

11-1266, 11-1474, 11-655
R.E., M.E., et al v. NYC Dep't of Education

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2011

(Argued: April 24, 2012 Decided: September 20, 2012)

Docket Nos. 11-1266-cv, 11-1474-cv, 11-655-cv

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R.E., Individually, on behalf of J.E., M.E,
Individually, on behalf of J.E.,

Plaintiffs-Appellees,

-- v. --

New York City Department of Education,

Defendant-Appellant.

-----x

R.K., by her parents R.K. and S.L.,

Plaintiff-Appellee,

-- v. --

New York City Department of Education,

Defendant-Appellant.

-----x

E.Z.-L., by her parents R.L. and A.Z.,

Plaintiff-Counter-Defendant-Appellant,

-- v. --

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2 New York City Department of Education,

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4 Defendant-Counter-Claimant-Appellee.

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9 B e f o r e : WINTER, WALKER, and CABRANES, Circuit Judges.

10 Defendant New York City Department of Education ("the
11 Department") appeals from an order of the United States District
12 Court for the Southern District of New York (Robert W. Sweet,
13 Judge) granting summary judgment to R.E. and M.E. on their claim
14 for tuition reimbursement under the Individuals with Disabilities
15 Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., and a separate
16 order of the District Court for the Eastern District of New York
17 (Kiyoo A. Matsumoto, Judge) granting summary judgment to R.K. on
18 her claim for tuition reimbursement under the IDEA. Plaintiff-
19 counter-defendant E.Z.-L. appeals from an order of the Southern
20 District of New York (Sidney H. Stein, Judge) denying her claim
21 for tuition reimbursement under the IDEA. These appeals were
22 heard in tandem due to common questions of law. In resolving a
23 central question presented by these appeals, we hold that courts
24 must evaluate the adequacy of an IEP prospectively as of the time
25 of the parents' placement decision and may not consider
26 "retrospective" testimony regarding services not listed in the
27 IEP. However, we reject a rigid "four-corners rule" that would

1 prevent a court from considering evidence explicating the written
2 terms of the IEP.

3 In light of this holding and for further reasons we
4 elaborate, we reach the following conclusions in the three
5 appeals. In R.E., no. 11-1266-cv, we find that the Department
6 offered the student a free and appropriate public education
7 ("FAPE") and REVERSE the decision of the district court. In
8 R.K., no. 11-1474-cv, we find that the Department failed to offer
9 the student a FAPE and AFFIRM the decision of the district court.
10 In E.Z.-L., no. 11-655-cv, we find that the Department offered
11 the student a FAPE and AFFIRM the decision of the district court.

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17
18 JOHN M. WALKER, JR., Circuit Judge:

19 These cases require us to resolve several legal issues
20 related to the rights of disabled children under the Individuals
21 with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et
22 seq. In these three cases, parents of autistic children
23 (collectively and in their respective pairs, "the parents")
24 declined school placements offered by the New York City
25 Department of Education ("the Department") and placed their
26 children in private schools. The parents brought due process
27 claims against the Department for tuition reimbursement on the
28 grounds that the Department's public school placement offers for
29 their children were inadequate. In each case, the parents were
30 initially granted relief following a hearing before an impartial
31 hearing officer ("IHO"), but subsequently were denied relief
32 after the IHO's decision was reversed on appeal by the state

1 review officer ("SRO"). In each case, the SRO relied in part on
2 testimony from Department personnel about the educational program
3 the student would have received if he or she had attended public
4 school. The parents challenge the appropriateness of relying on
5 such testimony, which for ease of reference we refer to in
6 shorthand as "retrospective testimony."

7 In each case, the parents sought to have the SRO's
8 determination reversed by the appropriate United States District
9 Court, and in two of the three cases they succeeded. In R.E.,
10 no. 11-1266-cv, the District Court for the Southern District of
11 New York (Robert W. Sweet, Judge) found that the Department
12 failed to provide the student with a free and appropriate public
13 education ("FAPE") and granted summary judgment for the parents.
14 In R.K., no. 11-1474-cv, the District Court for the Eastern
15 District of New York (Kiyoo A. Matsumoto, Judge) similarly found
16 that the Department failed to provide the student with a FAPE and
17 granted summary judgment for the parents. In E.Z.-L., no. 11-
18 655-cv, however, the District Court for the Southern District of
19 New York (Sidney H. Stein, Judge) found that the Department had
20 provided the student with a FAPE and granted it summary judgment.

21 Among the legal conclusions we reach, we conclude that the
22 use of retrospective testimony about what would have happened if
23 a student had accepted the Department's proposed placement must
24 be limited to testimony regarding the services described in the

1 student's individualized educational program ("IEP"). Such
2 testimony may not be used to materially alter a deficient written
3 IEP by establishing that the student would have received services
4 beyond those listed in the IEP. In light of this and other legal
5 conclusions, we reverse the decision of the district court in
6 R.E., and we affirm the decisions of the district courts in R.K.
7 and E.Z.-L.

8 BACKGROUND

9 I. The Legal Framework

10 Before delving into the facts of these cases, it is useful
11 to understand the legal framework of the IDEA. A state receiving
12 federal funds under the IDEA must provide disabled children with
13 a free and appropriate public education ("FAPE"). Cerra v.
14 Pawling Cent. Sch. Dist., 427 F.3d 186, 192 (2d Cir. 2005). To
15 ensure that qualifying children receive a FAPE, a school district
16 must create an individualized education program ("IEP") for each
17 such child. See 20 U.S.C. § 1414(d); Murphy v. Arlington Cent.
18 Sch. Dist. Bd. of Educ., 297 F.3d 195, 197 (2d Cir. 2002)
19 (describing the IEP as the "centerpiece" of the IDEA system).
20 The IEP is "a written statement that sets out the child's present
21 educational performance, establishes annual and short-term
22 objectives for improvements in that performance, and describes
23 the specially designed instruction and services that will enable

1 the child to meet those objectives." D.D. ex rel. V.D. v. N.Y.C.
2 Bd. of Educ., 465 F.3d 503, 507-08 (2d Cir. 2006) (internal
3 quotation marks omitted). The IDEA requires that an IEP be
4 "reasonably calculated to enable the child to receive educational
5 benefits." Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982).

6 In New York, the state has assigned responsibility for
7 developing IEPs to local Committees on Special Education
8 ("CSEs"). N.Y. Educ. Law § 4402(1)(b)(1); Walczak v. Fla. Union
9 Free Sch. Dist., 142 F.3d 119, 123 (2d Cir. 1998). CSEs are
10 comprised of members appointed by the local school district's
11 board of education, and must include the student's parent(s), a
12 regular or special education teacher, a school board
13 representative, a parent representative, and others. N.Y. Educ.
14 Law § 4402(1)(b)(1)(a). The CSE must examine the student's level
15 of achievement and specific needs and determine an appropriate
16 educational program. Gagliardo v. Arlington Cent. Sch. Dist.,
17 489 F.3d 105, 107-08 (2d Cir. 2007).

18 If a parent believes that his child's IEP does not comply
19 with the IDEA, the parent may file a "due process complaint" (a
20 type of administrative challenge unrelated to the concept of
21 constitutional due process) with the appropriate state agency.
22 20 U.S.C. § 1415(b)(6). In such cases, the IDEA mandates that
23 states provide "impartial due process hearings" before impartial
24 hearing officers ("IHOs"). Id. § 1415(f). Under New York's

1 administrative system, the parties first pursue their claim in a
2 hearing before an IHO. N.Y. Educ. Law § 4404(1). Either party
3 may then appeal the case to the state review officer ("SRO"), who
4 may affirm or modify the IHO's order. Id. § 4404(2). Either
5 party may then bring a civil action in state or federal court to
6 review the SRO's decision. 20 U.S.C. § 1415(i)(2)(A).

7 8 **II. Facts**

9 Like most IDEA cases, the consolidated appeals before us are
10 fact-intensive. We therefore find it necessary to set forth in
11 some detail the facts of the three cases.

12 13 **A. R.E., No. 11-1266-cv**

14 **1. Background**

15 J.E., the son of R.E. and M.E., is an autistic child born in
16 1999. Since September 2002, J.E. has attended the private
17 McCarton School ("McCarton") located in Manhattan. May 2007,
18 R.E. and M.E. rejected the Department's offer of a 6:1:1 (six
19 students, one teacher, one paraprofessional aide) classroom
20 setting in a special public school for the 2007-08 school year.
21 After the Department conceded that the 2007-08 placement had
22 failed to provide a FAPE, the IHO found that the parents were
23 entitled to reimbursement, which conclusion is not challenged in

1 this appeal. J.E. continued at McCarton during the 2007-08
2 school year.

3 At McCarton, J.E. was in a classroom with five other
4 children and a 1:1 student-to-teacher ratio (i.e., each student
5 had his or her own teacher). Each week he received approximately
6 30 hours of applied behavioral analysis ("ABA") therapy, which is
7 an intensive one-on-one therapy that "involves breaking down
8 activities into discrete tasks and rewarding a child's
9 accomplishments." Cnty. Sch. Bd. v. Z.P. ex rel. R.P., 399 F.3d
10 298, 301 (4th Cir. 2005) (internal quotation marks omitted). He
11 also received 1:1 speech and language therapy five times a week
12 in 60-minute sessions, and 1:1 occupational therapy five times a
13 week in 45-minute sessions.

14 **2. The IEP**

15 On May 21, 2008, the Department convened a CSE to develop an
16 IEP for the 2008-09 school year. Present at this meeting were
17 R.E., J.E.'s father; Xin Xin Guan, the Department's
18 representative; Jane O'Connor, a special education teacher;
19 Jeanette Betty, a parent representative; Tara Swietek, J.E.'s
20 head teacher at McCarton; Kelly Lynn Landris, a McCarton speech
21 and language pathologist; Nipa Bhandari, a McCarton occupational
22 therapist; and Ivy Feldman, McCarton's director.

23 Because J.E. had never attended public school, the CSE
24 relied primarily on information it received from McCarton. This

1 information consisted of an educational progress report, which
2 explained J.E.'s aptitude with communication, cognition, social
3 skills, and adaptive behaviors, and recommended continuation of
4 his current course of 1:1 therapy; a speech and language progress
5 report, which evaluated J.E.'s language abilities and recommended
6 a continued course of five 60-minute sessions per week; and an
7 occupational therapy progress report, which outlined J.E.'s
8 progress and goals and recommended that he continue with his
9 current course of five 45-minute sessions per week and continue
10 to participate in yoga sessions. Additionally, Carol Schaechter,
11 a Department employee, observed J.E. for one day at McCarton.
12 Her report related J.E.'s activities and noted some behavioral
13 problems. It made no recommendations.

14 The resulting IEP offered J.E. a 12-month placement in a
15 special class in a public school with a staffing ratio of 6:1:1.
16 It also provided J.E. with a dedicated full-time paraprofessional
17 aide. The IEP included speech therapy, occupational therapy, and
18 counseling as related services. The CSE also produced a
19 Functional Behavioral Assessment ("FBA"). The FBA identified six
20 problem behaviors that interfere with J.E.'s learning:
21 scripting/self-talk, eye closing, vocal protests, impulsivity,
22 anxiety, and escape behaviors. The CSE created a corresponding
23 Behavior Intervention Plan ("BIP"), stating that prompting,
24 redirection, positive reinforcement, token economy, and a written

1 schedule were the primary strategies that would be used to
2 address J.E.'s problem behaviors.

3 On June 9, 2008, the Department mailed R.E. and M.E. a final
4 notice of recommendation ("FNR") offering a classroom at P.S. 208
5 that provided the services listed in the IEP. After the parents
6 visited P.S. 208, R.E. sent a letter to the Department rejecting
7 the proposed placement because it lacked sufficient 1:1
8 instruction. R.E. stated that he would be willing to consider
9 other placements, but that if none was offered, J.E. would
10 continue at McCarton. The Department did not offer an
11 alternative placement, and on February 11, 2009, the parents
12 filed a Demand for Due Process seeking tuition reimbursement for
13 the 2008-09 school year.

14 **3. The Due Process Hearing and IHO Determination**

15 At the due process hearing, Department psychologist Xin Xin
16 Guan, who had represented the Department at the IEP meeting,
17 testified that the CSE had reviewed all of the McCarton reports.
18 Based on these documents, Guan believed that the IEP was
19 appropriate. Specifically, she believed that the 6:1:1 staffing
20 ratio "could provide [J.E.] with the support[] needed to address
21 his academic and social-emotional needs." June 16, 2009 Hearing
22 Transcript at 278-79, Joint Appendix ("J.A.") 306-07. She
23 testified that she felt a non-public-school placement would be
24 too restrictive, and that it would not hurt J.E. to be exposed to

1 methodologies besides ABA therapy. Guan further explained that
2 she had developed the FBA and BIP based on the McCarton reports.
3 She acknowledged that she lacked specific information about the
4 frequency and duration of J.E.'s problem behaviors.

5 Peter De Nuovo, a special education teacher at P.S. 208,
6 testified that he would have been J.E.'s teacher at P.S. 208. He
7 described his classroom, noting that for the 2008-09 school year,
8 he had five students in his class ranging from nine to twelve
9 years old. He stated that he was supported by a classroom
10 paraprofessional, Kesha Danc, who had about ten years' experience
11 working with autistic children, and that, in addition, three of
12 the students had their own paraprofessionals. De Nuovo described
13 his methods of instruction. He also testified about techniques
14 he would have used to remedy J.E.'s problem behaviors.

15 Two McCarton personnel, Joe Pierce and Ivy Feldman,
16 countered the testimony of Guan and De Nuovo: they testified that
17 J.E. requires 1:1 teacher support and would not be able to learn
18 in a 6:1:1 setting.

19 On August 28, 2009, IHO William J. Wall issued a decision
20 granting the parents' reimbursement request. He noted that the
21 Department representatives had no personal knowledge of J.E., but
22 the McCarton personnel did. He found that the evidence before
23 the CSE did not support the conclusion that J.E. could succeed in
24 a 6:1:1 setting because the only evaluations of J.E. stated that

1 he required 1:1 teacher support. Additionally, he found that the
2 proposed IEP did not include the amount of related services
3 recommended by the McCarton reports. The IHO concluded that
4 "[t]he testimony and the evidence does not support the District's
5 conclusion that a 6:1:1 program would be an educational setting
6 that would be calculated to provide [J.E.] with meaningful
7 educational progress." IHO Decision at 7, J.A. 673.

8 The IHO also faulted the Department for its failure to
9 conduct an adequate FBA and develop an appropriate BIP. Although
10 these documents were prepared, they purportedly failed to meet
11 the criteria laid out in New York State regulations because they
12 did not contain specific information about the frequency,
13 duration, and intensity of the problem behaviors. See N.Y. Comp.
14 Codes R. & Regs. tit. 8, § 200.22(a)(3), (b)(5). The IHO went on
15 to find that the McCarton school was an appropriate placement and
16 that J.E.'s parents were entitled to full tuition reimbursement.

17 **4. The SRO Decision**

18 The Department appealed, and on December 14, 2009, SRO Paul
19 F. Kelly issued a lengthy opinion reversing the IHO and denying
20 tuition reimbursement. The SRO concluded that the goals and
21 objectives listed in the IEP were adequately linked to J.E.'s
22 academic level and needs, and that, contrary to the IHO's
23 finding, a 6:1:1 program was appropriate. The SRO noted De
24 Nuovo's testimony that his class actually consisted of five

1 students and five adults (himself, the classroom aide, and the
2 three dedicated paraprofessionals), and emphasized that the
3 instructor and paraprofessionals were adequately trained and had
4 appropriate credentials. Ultimately, the SRO concluded that "the
5 hearing record illustrates that the recommended classroom would
6 have been able to appropriately support the student with 1:1
7 paraprofessional support such that a FAPE was offered." SRO
8 Opinion at 18, J.A. 701. The SRO further found that, although
9 the McCarton reports indicated a need for 1:1 support, they did
10 not suggest that 1:1 paraprofessional support would be
11 insufficient.

12 The SRO went on to state that De Nuovo would have "adapted
13 the New York State curriculum to meet the students' individual
14 needs." Id. He cited specific examples from De Nuovo's
15 testimony as to what strategies he would have used to work with
16 J.E. The SRO also found that the lack of specific data in the
17 FBA was not fatal to the IEP. He noted that the IEP contained
18 strategies to deal with J.E.'s problem behaviors and also
19 referred to specific strategies that De Nuovo would have used in
20 the classroom. Finally, he concluded that the absence of parent
21 training and counseling from the written IEP was acceptable
22 because the record showed that adequate counseling opportunities
23 would have been available at P.S. 208.

1 **5. Proceedings in the District Court**

2 The parents then brought this action in the United States
3 District Court for the Southern District of New York seeking a
4 reversal of the SRO's decision. On March 11, 2011, the district
5 court granted summary judgment for the parents and reversed the
6 SRO. R.E. v. N.Y.C. Dep't of Educ., 785 F. Supp. 2d 28 (S.D.N.Y.
7 2011). The district court found that the SRO had based his
8 conclusion on "after-the-fact testimony . . . as to what the
9 teacher, De Nuovo, would have done if J.E. had attended his
10 class." Id. at 41. It adopted the rule that "[t]he sufficiency
11 of the IEP is determined from the content within the four corners
12 of the IEP itself." Id. at 42. The district court found that
13 the SRO had reversed the IHO primarily on the basis of De Nuovo's
14 testimony, and that there was no evidence in the record to
15 support the SRO's conclusion that a 1:1 paraprofessional aide was
16 adequate for J.E. Id. at 42-43. It further concluded that the
17 SRO's decision was not based on educational policy, "particularly
18 given that it relies so heavily on the testimony [of] individuals
19 who lacked personal knowledge of J.E." Id. at 43. The
20 Department appeals.

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1 **B. R.K., No. 11-1474-cv**

2 **1. Background**

3 R.K., the daughter of R.K. and S.L., is an autistic child
4 born in 2004. R.K. was first diagnosed with autism at age two.
5 Prior to mid-2006, she received home-based therapy (occupational
6 and speech therapy as well as ABA) through New York's Early
7 Intervention Program. In July 2006, R.K. began a full-day
8 preschool program at the Interdisciplinary Center for Child
9 Development ("ICCD"). She was placed in an 8:1:3 classroom
10 (eight students, one teacher, three classroom aides), and
11 received separate speech and language therapy and occupational
12 therapy three times each week in 30-minute 1:1 sessions.
13 Starting in September 2007, R.K. received five two-hour 1:1 ABA
14 therapy sessions per week at home through TheraCare.

15 **2. The IEP**

16 On April 29, 2008, the CSE met to create an IEP for R.K. for
17 the 2008-09 school year. Present at the meeting were R.K.'s
18 parents; Dr. Wanda Enoch, the Department representative; Tracy
19 Spiro, a special education teacher; Rita Halpern, a general
20 education teacher; a parent representative; and a school social
21 worker. The CSE reviewed extensive reports on R.K., including a
22 pediatric report by neurologist Dr. John T. Wells, which
23 concluded that R.K. was high-functioning autistic and should
24 continue with an ABA-based program; a social history update from

1 ICCD, which concluded that the ABA method was effective for R.K.
2 and that she should remain in a small, structured environment; a
3 psycho-educational evaluation by school psychologist Chris
4 Starvopoulos, finding that R.K. was too unstable to be evaluated
5 but opining that she required a highly structured environment; a
6 TheraCare age-out report concluding that R.K. required continued
7 1:1 special education services, as well as related services; a
8 progress report from ICCD, prepared by Tracey Spiro, concluding
9 that R.K. would benefit from a small and highly structured
10 classroom environment; a speech progress report from the ICCD,
11 again recommending a small, structured learning environment and
12 three 1:1 speech and language sessions per week; an occupational
13 therapy progress report from ICCD recommending three occupational
14 therapy sessions per week; a private evaluation by the McCarton
15 Center, recommending 40 hours of 1:1 ABA therapy per week,
16 "manding" sessions (in which a child is shown reinforcing items
17 she can access upon request), five 60-minute speech and language
18 therapy sessions per week, five 60-minute occupational therapy
19 sessions per week in a sensory gym, and two hours of ABA training
20 per week for the parents; and a checklist prepared after a
21 preschool observation of R.K recommending a 6:1:1 classroom.

22 The resulting IEP offered a 6:1:1 class in a special public
23 school. It offered speech and language therapy and occupational
24 therapy, each three times a week in 30-minute sessions. It

1 stated that R.K. demonstrated "self-stimulatory behaviors which
2 interfere[d] with her ability to attend to tasks and to socially
3 interact with others." IEP at 3, J.A. 610. However, it
4 concluded that her behavior "does not seriously interfere with
5 instruction and can be addressed by the . . . special education
6 classroom teacher." IEP at 4, J.A. 612.

7 On May 7, 2008, before the parents received a final
8 placement offer from the Department, they signed a contract to
9 enroll R.K. in the Brooklyn Autism Center ("BAC"), a private
10 school. The contract allowed the parents to withdraw prior to
11 September 10, 2008, and be reimbursed for their tuition payments
12 minus a \$1,000 non-refundable deposit. On June 12, 2008, the
13 Department provided R.K.'s parents with an FNR offering her a
14 classroom at "P075Q @ Robert E. Peary Schl" ("P075Q"). On June
15 26, 2008, the parents notified the Department that they rejected
16 the proposed placement and would be sending R.K. to BAC. They
17 primarily cited inadequate 1:1 ABA support in the IEP.

18 **3. The Due Process Hearing and IHO Determination**

19 On June 27, 2008, the parents filed a Demand for Due Process
20 seeking reimbursement for their 2008-09 tuition at BAC. IHO Mary
21 Noe held a hearing on January 7 and 8, 2009. At the hearing,
22 Jamie Nicklaus, the Educational Director at BAC, testified that
23 R.K. required 1:1 instruction to make progress. Leonilda Perez,
24 who would have been R.K.'s teacher at P075Q, testified about her

1 classroom practices. She stated that she used a method called
2 Treatment and Education of Autistic and Communication-Related
3 Handicapped Children ("TEACCH") with some elements of ABA. The
4 TEACCH method differs from ABA therapy in that it places greater
5 emphasis on visual skills, independent work, and group
6 instruction. See Z.P., 399 F.3d at 302. Perez testified that
7 she conducted 1:1 ABA sessions, including manding, with each
8 student. Perez further stated that, based on the information in
9 R.K.'s IEP, she might have had to create a BIP for R.K.

10 Dr. Enoch, a school psychologist and the Department's
11 representative at the CSE, testified that a 1:1 setting would be
12 too restrictive for R.K. and that it would be better for her to
13 interact with a small group. She stated that no formal FBA or
14 BIP was necessary because R.K.'s preschool teacher said she was
15 "no behavior problem." January 7, 2009 Hearing Transcript at
16 144-45, J.A. 82-83. Desiree Sandoval, the parent coordinator at
17 P075Q, testified that the school would have provided various
18 counseling and training opportunities for the parents at their
19 request.

20 On February 25, 2009, the IHO issued a decision awarding
21 tuition reimbursement to R.K.'s parents. Based on the record,
22 the IHO found that there was "no one unanimous theory as to
23 whether this student needs 1:1 or just a highly structured
24 environment. There is a consensus that the student needs an ABA

1 program, speech and language and occupational therapy." IHO
2 Opinion at 5, J.A. 677. The IHO found that because the IEP's
3 recommended program was a 6:1:1 classroom and provided only 25
4 minutes of 1:1 ABA therapy per day, it did not have an adequate
5 level of support for R.K.

6 However, the IHO found that the parents were entitled to
7 only partial reimbursement because the BAC program selected by
8 the parents met only part of R.K.'s special education needs and
9 provided more individualized instruction than her assessments
10 warranted. The IHO noted that R.K. received 1:1 therapy all day,
11 which she felt was more restrictive than warranted by R.K.'s
12 providers' consistent recommendations of a small, structured
13 environment. Additionally, she found that no therapies were
14 provided in the BAC classroom and there were no integrated
15 efforts by therapists and teachers. The IHO then calculated the
16 appropriate award by multiplying the Department's rate for ABA
17 therapists (\$45 per hour, less than the \$62.50 per hour charged
18 by BAC) times the number of hours of 1:1 ABA instruction (an
19 estimate created by halving the total number of school hours).
20 She arrived at an award of \$32,400. BAC's tuition is \$90,000 per
21 year.

22 **4. The SRO Decision**

23 The Department appealed, and on June 19, 2009, SRO Kelly
24 issued a decision reversing the IHO and denying tuition

1 reimbursement entirely. He found that the IEP provided an
2 adequate program to address R.K.'s speech and language deficits
3 as well as her motor sensory deficits because it provided for
4 speech and language therapy and occupational therapy. Relying
5 extensively on Perez's testimony about her classroom methods, the
6 SRO found that the proposed 6:1:1 program was sufficient. He
7 noted that Perez used TEACCH methodology with some elements of
8 ABA, and stated that R.K. would have received 25 minutes of 1:1
9 ABA instruction per day, including manding. The SRO also found,
10 based on Perez's testimony, that she would have conducted an FBA
11 and developed a BIP to address R.K.'s problem behaviors.
12 Ultimately, the SRO found that "[t]he hearing record indicates
13 that the recommended 6:1+1 class would have provided the student
14 with a small, highly structured classroom environment along with
15 the opportunity to interact with peers. . . . In addition, the
16 student would have received individual instruction and that
17 instruction would have been ABA-based." SRO Opinion at 19, J.A.
18 762.

19 The SRO dismissed the concern that the IEP did not include
20 parent training or counseling, as required by state regulation,
21 because of Sandoval's testimony that the P075Q would have
22 provided parent training and counseling. Similarly, he found
23 that although the IEP did not include the required 30-60 minutes
24 of daily speech therapy, Perez had testified that this therapy

1 was incorporated into her class, and the requirement was
2 therefore satisfied. Finally, the SRO acknowledged that no FBA
3 or BIP had been completed but found that this did not amount to a
4 denial of a FAPE because Perez would have created a BIP and the
5 parents had not articulated how R.K. would have been harmed by
6 not having a BIP in place before entering the class.

7 **5. Proceedings in the District Court**

8 R.K.'s parents then initiated the present action seeking a
9 reversal of the SRO's decision and full tuition reimbursement.
10 On January 21, 2011, Magistrate Judge Roanne L. Mann issued a
11 recommendation that summary judgment be granted for the parents.
12 R.K. ex rel. R.K. v. N.Y.C. Dep't of Educ., No. 09-CV-4478 (KAM),
13 2011 WL 1131492 (E.D.N.Y. Jan. 21, 2011). She concluded that the
14 Department's failure to conduct an FBA and develop a BIP was
15 significant because the record plainly established that R.K.'s
16 behavioral problems impeded her learning. Id. at *17-20; see
17 also N.Y. Comp. Codes R. & Regs. tit. 8, § 200.4(b)(1)(v). She
18 found that the goals and objectives in the IEP were not adequate
19 because they did not provide specific strategies for addressing
20 problem behaviors. R.K., 2011 WL 1131492, at *19; see also N.Y.
21 Comp. Codes R. & Regs. tit. 8, § 200.22(b)(4). Judge Mann
22 rejected as insufficient Perez's testimony that she would have
23 created a BIP once R.K. was in her class. R.K., 2011 WL 1131492,
24 at *20.

1 Notably, Judge Mann rejected testimony offered by the
2 Department to attempt to overcome omissions in the IEP: "More
3 broadly, the Court rejects, as fundamentally flawed, the DOE's
4 invitation to the Court to overlook deficiencies in the IEP based
5 on subsequent testimony that the recommended placement might have
6 later sought to cure those deficiencies." Id. Following similar
7 reasoning, Judge Mann rejected the SRO's reliance on testimony
8 that, despite being omitted in the IEP, parent counseling and
9 speech and language therapy would have been provided in practice.
10 Id. at *21.

11 Judge Mann also rejected the SRO's conclusion that the
12 proposed 6:1:1 placement was sufficient. She noted that,
13 although R.K. would have received 25 minutes of 1:1 ABA per day,
14 the consensus view of the professional evaluations was that this
15 amount of 1:1 support would be insufficient. Id. at *23. She
16 further noted that 1:1 instruction is not inconsistent with a
17 small group setting. Id. at *24.

18 Ultimately, Judge Mann concluded that the IEP was inadequate
19 and R.K. had been denied a FAPE. She determined that the SRO had
20 ignored the clear consensus of R.K.'s evaluators and failed to
21 consider the cumulative effect of the numerous procedural
22 deficiencies. Id. at *24-25. She disagreed with the IHO's
23 partial award determination and recommended that the parents
24 receive full reimbursement. Id. at *27-30. On March 28, 2011,

1 the United States District Court for the Eastern District of New
2 York (Kiyoko A. Matsumoto, Judge) adopted the magistrate's
3 recommendation in full, over the Department's objection. R.K. ex
4 rel. R.K. v. N.Y.C. Dep't of Educ., No. 09-CV-4478 (KAM) (RLM),
5 2011 WL 1131522 (E.D.N.Y. Mar. 28, 2011). The Department
6 appeals.

7
8 **C. E.Z.-L., No. 11-655-cv**

9 **1. Background**

10 E.Z.-L., the daughter of R.L. and A.Z., is an autistic child
11 born in 2002. Since September 2005, E.Z.-L. has attended the
12 Rebecca School, a private school located in Manhattan. In 2007,
13 the Department offered E.Z.-L. a placement for the 2007-08
14 school year. The parents rejected this placement and re-enrolled
15 her at the Rebecca School. The parents then sought tuition
16 reimbursement. During the due process hearing, the Department
17 conceded that it had failed to provide a FAPE, but argued that
18 the Rebecca School was not an appropriate placement. The IHO
19 concluded that the Rebecca School was appropriate and awarded the
20 parents tuition for the 2007-08 school year. The Department did
21 not appeal.

22 **2. The IEP**

23 On April 30, 2008, a CSE met to create an IEP for E.Z.-L.
24 for the 2008-09 school year. Present at the meeting were Feng

1 Ye, a special education teacher acting as the Department's
2 representative; a Department general education teacher; a parent
3 representative; a social worker from the Rebecca School; and
4 Rebecca Starr, E.Z.-L.'s teacher at the Rebecca School. The CSE
5 reviewed numerous documents from the Rebecca School and private
6 clinicians, including a January 2, 2008 occupational therapy
7 progress report, which described E.Z.-L.'s ability to use a
8 sensory gym; a January 2008 progress report from the Rebecca
9 School detailing E.Z.-L.'s progress in a number of areas; a
10 February 6, 2008 speech and language progress report recommending
11 continued speech interventions; a March 30, 2008 occupational
12 therapy progress report, which recommended occupational therapy
13 three times per week individually and once per week in a dyad
14 (group of two); an April 2008 speech and language progress
15 report, which recommended continued speech and language therapy
16 in three 30-minute sessions per week (two sessions individually,
17 one in a dyad); and a May 2008 progress report, which showed
18 notable progress in most areas.

19 The resulting IEP offered E.Z.-L. a place in a specialized
20 public school with a staffing ratio of 6:1:1. It also included
21 occupational therapy, speech and language therapy, and
22 counseling. The IEP did not include an FBA or BIP because it
23 found that E.Z.-L.'s behavior did not seriously interfere with
24 instruction. On May 8, 2008, the Department issued an FNR

1 placing E.Z.-L. at the Children's Workshop School in Manhattan.
2 On May 22, 2008, the parents sent a letter to the Department
3 stating that, after visiting the proposed school, they rejected
4 the Department's recommendation. The letter stated that the
5 parents would consider other programs, but in the absence of
6 another offer, would seek reimbursement for tuition at the
7 Rebecca School. On June 25, 2008, the parents sent a followup
8 letter reiterating their view that the proposed placement was
9 inappropriate and notifying the Department that they would seek
10 reimbursement for physical therapy and related services in
11 addition to R.K.'s private tuition.

12 3. The Due Process Hearing and IHO Determination

13 On June 27, 2008, the parents filed a Demand for Due Process
14 formally seeking reimbursement. A hearing was held before IHO
15 Gary D. Peters over the course of five non-consecutive days in
16 2008 and 2009. At the hearing, Tina McCourt, the program
17 director at the Rebecca School, testified about the school's
18 methodology. The school uses the "DIR/Greenspan/floor time"
19 approach, which involves sensory gyms and frequent assessments
20 aided by video monitoring.¹ McCourt testified that the sensory

¹ DIR stands for "Developmental Individual-difference Relationship-based" therapy. Unlike ABA, which is a behavioral therapy, DIR is primarily based on helping the child build relationships and reach a higher developmental level. See A.D. v. Bd. of Educ. Of City Sch. Dist. of City of N.Y., 690 F. Supp. 2d 193, 198-99 (S.D.N.Y. 2010).

1 gym is particularly important for E.Z.-L. Rebecca Starr, E.Z.-
2 L.'s teacher at the Rebecca School, testified about E.Z.-L.'s
3 class. The class contains seven or eight students, and three
4 assistant teachers, all of whom have at least a bachelor's
5 degree. Starr described E.Z.-L. as very rigid and explained that
6 she required a large amount of floor time to overcome this.
7 Starr also described the speech therapy and DIR therapy provided
8 at the Rebecca School.

9 A.Z., E.Z.-L.'s mother, testified that she had visited the
10 Children's Workshop and had been told that it did not contain a
11 sensory gym or offer DIR support. She recalled being told that
12 the school conducted occasional parent training events that she
13 could attend. A.Z. also described the "Throwback Sports"
14 program, a recreational therapeutic program in which she had
15 enrolled E.Z.-L., and for which she was seeking reimbursement
16 from the Department.

17 Feng Ye, a Department special education teacher, explained
18 that, although E.Z.-L. had a history of biting her hands and
19 hitting herself, the IEP team declined to create an FBA or BIP
20 because it believed E.Z.-L.'s behaviors could be addressed by the
21 classroom teacher. Susan Cruz, an assistant principal at P.S.
22 94, testified about the Children's Workshop (which was an off-
23 site part of P.S. 94). Cruz testified about the classroom in
24 which E.Z.-L. would have been placed. She explained that E.Z.-

1 L.'s teacher would have used TEACCH methodology with some ABA.
2 Cruz opined that a sensory diet could have been implemented by an
3 occupational therapist and that the school contained a sensory
4 room. She further stated that most of the teachers at the school
5 do use floor time. Finally, Cruz testified that the school
6 provides training for parents on an as-needed basis.

7 On March 24, 2009, the IHO issued a decision awarding
8 reimbursement to E.Z.-L.'s parents. The IHO found that the
9 Department should have conducted an FBA and created a BIP in
10 light of Ye's admission that E.Z.-L. exhibited self-injurious
11 behaviors. He also found that the IEP failed to include the
12 required parent training and counseling. The IHO concluded that
13 the Department's failure to recommend a specific placement at the
14 IEP meeting was a procedural violation because parents may join
15 "any group that makes decisions on the educational placement of
16 their child." 20 U.S.C. § 1414(e). The IHO was skeptical of
17 Ye's testimony, noting that she had never worked with autistic
18 children and that she had attended approximately 200 CSE meetings
19 in the spring of 2008 and thus had difficulty remembering exactly
20 what occurred at this particular meeting. The IHO also faulted
21 the Department's failure to create a transition plan. He
22 rejected Cruz's testimony that such a plan would have been
23 created, noting that transition plans necessarily must be
24 completed in advance.

1 For these reasons, the IHO concluded that E.Z.-L. had been
2 denied a FAPE. He further determined that the Rebecca School,
3 along with E.Z.-L.'s additional services, were appropriate and
4 that the parents were entitled to reimbursement.

5 **4. The SRO Decision**

6 The Department appealed, and on June 26, 2009, SRO Kelly
7 issued an opinion reversing the IHO and denying tuition
8 reimbursement. The SRO found that the failure to conduct an FBA
9 or create a BIP was not a violation because Rebecca Starr, E.Z.-
10 L.'s teacher, felt that one was not necessary. He further found
11 that the failure to include parent training in the IEP was not a
12 violation because training would have been provided by the school
13 as needed.

14 With regard to parent involvement in placement decisions,
15 the SRO found that the failure to recommend a specific school
16 during the CSE meeting was not a violation because the
17 requirement of parent involvement only applies to the general
18 structure of a placement, not the choice of a specific site. He
19 also found that the failure to develop a transition plan did not
20 amount to a denial of a FAPE because there was no evidence that
21 E.Z.-L. had been harmed by the lack of a plan and the record
22 showed that the proposed school would have been responsive to any
23 issues arising from her transfer.

1 After examining the IEP, the SRO concluded that the proposed
2 program adequately took into account E.Z.-L.'s difficulties and
3 abilities and was reasonably calculated to confer educational
4 benefit. Based on Cruz's testimony about the Children's
5 Workshop, he concluded that it would have met E.Z.-L.'s needs.

6 **5. Proceedings in the District Court**

7 E.Z.-L.'s parents then instituted this action seeking
8 reversal of the SRO's decision. On January 24, 2011, the United
9 States District Court for the Southern District of New York
10 granted summary judgment in favor of the Department. E.Z.-L. ex
11 rel. R.L. v. N.Y.C. Dep't of Educ., 763 F. Supp. 2d 584 (S.D.N.Y.
12 2011). The district court agreed with the SRO that the
13 Department had provided a FAPE and had not committed any
14 procedural or substantive violations, and accordingly denied
15 reimbursement. The parents appeal.

16
17 **DISCUSSION**

18 Although each of the three cases on appeal involves
19 individualized and unrelated facts, we address them in a single
20 opinion because they involve common issues of law. Accordingly,
21 we first examine these common issues before applying the law to
22 each individual case.

1 **I. Legal Framework**

2 "We review de novo the district court's grant of summary
3 judgment in an IDEA case. Summary judgment in this context
4 involves more than looking into disputed issues of fact; rather,
5 it is a 'pragmatic procedural mechanism' for reviewing
6 administrative decisions." A.C. ex rel. M.C. v. Bd. of Educ.,
7 553 F.3d 165, 171 (2d Cir. 2009) (internal citations omitted). A
8 federal court reviewing a dispute over an IEP must base its
9 decision on the preponderance of the evidence. Id. Moreover, we
10 must defer to the administrative decision because "the judiciary
11 generally lacks the specialized knowledge and experience
12 necessary to resolve persistent and difficult questions of
13 educational policy." Id. Deference is particularly appropriate
14 when the state officer's review "has been thorough and careful,"
15 but still we do not "simply rubber stamp administrative
16 decisions." Walczak, 142 F.3d at 129.

17 Under New York's Education Law § 4404(1)(c), the local
18 school board bears the initial burden of establishing the
19 validity of its plan at a due process hearing.² If the board
20 fails to carry this burden, the parents bear the burden of
21 establishing the appropriateness of their private placement and

² Although the Supreme Court has not decided whether a state-imposed burden in an initial hearing also applies in a subsequent federal suit, see Schaffer v. Weast, 546 U.S. 49, 62 (2005), we need not decide that issue here, see M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 225 n.3 (2d Cir. 2012).

1 that the equities favor them. Cerra, 427 F.3d at 192. This
2 framework is known as the Burlington/Carter test. See Florence
3 Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of
4 Town of Burlington v. Dep't of Educ., 471 U.S. 359 (1985).

5 The parties have presented four common questions of law that
6 we must resolve before turning to each case individually: First,
7 when, if ever, is it permissible for a district to augment the
8 written IEP with retrospective testimony about additional
9 services that would have been provided at the proposed placement;
10 second, when an IHO and SRO reach conflicting conclusions, what
11 deference should a court pay to each; third, at what point do
12 violations of state regulations governing the IEP process amount
13 to a denial of a FAPE entitling the parents to reimbursement; and
14 finally, must parents be involved in the selection of a specific
15 school for their child?

16 17 **Retrospective Testimony**

18 This appeal primarily calls upon us to consider the
19 appropriateness of what we have labeled "retrospective
20 testimony," i.e., testimony that certain services not listed in
21 the IEP would actually have been provided to the child if he or
22 she had attended the school district's proposed placement. In
23 each of the cases now before us, the Department offered
24 retrospective testimony at the IHO hearing to overcome

1 deficiencies in the IEP, and the SRO relied on this retrospective
2 testimony in varying degrees to find that the Department had
3 provided a FAPE.

4 The parents urge us to adopt a rigid "four corners" rule
5 prohibiting any testimony about services beyond what is written
6 in the IEP. The Department counters that review should focus on
7 the services the child would have actually received and therefore
8 should include evidence of services beyond those listed in the
9 IEP. Although we decline to adopt a four corners rule, we hold
10 that testimony regarding state-offered services may only explain
11 or justify what is listed in the written IEP. Testimony may not
12 support a modification that is materially different from the IEP,
13 and thus a deficient IEP may not be effectively rehabilitated or
14 amended after the fact through testimony regarding services that
15 do not appear in the IEP.

16 The permissibility of retrospective testimony is an open
17 question in this circuit. See D.F. ex rel. N.F. v. Ramapo Cent.
18 Sch. Dist., 430 F.3d 595, 598-99 (2d Cir. 2005) ("[T]his court
19 has not, as yet, decided if it is error to consider retrospective
20 evidence in assessing the substantive validity of an IEP.").
21 Three of our sister circuits have addressed similar, though not
22 identical, questions and have disfavored retrospective evidence.
23 See Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) ("[W]e
24 examine the adequacy of [the IEPs] at the time the plans were

1 drafted."); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 (3d
2 Cir. 1995) (holding that an IEP must be judged prospectively from
3 the time of its drafting); Roland M. v. Concord Sch. Comm., 910
4 F.2d 983, 992 (1st Cir. 1990) ("[A]ctions of school systems
5 cannot . . . be judged exclusively in hindsight. An IEP is a
6 snapshot, not a retrospective."). They are in agreement that the
7 IEP should be evaluated prospectively as of the time of its
8 drafting.

9 The same conclusion has been reached by a number of district
10 courts in this circuit. See R.E., 785 F. Supp. 2d at 41-42;
11 R.K., 2011 WL 1131492, at *20; J.R. v. Bd. of Educ. of City of
12 Rye Sch. Dist., 345 F. Supp. 2d 386, 395 (S.D.N.Y. 2004);
13 Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710, 724 (S.D.N.Y.
14 2003). But see E.Z.-L., 763 F. Supp. 2d at 597-98 (finding that
15 lack of parent training provision in IEP did not amount to a
16 violation because hearing testimony established that school would
17 have provided training); M.N. v. N.Y.C. Dept. of Educ., 700 F.
18 Supp. 2d 356, 368 (S.D.N.Y. 2010) (same).

19 We now adopt the majority view that the IEP must be
20 evaluated prospectively as of the time of its drafting and
21 therefore hold that retrospective testimony that the school
22 district would have provided additional services beyond those
23 listed in the IEP may not be considered in a Burlington/Carter
24 proceeding.

1 The Supreme Court has long recognized that the IDEA allows
2 parents to reject an IEP they feel is inadequate, place their
3 child in an appropriate private school, and seek tuition
4 reimbursement from the school district. See Burlington, 471 U.S.
5 at 369-70 (construing IDEA's authorization for courts to award
6 "appropriate" relief); see also Forest Grove Sch. Dist. v. T.A.,
7 557 U.S. 230, 242-43 (2009) (finding that amendments to the IDEA
8 do not abrogate the Burlington decision). In order for this
9 system to function properly, parents must have sufficient
10 information about the IEP to make an informed decision as to its
11 adequacy prior to making a placement decision. At the time the
12 parents must choose whether to accept the school district
13 recommendation or to place the child elsewhere, they have only
14 the IEP to rely on, and therefore the adequacy of the IEP itself
15 creates considerable reliance interests for the parents. Under
16 the Department's view, a school district could create an IEP that
17 was materially defective, causing the parents to justifiably
18 effect a private placement, and then defeat the parents'
19 reimbursement claim at a Burlington/Carter hearing with evidence
20 that effectively amends or fixes the IEP by showing that the
21 child would, in practice, have received the missing services.
22 The Department's view is incorrect. By requiring school
23 districts to put their efforts into creating adequate IEPs at the
24 outset, IDEA prevents a school district from effecting this type

1 of "bait and switch," even if the baiting is done
2 unintentionally. A school district cannot rehabilitate a
3 deficient IEP after the fact.

4 We reject, however, a rigid "four corners" rule prohibiting
5 testimony that goes beyond the face of the IEP. While testimony
6 that materially alters the written plan is not permitted,
7 testimony may be received that explains or justifies the services
8 listed in the IEP. See D.S. v. Bayonne Bd. of Educ., 602 F.3d
9 553, 564-65 (3d Cir. 2010) ("[A] court should determine the
10 appropriateness of an IEP as of the time it was made, and should
11 use evidence acquired subsequently to the creation of an IEP only
12 to evaluate the reasonableness of the school district's decisions
13 at the time they were made."). For example, if an IEP states
14 that a specific teaching method will be used to instruct a
15 student, the school district may introduce testimony at the
16 subsequent hearing to describe that teaching method and explain
17 why it was appropriate for the student. The district, however,
18 may not introduce testimony that a different teaching method, not
19 mentioned in the IEP, would have been used. Similarly, if a
20 student is offered a staffing ratio of 6:1:1, a school district
21 may introduce evidence explaining how this structure operates and
22 why it is appropriate. It may not introduce evidence that
23 modifies this staffing ratio (such as testimony from a teacher

1 that he would have provided extensive 1:1 instruction to the
2 student).

3 The prospective nature of the IEP also forecloses the school
4 district from relying on evidence that a child would have had a
5 specific teacher or specific aide. At the time the parents must
6 decide whether to make a unilateral placement based on the IEP,
7 they may have no guarantee of any particular teacher. Indeed,
8 even the Department cannot guarantee that a particular teacher or
9 aide will not quit or become otherwise unavailable for the
10 upcoming school year. Thus, it is error to find that a FAPE was
11 provided because a specific teacher would have been assigned or
12 because of actions that specific teacher would have taken beyond
13 what was listed in the IEP. The appropriate inquiry is into the
14 nature of the program actually offered in the written plan.

15 Contrary to the Department's assertions, this rule does not
16 unfairly skew the reimbursement hearing process. Parents who end
17 up placing their children in public school cannot later use
18 evidence that their child did not make progress under the IEP in
19 order to show that it was deficient from the outset.³ See Scott

³ However, evidence that the school district did not follow the IEP as written might be relevant in a later proceeding to show that the child was denied a FAPE because necessary services included in the IEP were not provided in practice. See K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 811 (8th Cir. 2011); Bend-Lapine Sch. Dist. v. D.W., 152 F.3d 923, 1998 WL 442952, at *3 (9th Cir. 1998) (table).

It is true that, if an IEP is determined to be inadequate, the

1 P., 62 F.3d at 530. In determining the adequacy of an IEP, both
2 parties are limited to discussing the placement and services
3 specified in the written plan and therefore reasonably known to
4 the parties at the time of the placement decision. See Fuhrmann
5 ex rel. Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1039-
6 40 (3d Cir. 1993) ("Rowley requires, at the time the initial
7 evaluation is undertaken, an IEP need only be 'reasonably
8 calculated to enable the child to receive educational benefits.'
9 . . . [T]he measure and adequacy of the IEP can only be
10 determined as of the time it is offered to the student, not at
11 some later date." (quoting Rowley, 458 U.S. at 206-07)).

12 An important feature of the IDEA is that it contains a
13 statutory 30-day resolution period once a "due process complaint"
14 is filed. 20 U.S.C. § 1415(f)(1)(B). That complaint must list
15 all of the alleged deficiencies in the IEP.⁴ The Department then

parents may provide evidence that the child made actual progress at their chosen private placement to support the adequacy of that placement. See Frank G. v. Bd. of Educ., 459 F.3d 356, 364-65 (2d Cir. 2006). However, review of the private placement at that stage of Burlington/Carter review is more informal than review of the original IEP: a private placement need not meet the IDEA requirement for a FAPE and is not subject to the same mainstreaming requirement as a public placement. Id. at 364. Additionally, the primary problem with retrospective testimony - namely, that it prevents parents from making a fully informed decision about whether to make a unilateral private placement - will usually not apply to private placements, because the school district does not rely in any way on the adequacy of the alternative program.

⁴ The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit them to add a new claim

1 has thirty days to remedy these deficiencies without penalty.
2 If, at the end of the resolution period, the parents feel their
3 concerns have not been adequately addressed and the amended IEP
4 still fails to provide a FAPE, they can continue with the due
5 process proceeding and seek reimbursement. The adequacy of the
6 IEP will then be judged by its content at the close of the
7 resolution period.

8 Because of this resolution period, there is no danger that
9 parents will take advantage of a school district by failing to
10 alert it to IEP deficiencies and subsequently recover tuition
11 based on those deficiencies. A school district that
12 inadvertently or in good faith omits a required service from the
13 IEP can cure that deficiency during the resolution period without
14 penalty once it receives a due process complaint. If, however,
15 the school district fails to rehabilitate an inadequate IEP
16 within the resolution period, it may not later benefit from the
17 use of retrospective evidence - that is, evidence showing that a
18 child's public education would have been materially different
19 than what was offered in the IEP. Similarly, parents are
20 precluded in later proceedings from raising additional defects in
21 the IEP that they should have raised from the outset, thus giving
22 the school district a chance to cure the defects without penalty.

after the resolution period has expired would allow them to
sandbag the school district. Accordingly, substantive amendments
to the parents' claims are not permitted.

1 Our holding today is not inconsistent with our previous
2 holding in T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 417-19
3 (2d Cir. 2009). In T.Y., after finding the IEP appropriate, the
4 IHO and SRO amended it to include additional required services
5 that had been omitted. We upheld this decision. The Department
6 contends that our endorsement of a retroactive amendment to the
7 IEP implicitly allows the use of retrospective evidence.
8 Crucially, however, in T.Y. the IEP was never found to be
9 defective. Thus, neither the IHO nor the SRO used retrospective
10 evidence to remedy a defective IEP; instead they altered an
11 adequate IEP. See id. at 417 ("[T]he IHO determined that [the
12 lack of certain services] alone did not establish that the
13 overall program recommended by the CSE was inappropriate.").
14 When an IEP adequately provides a FAPE, it is within the
15 discretion of the IHO and SRO to amend it to include omitted
16 services.

17 Accordingly, we hold that, with the exception of amendments
18 made during the resolution period, an IEP must be evaluated
19 prospectively as of the time it was created. Retrospective
20 evidence that materially alters the IEP is not permissible. This
21 rule recognizes the critical nature of the IEP as the centerpiece
22 of the system, ensures that parents will have sufficient
23 information on which to base a decision about unilateral
24 placement, and puts school districts on notice that they must

1 include all of the services they intend to provide in the written
2 plan. If a school district makes a good faith error and omits a
3 necessary provision, they have thirty days after the parents'
4 complaint to remedy the error without penalty.

6 **II. Deference to State Decision Makers**

7 In each of the cases before us, the IHO's decision was
8 reversed on appeal by the SRO. The parties dispute the degree of
9 deference that should be afforded to these two state officers.
10 The Department contends that we should defer entirely to the
11 SRO's views and give no weight to the earlier IHO's opinion. The
12 parents urge that the SRO's opinions were not sufficiently
13 reasoned to warrant deference and that consideration of the IHO's
14 opinion is appropriate.

15 "[T]he role of the federal courts in reviewing state
16 educational decisions under the IDEA is circumscribed."
17 Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112-13 (2d
18 Cir. 2007). We must give "due weight" to the state proceedings,
19 mindful that we lack "the specialized knowledge and experience
20 necessary to resolve . . . questions of educational policy." Id.
21 at 113. It is not for the federal court to "ch[oose] between the
22 views of conflicting experts" on such questions. Grim v.
23 Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 383 (2d Cir. 2003).
24 When an IHO and SRO reach conflicting conclusions, "[w]e defer to

1 the final decision of the state authorities," that is, the SRO's
2 decision. A.C., 553 F.3d at 171. But the question remains: how
3 much deference?

4 In a recent opinion, this Circuit resolved the deference
5 question now posed by the parties. See M.H. v. N.Y.C. Dep't of
6 Educ., 685 F.3d 217 (2d Cir. 2012). Synthesizing our precedent
7 on this issue, we concluded that the deference owed to an SRO's
8 decision depends on the quality of that opinion. Reviewing
9 courts must look to the factors that "normally determine whether
10 any particular judgment is persuasive, for example, whether the
11 decision being reviewed is well-reasoned, and whether it was
12 based on substantially greater familiarity with the evidence and
13 the witnesses than the reviewing court." Id. at 244. However,
14 courts must bear in mind the statutory context and the
15 administrative judges' greater institutional competence in
16 matters of educational policy. Id. The M.H. opinion offers
17 several illustrative examples:

18 [D]eterminations regarding the substantive adequacy of
19 an IEP should be afforded more weight than
20 determinations concerning whether the IEP was developed
21 according to the proper procedures. Decisions
22 involving a dispute over an appropriate educational
23 methodology should be afforded more deference than
24 determinations concerning whether there have been
25 objective indications of progress. Determinations
26 grounded in thorough and logical reasoning should be
27 provided more deference than decisions that are not.
28 And the district court should afford more deference
29 when its review is based entirely on the same evidence
30 as that before the SRO than when the district court has

1 before it additional evidence that was not considered
2 by the state agency.

3
4 Id. Where, as in our case, the IHO and SRO disagree, the general
5 rule is that "courts must defer to the reasoned conclusions of
6 the SRO as the final state administrative determination." Id. at
7 246.

8 However, when . . . the district court appropriately
9 concludes that the SRO's determinations are
10 insufficiently reasoned to merit that deference, and in
11 particular where the SRO rejects a more thorough and
12 carefully considered decision of an IHO, it is entirely
13 appropriate for the court, having in its turn found the
14 SRO's conclusions unpersuasive even after appropriate
15 deference is paid, to consider the IHO's analysis,
16 which is also informed by greater educational expertise
17 than that of judges, rather than to rely exclusively on
18 its own less informed educational judgment.

19
20 Id. Therefore, a court must defer to the SRO's decision on
21 matters requiring educational expertise unless it concludes that
22 the decision was inadequately reasoned, in which case a better-
23 reasoned IHO opinion may be considered instead.

24 25 **III. Procedural Violations**

26 In determining whether an IEP complies with the IDEA, courts
27 make a two-part inquiry that is, first, procedural, and second,
28 substantive. At the first step, courts examine whether there
29 were procedural violations of the IDEA, namely, "whether the
30 state has complied with the procedures set forth in the IDEA."
31 Cerra, 427 F.3d at 192. Courts then examine whether the IEP was

1 substantively adequate, namely, whether it was “reasonably
2 calculated to enable the child to receive educational
3 benefit[s].” Id. (quoting Rowley, 458 U.S. at 206-07).
4 Substantive inadequacy automatically entitles the parents to
5 reimbursement. Procedural violations, however, only do so if
6 they “impeded the child’s right to a [FAPE],” “significantly
7 impeded the parents’ opportunity to participate in the
8 decisionmaking process,” or “caused a deprivation of educational
9 benefits.” 20 U.S.C. § 1415(f)(3)(E)(ii); A.C., 553 F.3d at 172.
10 Multiple procedural violations may cumulatively result in the
11 denial of a FAPE even if the violations considered individually
12 do not. See Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp.
13 2d 656, 659 (S.D.N.Y. 2005).

14 Two specific procedural violations are common to all three
15 cases under review: In each case, the Department failed to
16 complete an adequate functional behavioral assessment (“FBA”) and
17 behavior intervention plan (“BIP”), and failed to include parent
18 counseling in the IEP. New York regulations require the
19 department to conduct an FBA for a student “whose behavior
20 impedes his or her learning or that of others.” N.Y. Comp. Codes
21 R. & Regs. tit. 8 § 200.4(b)(1)(v). The FBA includes “the
22 identification of the problem behavior, the definition of the
23 behavior in concrete terms, the identification of the contextual
24 factors that contribute to the behavior . . . and the formulation

1 of a hypothesis regarding the general conditions under which a
2 behavior usually occurs and probable consequences that serve to
3 maintain it." Id. § 200.1(r). When a student's behavior impedes
4 his learning, a BIP must be developed with strategies to deal
5 with the problem behavior(s). Id. § 200.22(b). We have held
6 that failure to conduct an FBA is a procedural violation, but
7 that it does not rise to the level of a denial of a FAPE if the
8 IEP adequately identifies the problem behavior and prescribes
9 ways to manage it. A.C., 553 F.3d at 172.

10 The failure to conduct an adequate FBA is a serious
11 procedural violation because it may prevent the CSE from
12 obtaining necessary information about the student's behaviors,
13 leading to their being addressed in the IEP inadequately or not
14 at all. As described above, such a failure seriously impairs
15 substantive review of the IEP because courts cannot determine
16 exactly what information an FBA would have yielded and whether
17 that information would be consistent with the student's IEP. The
18 entire purpose of an FBA is to ensure that the IEP's drafters
19 have sufficient information about the student's behaviors to
20 craft a plan that will appropriately address those behaviors.
21 See Harris v. District of Columbia, 561 F. Supp. 2d 63, 68
22 (D.D.C. 2008) ("The FBA is essential to addressing a child's
23 behavioral difficulties, and, as such, it plays an integral role
24 in the development of an IEP.").

1 The failure to conduct an FBA will not always rise to the
2 level of a denial of a FAPE, but when an FBA is not conducted,
3 the court must take particular care to ensure that the IEP
4 adequately addresses the child's problem behaviors. See A.C.,
5 553 F.3d at 172 (finding that IEP provided appropriate strategies
6 for student's problem behaviors when it (1) addressed student's
7 attention problem by providing a personal aide to keep child
8 focused and (2) addressed child's "minimal" tangential and
9 fantasy speech with psychiatric and psychological services). Our
10 precedents have considered the efficacy of IEPs' treatment of
11 behaviors in particular cases; they should not be read as
12 approving the practice of routinely omitting an FBA. New York
13 regulations do not permit this shortcut.

14 Additionally, New York regulations require that an IEP
15 provide for parent counseling and training for the parents of
16 autistic children. N.Y. Comp. Codes R. & Regs. tit. 8 §,
17 200.13(d). "Parent counseling and training means assisting
18 parents in understanding the special needs of their child;
19 providing parents with information about child development; and
20 helping parents to acquire the necessary skills that will allow
21 them to support the implementation of their child's
22 individualized education program." § 200.1(kk).

23 Although violating New York's regulations, the failure to
24 include parent counseling in the IEP is less serious than the

1 omission of an FBA. Whereas the FBA must be conducted in advance
2 to ensure that the IEP is based on adequate information, the
3 presence or absence of a parent-counseling provision does not
4 necessarily have a direct effect on the substantive adequacy of
5 the plan. See K.E., 647 F.3d at 811. Moreover, because school
6 districts are required by section 200.13(d) to provide parent
7 counseling, they remain accountable for their failure to do so no
8 matter the contents of the IEP. Parents can file a complaint at
9 any time if they feel they are not receiving this service. In
10 contrast, the sole value of an FBA is to assist in the drafting
11 of the IEP. Therefore the failure to conduct an FBA at the
12 proper time cannot be rectified by doing so at a later date.
13 Though the failure to include parent counseling in the IEP may,
14 in some cases (particularly when aggregated with other
15 violations), result in a denial of a FAPE, in the ordinary case
16 that failure, standing alone, is not sufficient to warrant
17 reimbursement.

18 We emphasize again that even minor violations may
19 cumulatively result in a denial of a FAPE. School districts are
20 well-advised to ensure the IEP complies with the checklist of
21 requirements specified by state regulations.
22
23
24

1 **IV. Specificity of Placement Decisions**

2 The parents also contend that the Department committed a
3 procedural violation in each of these cases by failing to inform
4 them of the exact school at which their child would be placed at
5 the IEP meeting or in the final IEP. The Department's practice
6 is to provide general placement information in the IEP, such as
7 the staffing ratio and related services, and then convey to the
8 parents a final notice of recommendation, or FNR identifying a
9 specific school at a later date. The parents are then able to
10 visit the placement before deciding whether to accept it.

11 The parents argue that this practice violates 20 U.S.C. §
12 1414(e), which mandates that: "Each local educational agency or
13 State educational agency shall ensure that the parents of each
14 child with a disability are members of any group that makes
15 decisions on the educational placement of their child." Federal
16 regulations further specify that parents must be part of any
17 group making a "placement decision." 34 C.F.R. § 300.501(c)(1).
18 We have held, however, that the term "educational placement"
19 refers "'only to the general type of educational program in which
20 a child is placed.'" T.Y., 584 F.3d at 419 (quoting Concerned
21 Parents v. N.Y.C. Bd. of Educ., 629 F.2d 751, 756 (2d Cir.
22 1980)). "[T]he requirement that an IEP specify the 'location'
23 does not mean that the IEP must specify a specific school site."
24 Id. The Department may select the specific school without the

1 advice of the parents so long as it conforms to the program
2 offered in the IEP. Id. at 420.⁵

3

4 **Application of Relevant Law to the Three Cases**

5 **A. R.E. and M.E., No. 11-1266-cv**

6 The parents of J.E. allege that the IEP was substantively
7 deficient because their child required 1:1 teacher support and
8 the IEP offered only 1:1 support by a paraprofessional aide.
9 They further allege procedural violations because the Department
10 failed to conduct an adequate FBA and did not include parent
11 counseling in the IEP. The district court agreed with the IHO
12 that there had been a substantive violation. It rejected the
13 SRO's conclusion that 1:1 paraprofessional support would be
14 sufficient, saying that such a conclusion lacked evidentiary
15 support and ignored uncontradicted evidence that J.E. needed 1:1
16 teacher support. R.E., 785 F. Supp. 2d at 42. We disagree.

17

18

⁵ The parents also allege that they were entitled to participate directly in school-specific placement decisions due to a stipulation reached in a 1979 class action suit. See Jose P. v. Ambach, 557 F. Supp. 1230 (S.D.N.Y. 1983). However, the certified class in Jose P. encompassed "all handicapped children between the ages of five and twenty-one living in New York City . . . who have not been evaluated within thirty days or placed within sixty days of [notification to the Department]." Id. at 1239-40. Since the plaintiffs in these cases were timely evaluated, the Jose P. stipulation does not apply to them. See R.E., 785 F. Supp. 2d at 43-44.

1 **1. Substantive Adequacy**

2 The SRO relied heavily on retrospective testimony by Peter
3 De Nuovo, who would have been J.E.'s teacher if he had accepted
4 the Department's placement. The SRO cited specific classroom
5 techniques that De Nuovo used, and noted that if J.E. required
6 more 1:1 instruction than his paraprofessional provided, De Nuovo
7 would have provided it. The SRO's reliance on De Nuovo's
8 testimony was inappropriate. At the time the parents made their
9 placement decision, they had no way of knowing, much less a
10 guarantee, that J.E. would be taught by De Nuovo as opposed to a
11 different teacher who did not provide additional 1:1 instruction
12 and did not use the same classroom techniques. The IEP provided
13 for a 6:1:1 classroom with a dedicated aide and must be evaluated
14 on that basis.

15 Despite his reliance on improper testimony, the SRO also
16 based his decision on an appropriate finding: he found no
17 evidence in the record that J.E. actually required 1:1 teacher
18 support, as opposed to 1:1 support by a dedicated aide, to make
19 educational progress. Similarly, although J.E. had been taught
20 previously with ABA, the SRO found no evidence that he could not
21 make progress with another methodology and 1:1 paraprofessional
22 support. In so finding, the SRO reversed the IHO's conclusion,
23 based on the same evidence, that J.E. required 1:1 teacher
24 support. The adequacy of 1:1 paraprofessional support as opposed

1 to 1:1 teacher support is precisely the kind of educational
2 policy judgment to which we owe the state deference if it is
3 supported by sufficient evidence, as is the case here. Because
4 we find this portion of the SRO's decision to be adequately
5 reasoned, we owe it deference as the final decision of the state.
6 We therefore find that the IEP was substantively adequate to
7 provide J.E. with a FAPE.

8 **2. Procedural Violations**

9 J.E.'s parents also allege that the Department's failure to
10 conduct an adequate FBA and to provide for parent counseling in
11 the IEP deprived J.E. of a FAPE. With regard to the FBA, the SRO
12 found that the IEP contained adequate strategies to address
13 J.E.'s problem behaviors. He cited the use of "a visual
14 schedule, verbal support, redirection, prompting, positive
15 reinforcement, and the provision of a 1:1 paraprofessional to
16 target the student's scripting, fleeing, and anxiety behaviors,"
17 as well as the use of a token economy and a consistent routine.
18 SRO Opinion at 20, J.A. 757. The SRO also relied, however, on
19 retrospective testimony from De Nuovo as to how he would have
20 developed a BIP and how he would have specifically addressed
21 certain behaviors. This retrospective testimony must be
22 disregarded. In spite of this error, however, we conclude that
23 the failure to create an adequate FBA did not amount to a denial
24 of a FAPE. We note that, although they did not meet state-

1 imposed criteria, an FBA and BIP were created. In addition, the
2 McCarton reports reviewed by the CSE contained unusually
3 extensive documentation of J.E.'s behaviors, and the IEP included
4 numerous specific strategies to address those behaviors,
5 including the use of a 1:1 aide to help him focus. The SRO's
6 reliance on the foregoing information was permissible and is
7 entitled to deference.

8 The SRO's reliance on retrospective testimony that parent
9 training would have been offered at J.E.'s placement was
10 inappropriate. However, we conclude that the failure to include
11 parent training in the IEP did not rise to the level of a denial
12 of a FAPE, even when considered cumulatively with the
13 deficiencies in the FBA.

14 We have reviewed J.E.'s parents' other claims and find that
15 they have not demonstrated that J.E. was denied a FAPE for the
16 2008-09 school year. Accordingly, the judgment of the district
17 court is reversed.

18

19 **B. R.K., No. 11-1474-cv**

20 R.K.'s parents allege that R.K. was denied a FAPE because
21 (1) the Department failed to conduct an FBA despite R.K.'s
22 serious behavioral problems; (2) the IEP lacked the required
23 provisions for parent counseling and speech and language therapy;
24 and (3) the proposed placement offered insufficient 1:1 remedial

1 instruction and ABA instruction. The district court adopted a
2 recommended ruling from the magistrate judge, relying on the
3 conclusions of the IHO, finding that R.K. had been denied a FAPE
4 for those reasons. We agree.

5 **1. Substantive Adequacy**

6 The IHO concluded that "there is no one unanimous theory as
7 to whether this student needs 1:1 or just a highly structured
8 environment. There is a consensus that the student needs an ABA
9 program, speech and language and occupational therapy." IHO
10 Opinion at 5, J.A. 677. The SRO disagreed. He concluded that
11 the evidence only indicated that R.K. needed a small, structured
12 setting, which he found to be satisfied by a 6:1:1 placement. He
13 also found that she did not necessarily need ABA because some
14 evaluations did not specify a teaching method. The SRO also
15 cited extensive testimony from Leonilda Perez, who would have
16 been R.K.'s teacher at the proposed placement, about techniques
17 she used in the classroom. The SRO noted that Perez conducted at
18 least 25 minutes of daily 1:1 ABA instruction, including manding,
19 with each student. The SRO emphasized this testimony in
20 concluding that the placement was appropriate, finding "the
21 student would have received individual instruction and that
22 instruction would have been ABA-based." SRO Opinion at 19.

23 The SRO's reliance on Perez's testimony was inappropriate.
24 R.K.'s parents had no knowledge or guarantee from the IEP that

1 R.K. would have received a teacher who conducted daily 1:1 ABA
2 sessions with each student. The rest of the SRO's decision on
3 this issue was based on permissible evidence. However, we agree
4 with the magistrate judge that the SRO's conclusion is contrary
5 to the overwhelming weight of the evidence. R.K., 2011 WL
6 1131492, at *23. As described in detail by Judge Mann, the
7 majority of the reports recommended 1:1 instruction. Even those
8 reports that did not specifically recommend a 1:1 ratio
9 emphasized that R.K. needed a high level of support. Further,
10 almost all of the reports found that R.K. needed continued ABA
11 therapy. The fact that some reports did not mention a specific
12 teaching methodology does not negate the clear consensus that
13 R.K. required ABA support. However, the plan proposed in her IEP
14 offered her a 6:1:1 classroom with no dedicated aide and no
15 guarantee of ABA therapy or any meaningful 1:1 support. Because
16 the SRO's conclusion was against the weight of the evidence and
17 thus flawed, deference to it is not warranted. But having
18 reviewed the record, we conclude that the IHO's decision was
19 sufficiently supported, and we therefore defer to the IHO's
20 conclusion that the IEP was not reasonably calculated to create
21 educational benefit for R.K.

22 **2. Procedural Violations**

23 Our conclusion that the IEP was inadequate is reinforced by
24 the CSE's failure to create an FBA or BIP for R.K. As noted

1 earlier, failure to conduct an FBA is a particularly serious
2 procedural violation for a student who has significant
3 interfering behaviors. The IEP itself notes that R.K. exhibited
4 "self-stimulatory behaviors which interfere with her ability to
5 attend to tasks and to socially interact with others." IEP at 3,
6 J.A. 610. All of the reports considered by the CSE agreed that
7 R.K. had behavioral difficulties. See R.K., 2011 WL 1131492, at
8 *18 (summarizing record evidence of R.K.'s interfering
9 behaviors). The SRO concluded that an FBA was not required
10 because R.K.'s behaviors were "not unusual for a student with
11 autism" and because R.K.'s preschool teacher did not think an FBA
12 was necessary. SRO Opinion at 22, J.A. 765. However, New York
13 regulations mandate that an FBA be developed when a student has
14 behaviors that impede her learning. N.Y. Comp. Codes R. & Regs.
15 tit. 8, § 200.4(b)(1)(v). Record evidence that R.K. did have
16 such behaviors was clear and uncontradicted. The SRO's reliance
17 on Perez's retrospective testimony that she would have created a
18 BIP once R.K. was in her class was not appropriate and must be
19 disregarded. Accordingly, we conclude that the failure to create
20 an FBA compounded the IEP's substantive deficiency, resulting in
21 the denial of a FAPE. Our conclusion that the IEP was inadequate
22 is buttressed by the CSE's failure to include statutorily
23 mandated speech and language therapy and parent training in the
24 IEP.

1 We further affirm the district court's conclusion that BAC
2 was an appropriate school placement and that the equities favor
3 reimbursement. We conclude that the partial reduction of the
4 award by the IHO for perceived inadequacies in the BAC program
5 was erroneous for the reasons cited by Judge Mann. R.K., 2011 WL
6 1131492, at *26-27. Accordingly, we affirm the judgment of the
7 district court awarding full reimbursement.

8

9 **C. E.Z.-L., No. 11-655-cv**

10 E.Z.-L.'s parents allege that E.Z.-L. was denied a FAPE
11 because (1) the Department failed to conduct an FBA, (2) the IEP
12 did not include parent training, and (3) the proposed placement
13 was inadequate because that school did not provide its students
14 with the appropriate occupational therapy. The district court
15 affirmed the SRO and found that E.Z.-L. was not denied a FAPE.
16 We agree.

17 **1. Substantive Adequacy**

18 We conclude that the Department's proposed placement was
19 substantively adequate. Unlike the other two cases before us,
20 E.Z.-L.'s parents do not seriously challenge the substance of the
21 IEP. Instead, they argue that the written IEP would not have
22 been effectively implemented at P.S. M094 because "defendant's
23 own internal documents show that a large percentage of students
24 at P.S. M094 have been and continue to be 'underserved' for

1 related services, particularly as to occupational therapy.”
2 Appellant’s Br. at 44-45. Our evaluation must focus on the
3 written plan offered to the parents, however. Speculation that
4 the school district will not adequately adhere to the IEP is not
5 an appropriate basis for unilateral placement. A suggestion that
6 some students are underserved cannot overcome the “particularly
7 important” deference that we afford the SRO’s assessment of the
8 plan’s substantive adequacy. See Cerra, 427 F.3d at 195. An IEP
9 need only be reasonably calculated to provide likely progress,
10 id., and after reviewing the record, we conclude that the SRO had
11 ample evidence to find that the IEP met this standard.

12 E.Z.-L.’s parents also challenge the IEP’s lack of a
13 transition plan, but they have not identified any legal
14 requirement that an IEP contain a transition plan, nor have they
15 articulated why the absence of such a plan was so significant as
16 to deny E.Z.-L. a FAPE.

17 **2. Procedural Violations**

18 With regard to the FBA, the SRO concluded that there was no
19 violation because the CSE, relying in part on testimony from
20 Rebecca Starr, E.Z.-L.’s teacher, found that her behavior “does
21 not seriously interfere with instruction.” IEP at 4, J.A. 556.
22 This is not a case where an FBA was required but not conducted.
23 Instead, the CSE considered the evidence of E.Z.-L.’s behaviors
24 and determined that they were not severe enough to warrant an

1 FBA. The SRO concluded that the CSE's decision was appropriate
2 based on the evidence. Because the record adequately supports
3 this conclusion, we defer to the SRO.

4 With regard to the absence of parent training in the IEP,
5 the SRO found no violation because training services were
6 available at the proposed placement. Although the SRO's use of
7 retrospective evidence was inappropriate, we find that this
8 violation on its own does not establish denial of a FAPE.

9 Accordingly, we agree with the district court that E.Z.-L.
10 was not denied a FAPE for the 2008-09 school year. The judgment
11 of the district court is affirmed.

12
13 **CONCLUSION**

14 We reiterate our principal holding that courts must evaluate
15 the adequacy of an IEP prospectively as of the time of the
16 parents' placement decision and may not consider "retrospective
17 testimony" regarding services not listed in the IEP. However, we
18 reject a rigid "four-corners rule" that would prevent a court
19 from considering evidence explicating the written terms of the
20 IEP.

21 In light of this holding, and for the other reasons stated
22 above, we AFFIRM the judgment of the district court in R.K. v.
23 N.Y.C. Dep't of Educ., No. 11-1474-cv and E.Z.L. v. N.Y.C. Dep't
24 of Educ., No. 11-655-cv, and REVERSE the judgment of the district
25 court in R.E. v. N.Y.C. Dep't of Educ., No. 11-1266-cv.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: September 20, 2012

DC Docket #: 10-cv-3176

Docket #: 11-1266cv

DC Court: SDNY (NEW YORK CITY)

Short Title: R.E. v. New York City Department of Ed

DC Judge: Sweet

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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Date: September 20, 2012
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DC Docket #: 10-cv-3176
DC Court: SDNY (NEW YORK CITY)
DC Judge: Sweet

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature