized equipment and adaptive devices needed for the pupil to benefit from education;

(vii) list those testing modifications to be used consistently by the pupil in the recommended educational program; and

(viii) indicate the recommended placement.

(3) Such recommendations shall be developed in meetings of the committee on

special education. . .

(d) . . . A copy of phase I of the IEP shall be provided to the appropriate teachers and supervisors of the recommended special education programs and services for use in the development of phase II of the IEP in accordance with subdivision (e) of this section.

(former 8 NYCRR 200.4[c][1]-[2] as amended June 1990).

Phase I of the State's IEP development scheme did not include consideration of grouping students by similarity of needs. The grouping aspects of educational planning, the purpose of which was to enhance the experiences of teachers and students in special classes to "assure that instruction provides each pupil appropriate opportunities to achieve his or her annual goals,"[24] were addressed

[24] A ruling from the Commissioner of Education near the end of these two-phase IEP development protocols demonstrates the relationship between the development of goals and the grouping. "To establish the appropriateness of a placement, it is necessary to determine whether a child is placed with other pupils whose academic levels, educational achievement, physical, social and management needs are sufficiently similar to enable the child to meet his annual goals (8 NYCRR 200.6[a][3][i]); (Application of a Child with a Handicapping Condition, 29 Ed Dept Rep 83). Upon my review of the evaluations, classroom profile and this child's annual goals, I conclude that the needs of the other pupils are sufficiently similar to enable this pupil to achieve his annual

in phase II of the IEP development process, which, similar to the 1970s approach, continued to be addressed in a "planning conference" conducted with the student's teacher after the student was placed in and began receiving public school services. Until 1990-91, phase II was specifically focused on the completion of the short-term objective aspects of each student's IEP, which were subcomponents of the annual goals section of the IEP.

> (5) The planning conference shall result in the following additions to the individualized education program (IEP) developed during phase I:
>
> > (i) a statement of short -term objectives consistent with the annual goals for the pupil;
> >
> > (ii) appropriate objective criteria and evaluation procedures and schedules for determining, on at last an annual basis, whether the instructional objectives are being achieved; and
> >
> > (iii) based on the short -term objectives developed at the planning conference, a determination shall be made by the participants regarding the continuing appropriateness of the placement as provided in the phase I IEP.

(former 8 NYCRR 200.4 [e][5] [as amended 1990]).

Thus until 1991, the IEP development scheme continued as a two-phase process in which phase II was conducted after a student entered the public school program pursuant to the phase I IEP, and the student's parent and then-current teacher completed the annual goals section of the IEP and were able to revisit the issue of grouping in light of the annual goals and short term objectives so developed. Additionally, as described above, the participants in phase II also revisited the determination of whether the student's placement was appropriate upon the completion of the IEP, once again, after the student entered the public program.

In preparation for the 1991-92 school year, the Board of Regents embarked on a mandate relief initiative that sparked substantial changes to the State's IEP development policy. Instead of requiring multiple meetings to develop a student's IEP, the state shifted its policy with the objective that "IEP development would be consolidated into a single process . . . to eliminate the requirement to conduct a second [phase II] meeting with many of the same participants, reduce the number of notifications and streamline the process" (N.Y. Reg. May 1, 1991, at p. 11). At the time, it was believed by policy makers that this change could effectuate a savings of $35.6 million dollars annually (see id.). Consequently, the post-placement phase II CSE meeting that was held with the parent after the student entered the public school program to further develop annual goals and revisit the continuing appropriateness of the placement was explicitly eliminated from State regulation. Since the 1991-92 school year the IEP process is completed prior to its implementation. The Board of Regents left intact the requirements in Section 200.6 that school districts must group

---

goals." (Application of a Child with a Handicapping Condition, 29 Ed Dept Rep 210). The case also demonstrated the changeability that occurs when grouping student's in special classes, noting that "[t]he record indicates that although an age variance was required at the time of the hearing, the variance is no longer necessary due to the transfer of one of the students" (id.).

students together by similarity of needs when they entered the public program (8 NYCRR 200.6 [a][3], [f]), but the automatic right of the parent to review that placement in a second mandated CSE meeting that provided the opportunity to examine the actual grouping of the student with his or her peers was discontinued. With respect to the time period between completion of each student's IEP and the student's entry in a public school class under such IEP, the Board of Regents did not choose to establish an alternative policy for school districts to follow that mandated parent participation in a grouping decision for a proposed, unimplemented IEP placement. However, the Board of Regents maintained an explicit requirement that addressed parent involvement related to grouping requirements:

> Each district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, except for special classes described in subparagraphs (4) (ii) and (iii) of this subdivision, provide the committee on special education and the parents and teacher of pupils in such class a description of the range of achievement in reading and mathematics, and the general levels of social development, physical development and management needs in the class, by November 1st of each year. The parent of each pupil entering such a class after November 1st shall also be provided a description of the class. A district providing such a description shall also inform the parent of each pupil in such class that, upon request, the parent shall be afforded the opportunity to discuss the description with an appropriate representative of the district

(former 8 NYCRR 200.6[f][7] [as amended 1991], now [h][7] [emphasis added]). Consequently, while parents have a right to information and the opportunity to discuss grouping, that right and participatory opportunity has become more circumscribed as State policy evolved over time after it was moved out of the IEP development process.

In summary, the history of State regulations related to the grouping of students in special classes in accordance with similarity of needs shows that parents once had a broad opportunity under State procedures to address the grouping of students in special classes upon the completion of the IEP and a student's entry into the program offered by the public school. However, that right was later explicitly modified by State policy makers to a degree as the result of a deliberative process in the early 1990s. With that historical context in place, I will proceed next to address the parties' claims.

1. Cases Permitting Prospective Grouping Challenges

As noted above, the State's policy that addressing the procedures for communicating with parents about State grouping requirements has remained unchanged for over 25 years. Understandably, the parents' legal analysis points to cases that focus on a parent's right to information about functional grouping.

Much has been said on the topic, related to the topic but little of the footing has been solid. The United States Department of Education has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]); see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating

access for parents, "the process contemplates cooperation between parents and school administrators"]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority]; E.A.M., 2012 WL 4571794, at *11 [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F., 2011 WL 5419847, at *12 [same]).[25] On the other hand, there is some district court authority indicating that a parent has a right to obtain information about an assigned public school site (F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding "implicit" in the reasoning of the Second Circuit's decision in M.O. the proposition that parents have the right to obtain information on which to form a judgment about an assigned school]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered, rather than, the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

In particular, the parents cites to district court authority finding certain grouping claims to be non-speculative, permissible claims (S.B. v New York City Dep't of Educ., 117 F. Supp.3d 355, at 366-367, 376-380 [S.D.N.Y. June 25, 2015] [parent allowed to rely on information obtained from school staff during visit that the school does not group students based on their functional or academic levels in assessing whether the school was an appropriate placement]). The parents district court authority indicating that a parent has a right to obtain information about an assigned public school site (F.B., 132 F. Supp.3d 522). In F.B., the court considered the question of whether "parents' procedural rights stop the moment the CSE meeting ends" namely, is "the 'snapshot' conception of the Parent's participatory right correct" or "do parents have a continuing participatory right—including … to obtain timely information about, and/or to comment upon, the … placement decision" (F.B., 132 F. Supp.3d at 538). The court found that implicit in the Second Circuit's decision in M.O., was "the right to obtain information on which to form a judgment about the proposed placement" (id. at pp. 540-41).

In finding the district's failure to provide the parent with relevant and timely information about the proposed school significantly impeded the parents' opportunity to participate in the decision making process, the court in F.B., highlighted five features supporting its decision, including: that (1) the district waited until June, after a February CSE meeting, to recommend a placement; (2) the parents made good-faith attempts to acquire relevant information given the impending start of the new school year—consisting of writing the district four times—but the district inexplicably failed to respond; (3) the information the parents sought was directly relevant to their ability to assess the proposed school placement and its capacity to implement the student's IEP; (4) as of the June deadline to reenroll the student in the unilateral placement, the parents had not been notified of a proposed placement; the district had "gone radio silent for four months," and

[25] Nothing in this decision is intended to discourage districts from offering parents the opportunity to view school or classroom placements, as such opportunities can only foster the collaborative process between parents and districts envisioned by Congress as the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5]).

"the parents lacked any tangible ability to assess whether a proposed placement would be appropriate for [the student's] needs"; and (5) the parents were not at fault, having "consistently acted swiftly and conscientiously" (F.B., 132 F. Supp.3d at 543-44).

a. Information Requests

Tuning to the facts of this case, with regard to the parties' dispute over whether the parent requested information about the proposed class and a class profile, the IHO found that while the parent inquired about the class and whether it would be "a good fit" for the student, she did not specifically ask to visit the class (IHO Decision at p. 31). The IHO also determined that the "district was less than forthcoming with information about the students in the class" as the director of special education had a class profile but did not share it with the parent (id.). However, the IHO found the class profile was "not relevant" because it related to the class composition for the 2016-17 school year, not the 2017-18 school year at issue, and further, that none of the cases cited by the parent held that a parent has the right to a class profile (IHO Decision at p. 31; see Tr. pp. 166-168, 693-694; Parent Ex. G). The parents did not cross-appeal any of the IHO's findings in this regard and they have become final and binding.

As noted above, the May 2017 IEP recommended that the student be placed in 12:1+1 special classes for ELA, math, science and social studies; a 5:1 special class for instruction in reading; a 5:1 resource room program; and individual and small group OT, as well as individual counseling (Dist. Ex. 3 at pp. 1, 12-13). However, the hearing record contains little, if any, information about how the student would be grouped in the special classes or group related services.

The student's mother testified that there was no discussion of the student's grade level at the May 2017 CSE meeting, rather, "it was just talking about him being in this 12:1 class, then realizing that it was a third to fifth grade class" (Tr. p. 780). She commented that she did not think the CSE "talked about [the student's] class level other than what was proposed by the district" (Tr. p. 780). According to the CSE chairperson, the parent did not request a profile of the special class, the resource room, or the group occupational therapy services that were recommended for the student either at or after the CSE meeting (Tr. pp. 121-22). Nor did she ask the chairperson to describe the cognitive functioning levels or the reading, writing, or math functional levels of any of the students in the proposed class (id.).

Notably, at the May 2017 CSE meeting, the CSE chairperson had, but did not share a class profile, which, as indicated above, was comprised of information regarding the students enrolled in the proposed class during the 2016-17 school year (Tr. pp. 160-61, 165-167). Although the parent did not request class profiles, she testified that during the May 2017 CSE meeting, she asked the teacher of the proposed class what the students in her class were like, and the teacher "pulled back a little bit" and appeared to be uncomfortable with the question (Tr. pp. 398, 773-74, 830-31).[26] The parent interpreted the teacher's reaction as an indication that she should not ask that question and therefore, she rephrased the question, noted that the teacher had tested the student

[26] As discussed in detail below, the parent also testified that during the May 2017 CSE meeting she asked the teacher if she could visit the proposed class and was told that she could not (Tr. p. 774).

and asked if the teacher felt the student was "the right fit" for the class (Tr. pp. 773-74). The teacher indicated she thought the student would fit right in (Tr. p. 774).

Beyond questioning the teacher of the proposed class at the CSE meeting, the hearing record does not contain any documentary evidence of telephone calls, emails or other written communication showing that the parents' requested information about grouping or the functional levels of the students in the proposed class. Additionally, as noted above, the IHO found that the parents did not include concerns about the proposed classroom in their notice of unilateral placement (IHO Decision at p. 36). Consequently, this case is dissimilar to the parent attempts to acquire information that were present in the F.B. case.[27]

The other related concern is that if the analysis in F.B. were to be applied to State grouping regulations—namely the holding that "implicit" in the M.O. case is "the right to obtain information on which to form a judgment about the proposed placement" (F.B., 132 F. Supp.3d at pp. 540-41)—such an extension of federal law would essentially reverse a longstanding State policy decision on a State law issue on which the IDEA is silent. As noted above, State policy already determines how grouping must be conducted by districts upon the implementation of a student's IEP and the regulatory requirements governing when parents are to be provided with grouping information have always post-dated the student's entry into the programing offered by the public school. The evolution of the IEP development procedures did nothing to change that policy.

b. Requests to Visit

With regard to the parties' dispute over whether the parent asked to visit the proposed class, the IHO "d[id] not find that [the parent] specifically asked to visit; either at the CSE meeting or at the subsequent Resolution Session" (IHO Decision at p. 31). In so finding, the IHO relied on the testimony from four school district witnesses who "testified credibly that no such request was made

[27] In addition, while the class profile provided some information about the recommended class at the time of the May 2017 CSE meeting, according to the CSE chairperson, there "was no guarantee" that the same students would have been in the class for the upcoming year (Tr. p. 160). Similarly, testimony by the teacher in the recommended class indicated that she expressed her opinion at the May 2017 CSE meeting that the student would be appropriately placed in her class relative to the students who were in her class in spring 2017 (Tr. p. 386; see Tr. pp. 399-400). She testified that as of the May 2017 CSE meeting she did not know what her class was going to look like for the following year, as she would not know until she received a class roster over the summer; however, she testified that she anticipated some of the students in her class would continue with her the following year (Tr. pp. 386-87). Although not available to either the CSE or the parent at the time of the May 2017 CSE meeting or the time that the parents notified the district that the student would be unilaterally placed, testimony by the teacher in the recommended class provided some information about her 2017-18 class. She testified that for the 2017-18 school year, she has 11 students in the proposed class, the majority of whom are classified as having an other health-impairment (Tr. p. 379). Two of the previous year's students moved on to the middle school while three new students joined the class, two with classifications of other health-impairment and one with a classification of autism (Tr. pp. 380-81). There are two students currently in the class, who are classified as students with multiple disabilities, one of whom has difficulty with attention and learning, and who has cognitive functioning in the below average range (Tr. pp. 382-83). One student in the class has a 1:1 aide who assists that student with academics, study skills, and sensory needs (Tr. pp. 381-82). The teacher testified that she did not know the approximate age of the youngest student in the class but indicated that there are third, fourth, and fifth graders in her class (Tr. pp. 384-85).

at the CSE review" (id.). He further found that the "mother contradicted herself when questioned about her requests to visit (or have her son) visit the proposed class and the self-contained class at the middle school" and that "[t]he parents did not mention their concerns about not being able to view the class, in their ten day notice" (IHO Decision at p. 31). The parent has not cross-appealed the IHO's findings and, consequently they have become final and binding. The IHO further noted that none of the cases cited by the parents held that they had the right to observe the proposed class (id.).[28]

Even assuming, for the sake of argument, that the parents had cross-appealed, they would not prevail on this point in any event. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16-*17 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, as discussed below, the evidence in the hearing record would provide no reason to disturb that credibility finding.

The May 2017 IEP reflects that the CSE discussed opportunities for the student to transition to the district elementary school, including visiting during art, music, lunch, or the Flag Day ceremony (Dist. Ex. 3 at p. 3). The IEP does not specifically reflect that either the parent or the student should or could visit the recommended special class (see Dist. Ex. 3 at p. 3).

The CSE chairperson testified that, at the end of the May 2017 CSE meeting, the committee discussed opportunities for the student and his parents to come to the school near the end of the year, in order to initiate the student's transition to the district (Tr. pp. 123-24). She testified that the CSE thought it would be a good idea for the parent and the student to visit the school and discussed having the student initially attend a non-academic setting with students from the 12:1+1 special class, such as music, art, or lunch to minimize any anxiety he might have regarding coming to a new setting (id.). The CSE chairperson explained that the teacher of the 12:1+1 special class had some classroom time with a therapy dog that would also be a "less academic" time for the student to come and visit the school and the classroom (Tr. p. 124). Similarly, the teacher of the proposed class reported that the CSE was "trying to come up with a plan to help [the student] feel comfortable about returning to [the district's elementary school]" and within that discussion the possibility of having the student visit the school for a Flag Day activity or when a therapy dog was in her room were considered (Tr. pp. 123-24, 387-92).

The CSE chairperson recalled that the invitation to visit was left open and that the parent could contact the staff at the school and schedule a time that would work for both the parent and the school (Tr. p. 125). According to the CSE chairperson, the parent did not make any requests

[28] In their answer, the parents did assert that the student's mother "asked to visit the proposed class at the May 19, 2017 CSE meeting, but was denied the opportunity" (Answer ¶11; see Tr. pp. 774-75, 833), but this does not constitute a cross-appeal.

to come and observe or visit any of the district's recommended programs or services, at the May 2017 CSE meeting, or thereafter (Tr. pp. 126-27).

The CSE chairperson reported that the district did not have a set policy regarding when parents could or could not visit special education placements, or any policy that prohibited a parent from visiting (Tr. p. 136). However, she also testified that the district was "cautious" and did not typically have parents visit every program in the district (Tr. pp. 136-37). The CSE chairperson further testified that the district tried to program for students in their "home schools so they can be in their neighborhood… with peers that live around them, in an effort to keep them as close to home as possible" (id.). She also testified that if the parent requested a visit, she (the CSE chairperson) would have been responsible for following up to make sure it occurred, but that she is not the only person responsible for arranging visits and may ask the building principal or the school psychologist to assist her in setting up a parent's request for a visit (Tr. pp. 126, 138-39). However, the CSE chairperson and teacher of the proposed class testified that it was not common practice for parents to visit classrooms (Tr. pp. 136, 392-97).

In contrast to district witnesses, the parent testified that she asked the teacher of the proposed class at the CSE meeting if she could visit the class (Tr. pp. 773-74). According to the parent, the teacher's response was "no, that doesn't happen in the school, parents don't come to the class, that's not something that the school does" (Tr. p. 774).[29] The parent explained that she thought there may be a privacy issue and asked if the student could see the class and spend some time there; however, she was told no (id.). The parent felt that she and the student were not being allowed to visit the proposed class (Tr. pp. 774, 776, 833-34). The parent testified that she again requested to visit the proposed class, at the resolution meeting, to see if it was appropriate for the student but had not been invited to do so (Tr. pp. 776-77). She also testified that she asked to see the district middle school during the resolution session (Tr. pp. 777-78), but later clarified that any programs that she asked to observe at the resolution session were programs that she was going to consider for the 2018-19 school year (Tr. p. 837).[30]

The parent testified that the CSE "countered" her request to have the student spend some time in the proposed class by inviting the student to the school Flag Day ceremony as a transition back to the district; however, she wanted to see how a self-contained 12:1 class looked and what it would be like, not a gathering of 600 students (Tr. pp. 774-75). According to the parent, the teacher of the proposed class told her that she might not get the same picture if she visited the then-current class because the students in the class may not be the same the following school year (Tr. p. 775). Contrary to testimony by the CSE chairperson, the parent testified that the student was not invited to visit the class when the therapy dog was there, stating "I clearly [knew] that they

[29] The teacher in the recommended class testified that during the last three years she had not had a parent of a prospective student request to visit her classroom (Tr. pp. 396-97). She stated that "[a]nyone is welcome to come to my classroom" although she further indicated, that "[w]hether or not the parent comes I guess is arranged by an administrator," such as the building principal or her supervisor (Tr. pp. 395-96).

[30] The parent testified on cross examination that she did not recall if she asked at the resolution meeting to visit the recommended class and stated that much of the conversation was through her attorney (Tr. p. 836).

were not letting [the student] or I come see the class" and further noted that it was difficult to make a decision on the class when she didn't have enough information about it (Tr. p. 776).

The IHO credited the testimony of the four district witnesses including the CSE chairperson, the district special education teacher who had tested and observed the student, the school psychologist, and the teacher in the proposed class, the parent did not request a visit to the class during the May 2017 CSE meeting (IHO Decision at p. 31).

As discussed above, the hearing record indicates that the only information available to the parents at the May 2017 CSE meeting about how the student would be grouped in the proposed class was that it would be a "third to fifth grade class." The classroom teacher attended the CSE meeting and was available to answer questions about the class. However, the parents did not ask for a class profile, or raise any objections about the proposed class (see Tr. pp. 373-74, 398). The IHO presumably heard the parent's testimony as to her perception that the teacher recoiled from the question about other students in the class, but did not appear to place great weight on this testimony, if any weight at all. Additionally, unlike the parents in F.B., who were attempting to respond to the district's offer to arrange for a school visit but were repeatedly unable to get assistance or even a response from the district and created a trail of written communications, there is no evidence in the hearing record that the parents in the matter followed up with the district, in writing or otherwise, again, not even mentioning them in their notice of unilateral placement. Accordingly, the facts of this case differ from the circumstances of the cases most favorable to the parent, like F.B. above, in which the district delayed in assigning a school placement and repeatedly failed to respond to the parents' written requests for information about the school placement.[31]

c. Retrospective Testimony Regarding Social Effect upon the Student

With respect to the parties' dispute regarding the IHO's findings that "third and fourth grade students would have different levels of social and physical development than the student" and that "placement in the proposed class at [the district] elementary school would not constitute an appropriate grouping," the IHO credited the testimony of both the parent and the student's Kildonan counselor that "it would be detrimental to the student's self-esteem and psychological well-being to place him in an elementary school, with children much younger than himself." The IHO also noted that, at the time of the CSE review, the student "was successfully progressing through the fifth grade at Kildonan; attending classes with sixth-grade students, and would be entering middle school the following year."

The student's counselor at Kildonan testified that the student had anxiety, which impacted his learning and the way he functioned at school, and that he also had deficits in social skills such that he "sometimes ha[d] difficulty relating to other people and understanding the dynamics of groups" (Tr. pp. 683-84). The May 2017 CSE meeting notes indicate that this information was known to the CSE (Dist. Ex. 3 at p. 2). Specifically, the IEP reflects that the student had expressed

[31] As the IHO found in favor of the district regarding the parents' request to visit the proposed class and the parents did not cross-appeal, the IHO's decision is final and binding. Additionally, as discussed above, the circumstances of the matter do not compel a different result than that reached by the IHO with respect to this issue.

concerns of anxiety at school and that he struggled to connect with peers socially, had difficulty comprehending literal language, was often rigid in his application of the rules, and struggled to gauge how his actions were perceived by others (id. at pp. 2, 9). The IEP reflected that although the student was quiet and at times on the periphery of social interactions among his peers, he was also able to form positive relationships with adults and peers (id. at p. 9). The IEP further reflected that the student tended to withdraw in challenging situations such as during conflict, however, he was able to respond to the support of the school counselor (id.). The CSE addressed the student's needs with the recommendation of one 30-minute individual counseling session per week (id. at pp. 1, 13). The IEP did not indicate any concerns that the student would suffer any negative impact to his self-esteem or psychological well-being by being placed with younger students or in an elementary school.

During the hearing, the student's counselor at Kildonan testified that he believed it made a difference whether the student was in an elementary school versus a middle school for the 2017-18 school year because the student was currently a middle schooler at Kildonan, getting along well with middle school peers and that in an elementary school with "little children" the student would feel "very stigmatized" and as if "he is going backwards instead of forwards" (Tr. pp. 689-90). He also testified that the student had done all the work and earned the right to be a sixth grader (Tr. pp. 689-90). According to the counselor, the student's self-esteem was "fragile" because he came to Kildonan with a history of being teased and bullied and, as a result, he took things personally and incorrectly internalized the sometimes "gruff" interactions with his peers, as his fault, or because he had done something wrong (Tr. pp. 684-85, 699). The counselor testified that based on conversations he had with the student about the "bad experience" that the student previously had in the district school, he believed it would be a mistake for the student to return to that school (Tr. pp. 690-92). Similarly, testimony by the parent indicated that she also believed that the student would have a bad experience if he returned to the same district school (Tr. p. 780). The parent further testified that the student was accustomed to being with older students as he had been in a combined fifth and sixth grade class during the 2016-17 school year and was currently in a combined sixth and seventh class for the 2017-18 school year at Kildonan (Tr. pp. 778-79). It was her belief that the student would be "completely demoralized" and that it would be "really bad for his self-esteem and motivation" if he were to be "pushed back to a group of students of third, fourth and fifth graders when he [was] on a trajectory to sixth [grade] and middle school" (Tr. p. 779).

A major point of concern with the IHO's decision to base her analysis that the district denied the student a FAPE on the testimony above is that this viewpoint that the student would be stigmatized and would not want to be with younger children was offered at the time of the impartial hearing. Whether viewing the case prospectively at the time the IEP was developed, or even at the time that the IEP would have been implemented, this testimony is impermissibly retrospective. Although the student's mother and the counselor raised the above concerns during the hearing, the parent testified that the CSE did not discuss the student's "class level other than what was proposed by the school" (Tr. p. 780). She further testified that she did not ask about having the student attend middle school, because no one from the middle school was present at the meeting (Tr. pp. 828-29).

Accordingly, while the hearing record reflects that placement of the student in a class that included significantly younger students may have a negative impact on the student emotionally, the IHO relied, in part, on impermissibly retrospective testimony by the Kildonan counselor. Such

evidence is not properly prospective in nature and may not be considered in looking back at the district's decision to place the student in a fifth-grade class.

Lastly, the IHO's determination failed to address the State grouping regulation insofar "[t]he social needs of a student shall not be the sole determinant of such placement (8 NYCRR 200.6[a][3][ii]). The testimony of the parent and counselor relied on by the IHO squarely focused on the student's social needs as the sole determinate for concluding that the student would not be appropriately grouped.

In view of the analysis above, on balance, even under the most favorable case law including F.B., S.B. and their progeny, the parents' claims are ultimately unavailing.

2. Cases finding Prospective Grouping Challenges Impermissible

In contrast to the above district court cases discussed above, on the issue of grouping, the Second Circuit has held that "our precedent bars us from considering such retrospective evidence" (J.C. v New York City Dep't of Educ., 643 Fed.Appx. 31, 33 [2d Cir. March 16, 2016];[finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP" (quoting R.E., 694 F.3d at 195)]. Various district courts have followed this precedent post M.O. (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016] same; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016]["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement" (citing M.O., 793 F.3d at 245)].

Numerous other cases have followed suit (see E.P. v. N.Y.C. Dep't of Educ., 2016 WL 3443647 at *6, 9 [S.D.N.Y. June 10, 2016] [while acknowledging that "the Court does not go so far as to hold that an IEP need not ever specify functional grouping" and that "the IEP's failure to specify that [the student] be placed with peers of certain verbal ability did not render the IEP substantively deficient," the court went on to hold that the parent's challenge to the proposed placement based on the capacities of prospective peers "not as verbally advanced" as the student falls "squarely within the category of impermissible challenges" because it was "based on a presumption that the DOE would fail to comply" with regulations that required the student to be placed with students of similar needs, and that the parent's subjective account of the other students' functioning amounted to "insufficient evidence to raise [the parent's] concerns above a speculative level"); M.T. v. N.Y.C. Dep't of Educ., 165 F.Supp.3d 106, 120 [S.D.N.Y. Feb. 26, 2016][(holding that allegations that classroom age range and variation in functional levels were inappropriate for the student "hardly suggest that [the placement school] lacked the *capacity* to implement [the] IEP, as they at most suggest that [the student's] class *might* include what [the parent] considered to be an 'inappropriate' peer grouping or fail to deliver related services as prescribed" (emphasis in original)]; E.B. v. N.Y.C. Dep't of Educ., 2016 WL 3826284, at *9 [S.D.N.Y. July 12, 2016] [in discussing parent's functional grouping claim and evidence, the court held that "[b]ecause plaintiff's claims are based on her one-time observations and subjective conclusions, they are not sufficient to overcome the presumption that the proposed placement was capable of implementing

the IEP"].

As determined by the Second Circuit and followed by other courts, issues related to the functional grouping of the student within the public school are generally speculative and the circumstances of this case do not present a reason to depart from this rationale. This reasoning preserves the State's policy and procedural approach to grouping, namely that it is addressed by school districts as the student enters public school programming and, consequently, the district's argument that the parents' claims were impermissibly speculative when they rejected the public school's offer is, under the factual circumstances present in this case, the correct method of analysis. Consequently, the IHO's decision that the district denied the student a FAPE must be reversed.

VII. Conclusion

As a final note, I sympathize with the parents' views in this case. Kildonan appears to create a social sphere with specific qualities for their son that they find very appealing. As the IHO noted in her decision, the district continues to be financially responsible for the costs of the student's tuition at Kildonan pursuant to the provisions governing pendency during these proceedings. However, in determining whether the allegations of noncompliance with the IDEA and State regulations related to the grouping of the student at the proposed district elementary school have merit, and upon my independent review in this matter, I have found no violations on the part of the district that resulted in a denial of a FAPE to the student. Thus, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Kildonan was an appropriate placement or whether equitable considerations support the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated March 5, 2018 is modified, by reversing those portions which determined on the merits that the district failed to offer the student a FAPE for the 2017-18 school year and directed the district to reimburse the parents for the cost of the student's tuition at Kildonan for the 2017-18 school year.

Dated: **Albany, New York**
May 7, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER