

12-2720-cv

M.W. v. N.Y.C. Dep't of Educ.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: March 13, 2013 Decided: July 29, 2013)

Docket No. 12-2720-cv

M.W., BY HIS PARENTS, S.W. AND E.W.,

Plaintiffs-Appellants,

-V.-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant-Appellee.

Before:

WALKER, WESLEY, DRONEY, *Circuit Judges.*

Appeal from the order of the United States District Court for the Eastern District of New York (Weinstein, J.), entered on June 15, 2012, granting summary judgment for Defendant-Appellee New York City Department of Education and denying tuition reimbursement for Plaintiffs-Appellants after their unilateral placement of their child into a private school.

AFFIRMED

1 GARY S. MAYERSON (Tracey Spencer Walsh, Maria C.
2 McGinley, *on the brief*), Mayerson &
3 Associates, New York, NY, *for Plaintiffs-*
4 *Appellants*.

5
6 SUZANNE K. COLT, (Pamela Seider Dolgow, John Buhta,
7 Gail Eckstein, G. Christopher Harris, *on the*
8 *brief*), *for* Michael A. Cardozo, Corporation
9 Counsel of the City of New York, New York City
10 Law Department, New York, NY, *for Defendant-*
11 *Appellee*.

12
13
14 WESLEY, *Circuit Judge*:

15 S.W. ("Dad") and E.W. ("Mom") enrolled M.W., their
16 autistic child, in a private school after concluding that
17 the New York City Department of Education's ("DOE")
18 individualized education program failed to provide him with
19 a free and appropriate public education as required by the
20 Individuals with Disabilities Education Improvement Act
21 ("IDEA"), 20 U.S.C. §§ 1400 *et seq.* Subsequently, the
22 Parents filed a due-process complaint against the DOE
23 seeking tuition reimbursement. After twelve hearing days,
24 an impartial hearing officer granted them that relief. The
25 DOE appealed to a state review officer, who reversed that
26 decision. The Parents then filed a civil action in United
27 States District Court for the Eastern District of New York
28 (Weinstein, J.), which affirmed the order denying tuition

1 reimbursement. The Parents appeal principally contending
2 that the individualized education program's integrated co-
3 teaching services violated the IDEA's least restrictive
4 environment mandate by placing their child in a classroom
5 with as many as twelve other students who also had
6 individualized education programs. We **AFFIRM**.

7 **Background**

8 **I. The Legal Framework**

9 The IDEA requires New York state to "provide disabled
10 children with a free and appropriate public education
11 ('FAPE')." *R.E. v. N.Y. City Dep't of Educ.*, 694 F.3d 167,
12 174-75 (2d Cir. 2012) (citation omitted). Accordingly, the
13 DOE, through a Committee on Special Education ("CSE"), must
14 produce, in writing, an individualized education program
15 ("IEP"), see 20 U.S.C. § 1414(d), that "describes the
16 specially designed instruction and services that will enable
17 the child to meet" stated educational objectives and is
18 reasonably calculated to give educational benefits to the
19 child. *R.E.*, 694 F.3d at 175 (internal quotation marks and
20 citation omitted). Should a parent believe that the school
21 district breached these IDEA duties by failing to provide
22 their disabled child a FAPE, the parent may unilaterally

1 place their child in a private school at their own financial
 2 risk and seek tuition reimbursement. See *Florence Cnty.*
 3 *Sch. Dist. Four v. Carter*, 510 U.S. 7, 9-10, 16 (1993).

4 To begin the tuition-reimbursement process, a parent
 5 must first file a due-process complaint which triggers an
 6 administrative-review process that begins with a hearing in
 7 front of an impartial hearing officer ("IHO"). See 20
 8 U.S.C. § 1415(b)(6), (f); N.Y. Educ. L. § 4404(1). The
 9 three-pronged *Burlington/Carter* test, as construed by New
 10 York Education Law § 4404(1)(c), governs that hearing: (1)
 11 the DOE must establish that the student's IEP actually
 12 provided a FAPE; should the DOE fail to meet that burden,
 13 the parents are entitled to reimbursement¹ if (2) they

¹ The Parents invite us to expressly hold that the DOE carries their New York Education Law § 4404(1)(c) burden all the way into federal court, which would require us to decide whether the IDEA preempts that law. We do not need to address that argument "[b]ecause the State Review Officer[] in the case[] at bar concluded that the IEP[was] proper, and the courts are bound to exhibit deference to that decision[] the burden of demonstrating that the respective Review Officers erred is properly understood to fall on plaintiffs . . . , which party bore the burden of persuasion in the state review scheme is only relevant if the evidence was in equipoise." *M.H. v. NYC Dep't of Educ.*, 685 F.3d 217, 225 n.3 (2d Cir. 2012). Here, the evidence is not in equipoise. Moreover, it "is incumbent upon the Parents to bring to the Court's attention any procedural or substantive flaws and explain why they allegedly warrant reversal." *W.T. & K.T. ex rel. J.T. v. Bd. of Educ. of Sch. Dist. of N.Y.*, 716 F. Supp. 2d 270, 287 (S.D.N.Y. 2010).

1 establish that their unilateral placement was appropriate
2 and (3) the equities favor them. See *R.E.*, 694 F.3d at 184-
3 85 (citing *Carter*, 510 U.S. at 7; *Sch. Comm. of Town of*
4 *Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985)). A state
5 review officer ("SRO") evaluates appeals from an IHO's
6 decision, see N.Y. Educ. Law § 4404(2), and either party may
7 seek review of an SRO decision by bringing a civil action in
8 federal court, see 20 U.S.C. § 1415(i)(2)(A).

9 **II. Statement of Facts**

10 **A. M.W.**

11 M.W. is an autistic boy with Pervasive Developmental
12 Disorder, Attention Deficit Hyperactivity Disorder, certain
13 speech and language disorders, and fine and gross motor
14 deficits. Despite these setbacks, M.W. has an average IQ;
15 he is bright and can learn. His autism and developmental
16 disorders, however, present behavioral and social-emotional
17 problems that have resulted in academic under-performance
18 and have required speech, occupational, and physical
19 therapies. M.W. also requires direct, hands-on supervision
20 during the school day from a paraprofessional, who helps him
21 stay focused when his attention strays and calm in the event
22 of a behavioral crisis.

1 After the Parents rejected the IEP for the 2009-2010
2 school year, M.W. attended Luria, a Montessori school, where
3 he had the support of his full-time paraprofessional in a
4 classroom designed for typically developing students. On
5 January 30, 2010, Mom sent an email to Luria indicating a
6 desire to re-enroll M.W. for the 2010-2011 school year
7 before the CSE developed the contested IEP subject to this
8 appeal. Shortly thereafter, Mom submitted an application to
9 Luria which included a tuition contract and down payment to
10 hold M.W.'s spot.

11 Luria teachers do not use formal assessments to track
12 progress and rely on "a lot [of] note-taking and
13 observation" to track the child's progress. See Tr. 937.
14 Though M.W. progressed socially during the 2009-2010 school
15 year, he continued to have "a lot of behavioral issues that
16 [we]re getting in the way of his progress" through the 2010-
17 2011 school year. *Id.* at 921. When these behavioral issues
18 disrupted the class, his paraprofessional removed him from
19 the classroom to work with him outside, sometimes on the
20 floor.² *Id.* at 945-50.

² The record does not clearly set out the amount of time M.W. spent outside the classroom during both the 2009-2010 school year and the 2010-2011 school year. For the 2009-2010 school

1 **B. M.W.'s Individualized Education Program**

2 On June 10, 2010, the CSE convened to develop M.W.'s
3 2010-2011 IEP. The following individuals constituted the
4 CSE: (1) Mom; (2) Sara Malasky, M.W.'s general education
5 teacher, who participated *via* telephone; (3) Chanie Graus, a
6 school psychologist who acted as a school-district
7 representative; (4) a special education teacher; and (5) a
8 parent representative. M.W. was seven years old, and the
9 IEP was for his second-grade year, 2010-2011.

10 The IEP described M.W. as a seven-year-old autistic
11 child of average intelligence with Pervasive Developmental
12 Disorder. Despite his disorders, the IEP recognized that
13 M.W. had "made progress . . . in the area of peer
14 interactions" and, during the previous year at Luria, M.W.
15 had made friends and was "able to participate in a

year, M.W.'s Floor Time therapist worked with him outside the classroom. When sent to observe M.W. before the CSE meeting that produced the challenged IEP, the DOE representative observed M.W. on the hallway floor having an emotional breakdown during his Floor Time therapy. Around September of the 2010-2011 school year, M.W. developed Tourette Syndrome which caused a frequently disruptive tic. For that year, M.W. spent a significant amount of time outside of the classroom to work one-on-one with his paraprofessional as needed to control his disruptions. See Tr. 816, 824-25, 845-46, 854, 939, 945-50. Additionally, M.W.'s teacher and paraprofessional would plan ahead to have him removed from the classroom for instruction, sometimes with another student. Tr. 808, 923.

continuous flow of back and forth interactions" with his peers. Sealed App'x 1847. The IEP, however, also noted that M.W. had significant self-regulation difficulties, became frustrated easily, and struggled to calm himself down in the event of a behavioral crisis. *Id.*

The IEP recommended placement in a general education environment with integrated co-teaching ("ICT") services with a 12:1 staffing ratio, five days a week, for a ten-month school year.³ The IEP also provided M.W. with a full-time behavioral management paraprofessional to give him one-on-one help self-regulating in times of behavioral crisis, and these other related services:

	Service	Sessions x Week	Duration	Students
1	Counseling	1 x week	30 mins.	3
2	Occupational Therapy	3 x week	30 mins.	1
3	Physical Therapy	2 x week	30 mins.	1
4	Speech/Language Therapy	2 x week	30 mins.	1

³ The 12:1 staffing ratio means that one special education teacher would provide ICT services for up to twelve IEP students, the statutory maximum, in a classroom that also included typically developing students, a general education curriculum, and a general education teacher. For a detailed discussion of ICT services, see Discussion, *infra*, at XX.

1	5	Speech/Language Therapy	1 x week	30 mins.	2
---	---	-------------------------	----------	----------	---

2 Sealed App'x 1860.

3 Finally, the IEP concluded that M.W.'s "behavior
 4 seriously interfere[d] with instruction and require[d]
 5 additional adult support." *Id.* 1847. Based on those
 6 conclusions, the IEP required a behavioral intervention plan
 7 ("BIP"), which was incorporated in the IEP. *Id.* at 1860.
 8 The BIP identified "emotional meltdowns," "poor self-
 9 regulation," and "poor attention" as the behavioral
 10 difficulties that impaired M.W.'s academic progress and
 11 recommended a reward system, praise and encouragement, and
 12 positive modeling as strategies to modify those behaviors.
 13 *Id.* at 1862. The goal was to teach M.W. to become more
 14 attentive and focused and to better control himself when
 15 frustrated. *Id.* To implement those strategies, M.W.'s
 16 teacher, paraprofessional, and the Parents were to
 17 collaborate. The BIP did not quantify data relating to the
 18 frequency of M.W.'s "meltdowns" because Luria did not
 19 provide a functional behavior assessment ("FBA"), and the
 20 DOE did not request or develop one.

21 On July 1, 2010, the DOE sent a letter to M.W.'s
 22 Parents that classified M.W. as an autistic student and

1 recommended an ICT classroom⁴ at P.S. 197, the Ocean School,
2 with the related services that the IEP recommended. Mom
3 visited the school, decided to keep M.W. at Luria, and
4 immediately began the administrative-review process seeking
5 reimbursement for the 2010-2011 school year.

6 **C. Administrative Review**

7 On July 8, 2010, the Parents filed their demand for due
8 process and requested a hearing. The Parents subsequently
9 amended their demands on September 29, 2010. On May 2,
10 2011, the Parents submitted their closing brief after 12
11 hearing days that took place over the entire school year.
12 In relevant parts, the Parents argued that the IEP would
13 have denied M.W. a FAPE because the IEP Team created a BIP
14 without the benefit of an FBA and the IEP failed to provide
15 parent counseling and training as a related service. The
16 Parents also argued that the P.S. 197 placement was
17 defective because the recommended 10-month program exposed
18

⁴ The letter actually recommended Collaborative Team Teaching ("CTT"). CTT is equivalent to ICT. See <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.html> ("New York City (NYC) has used the term 'collaborative team teaching' (CTT) to identify a service that meets the regulatory definition of integrated co-teaching services."). In any event, the parties do not mention or argue over this distinction.

1 M.W. to regression risks. Finally, the Parents argued that
2 the IEP assigned M.W. to an overly restrictive environment.

3 The IHO expressly agreed with the Parents regarding the
4 BIP, the omission of parental counseling, and the inadequacy
5 of a 10-month program. Though the IHO mentioned the least
6 restrictive environment requirement in passing, she made no
7 explicit findings as to whether a general education
8 environment with ICT services would be too restrictive.⁵

9 See Sealed App'x 2155. The IHO found Luria to be an
10 appropriate placement and that the equities favored the
11 Parents. Accordingly, the IHO ordered that the Parents be
12 reimbursed, and the DOE sought review by a SRO. The SRO
13 reversed the IHO's determinations and denied tuition
14 reimbursement. Relying heavily on the SRO's analysis, the
15 district court affirmed that decision, and the Parents
16 appealed.

17
18
⁵ The IHO found that the ICT classroom, generally, was inappropriate because the class size was too large and the decision to make that placement was unsupported by documentary evidence. IHO Decision at 27. The IHO also summarily concluded that ICT service was an inappropriate support system for M.W.'s developmental problems. *Id.* Those criticisms, however, were not tied to a restrictiveness analysis and offer no insight into Parents' least restrictive environment arguments on appeal.

Discussion

I. Standard of Review and Burdens of Proof

We undergo a circumscribed *de novo* review of a district court's grant of summary judgment in the IDEA context because the "responsibility for determining whether a challenged IEP will provide a child with [a FAPE] rests in the first instance with administrative hearing and review officers." *M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 240 (2d Cir. 2012). Summary judgment in the IDEA context, therefore, is only a "pragmatic procedural mechanism for reviewing administrative decisions." *T.P. ex rel S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 252 (2d Cir. 2009) (per curiam) (internal quotation marks and citation omitted). This review "'requires a more critical appraisal of the agency determination than clear-error review'" but "'falls well short of complete *de novo* review.'" *M.H.*, 685 F.3d at 244 (quoting *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086-87 (1st Cir. 1993) (internal citations omitted)). Accordingly, our *de novo* review only seeks to independently verify that the administrative record supports the district court's determination that a student's IEP was adequate. See *R.E.*, 694 F.3d at 184.

1 In undertaking this independent review, we are further
2 restrained by our lack of specialized knowledge and
3 educational expertise; “we must defer to the administrative
4 decision [particularly where] the state officer’s review
5 ‘has been thorough and careful.’” See *id.* (quoting *Walczak*
6 *v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir.
7 1998)). While we will not “rubber stamp” administrative
8 decisions, we remain equally mindful that we cannot
9 substitute our own “notions of sound educational policy for
10 those of the school authorities” under review. *M.H.*, 685
11 F.3d at 240. Furthermore, when, as here, “an IHO and SRO
12 reach conflicting conclusions, ‘[w]e defer to the final
13 decision of the state authorities,’ that is, the SRO’s
14 decision.” *R.E.*, 694 F.3d at 189 (quoting *A.C. ex rel. M.C.*
15 *v. Bd. of Educ. of Chappaqua Cent. Sch. Dist.*, 553 F.3d 165,
16 171 (2d Cir. 2009)).

17 Recently, we parsed the amount of deference an SRO’s
18 determination deserves and concluded that it “depends on the
19 quality of that opinion.” See *R.E.*, 694 F.3d at 189.
20 “Reviewing courts must look to the factors that ‘normally
21 determine whether any particular judgment is persuasive, for
22 example, whether the decision being reviewed is well-
23 reasoned, and whether it was based on substantially greater

1 familiarity with the evidence and the witnesses than the
2 reviewing court.'" *Id.* at 189 (quoting *M.H.*, 685 F.3d at
3 244). Where an SRO has clearly demonstrated a better
4 command of the record and supported her conclusions through
5 better legal and factual analysis than an IHO, we will have
6 little difficulty deferring to the SRO's opinion. *See id.*
7 Accordingly, an appellant seeking to have a reviewing court
8 credit an IHO's determination over an SRO's determination
9 would benefit from calling our attention to an SRO's
10 specific errors in law, fact, or reasoning.⁶

11 **II. Procedural Violations**

12 "In determining whether an IEP complies with the IDEA,
13 courts make a two-part inquiry that is, first, procedural,
14 and second, substantive." *Id.* at 189-90. Procedural
15 violations warrant tuition reimbursement only if they
16 "'impeded the child's right to a [FAPE],' 'significantly
17 impeded the parents' opportunity to participate in the
18 decision[-]making process,' or 'caused a deprivation of
19 educational benefits.'" *Id.* at 190 (quoting 20 U.S.C. §
20 1415(f)(3)(E)(ii); *A.C.*, 553 F.3d at 172). That is, parents

⁶ By attempting to undercut the deference owed to the SRO based on her alleged personal inexperience, Parents' counsel moved us to (re)articulate these guiding principles. *See* Compl. at 8, ¶ 23.

1 must articulate how a procedural violation resulted in the
2 IEP's substantive inadequacy or affected the decision-making
3 process. Of course, "[m]ultiple procedural violations may
4 cumulatively result in the denial of a FAPE even if the
5 violations considered individually do not." *Id.*

6 Here, the Parents allege that the DOE committed two
7 procedural violations: it failed to undertake an FBA in
8 developing the BIP and it failed to include parental
9 training and counseling in the IEP. The Parents also assert
10 that the SRO impermissibly relied on retrospective testimony
11 to justify those omissions.

12 **A. Behavioral Intervention Plan**

13 An FBA provides an "identification of [a disabled
14 student's] problem behavior, the definition of the behavior
15 in concrete terms, the identification of the contextual
16 factors that contribute to the behavior . . . and the
17 formulation of a hypothesis regarding the general conditions
18 under which a behavior usually occurs and probable
19 consequences that serve to maintain it." N.Y. Comp. Codes
20 R. & Regs. tit. 8 § 200.1(r)). "New York regulations
21 require the department to conduct an FBA for a student
22 'whose behavior impedes his or her learning or that of
23 others.'" See *R.E.*, 694 F.3d at 190 (quoting N.Y. Comp.

1 Codes R. & Regs. tit. 8 § 200.4(b)(1)(v)). Those
2 regulations, however, only require an FBA “as necessary to
3 ascertain the physical, mental, behavioral and emotional
4 factors which contribute to [a] suspected disabilit[y].”
5 N.Y. Comp. Codes R. & Regs. tit. 8 § 200.4(b)(1)(v)
6 (emphasis added).

7 Though the “IDEA incorporates some but not all state
8 law concerning special education,” these regulations do not
9 raise the IDEA bar by rendering IEP’s developed without an
10 FBA legally inadequate. See *A.C.*, 553 F.3d at 172 n.1
11 (quoting *Bay Shore Union Free Sch. Dist. v. Kain ex rel.*
12 *Kain*, 485 F.3d 730, 734 (2d Cir. 2007)). The IDEA only
13 requires a school district to “consider the use of positive
14 behavioral interventions and supports, and other strategies”
15 when a child’s behavior impedes learning. See *id.* at 172
16 (quoting 20 U.S.C. § 1414(d)(3)(B)(i)) (internal quotation
17 marks omitted). An FBA omission does, however, cause us to
18 “take particular care to ensure that the IEP adequately
19 addresses the child’s problem behaviors.” *R.E.*, 694 F.3d at
20 190. Two cases chart our course. See *R.E.*, 694 F.3d at
21 192-95; *A.C.*, 553 F.3d at 172-73.

22 In *A.C.*, we concluded that the failure to conduct an
23 FBA did not make an IEP legally inadequate because it noted

(1) the student's attention problems; (2) the student's need for a personal aide to help the student focus during class; and (3) the student's need for psychiatric and psychological services. *A.C.*, 553 F.3d at 172. In *R.E.* we considered the effect of an FBA omission for three separate students. See *R.E.*, 694 F.3d at 192-95. For one student, we concluded that an FBA omission did not deny a FAPE where (1) the CSE reviewed documents regarding the student's behavior, and (2) the IEP provided strategies to address those behaviors, "including the use of a 1:1 aide to help him focus." *Id.* at 193. Moreover, we have decided that whether an IEP adequately addresses a disabled student's behaviors and whether strategies for dealing with those behaviors are appropriate are "precisely the type of issue[s] upon which the IDEA requires deference to the expertise of the administrative officers." *A.C.*, 553 F.3d at 172 (quoting *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 382 (2d Cir. 2003)) (internal quotation marks omitted).

Failure to conduct an FBA, therefore, does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior. See, e.g., *id.* Where the IEP actually includes a BIP, parents should

1 at least suggest how the lack of an FBA resulted in the
2 BIP's inadequacy or prevented meaningful decision-making.
3 See *R.E.* at 189-90. For example, parents could argue that
4 an FBA would have exposed a BIP's obsolete assessment of the
5 student's behavioral problems or that the recommended
6 behavior-modification strategies failed to accommodate the
7 frequency or intensity of the student's behavioral problems.
8 Here, however, the Parents summarily argue that failure to
9 conduct an FBA made the IEP legally defective; the record
10 belies those assertions.

11 As an initial matter, the IHO's FBA and BIP analysis
12 consisted of a single sentence without citation to the
13 administrative record: "Lastly, I find there was no FBA
14 developed and the BIP was developed without parent or
15 teacher involvement and I find the BIP was not appropriate."
16 IHO Decision at 28. By contrast, the SRO provided an in-
17 depth, four-page discussion of the issue replete with legal
18 and factual analysis. See SRO Decision at 17-20. The SRO
19 found that the IHO's finding was unsubstantiated by a record
20 which clearly established M.W.'s behavioral problems,
21 identified strategies to manage those problems, and
22 recommended a collaborative intervention plan between the
23 Parents, teacher, and paraprofessional.

1 The SRO concluded that the BIP accurately described the
2 behaviors that interfered with learning: "emotional
3 meltdowns," poor self-regulation, and poor attention. In
4 support of her analysis, the SRO relied upon, *inter alia*,
5 the Luria progress reports, the Floor Time therapist's
6 report, and Graus's in-class observations of M.W., all of
7 which describe those behavioral difficulties in detail. See
8 SRO Decision at 19 (citing Dist. Ex. 5-12). The Parents
9 confirm the accuracy of those descriptions and do not
10 contend that the IEP misidentified or overlooked their son's
11 behavioral issues. See Parents' Local Rule 56.1 Statement
12 of Material Facts ¶ 5. Accordingly, we agree with the SRO's
13 determination that the BIP adequately described M.W.'s
14 behavioral impediments.

15 The SRO also concluded that the BIP was consistent with
16 the information available to the CSE and that the
17 intervention services were adequate because they provided a
18 broad, collaborative approach to implement specific
19 strategies to modify those behaviors on a daily, one-on-one
20 basis. The Parents do not contend that M.W. needed more or
21 less attention. Additionally, the BIP recommended that M.W.
22 be provided with a reward system, praise, encouragement, and
23 positive modeling to learn to adjust his behavior within a

1 collaborative support system between parent, teacher, and
2 paraprofessional. The Parents do not attack those
3 strategies. The Parents have simply failed to articulate a
4 single reason why an FBA was required for a legally valid
5 BIP.

6 We therefore affirm the SRO's determination that the
7 "hearing record does not support the impartial hearing
8 officer's determination that the lack of an FBA rose to the
9 level of denying the student a FAPE where the IEP addressed
10 behavioral needs." SRO Decision at 20. As in *R.E.*, (1) the
11 CSE reviewed documents regarding the student's behavior, and
12 (2) the IEP provided strategies to address those behaviors,
13 including the use of a paraprofessional. *R.E.*, 694 F.3d at
14 193.

15 **B. Parental Counseling**

16 Next, the Parents argue that the IEP's failure to
17 include parental counseling denied M.W. a FAPE. To enable
18 parents to "perform appropriate follow-up intervention
19 activities at home," New York requires that an IEP provide
20 parents of autistic students training and counseling. See
21 N.Y. Comp. Codes R. & Regs. tit. 8 § 200.13(d). "Parent
22 counseling and training means assisting parents in
23 understanding the special needs of their child; providing

1 parents with information about child development; and
2 helping parents to acquire the necessary skills that will
3 allow them to support the implementation of their child's
4 individualized education program." *Id.* § 200.1(kk)
5 (emphasis omitted). The regulations contemplate parental
6 counseling for the educational benefit of the disabled
7 student by ensuring that the parents are equipped with the
8 skills and knowledge necessary to continue and implement the
9 student's IEP at home.

10 We have previously described counseling omissions as
11 procedural violations "less serious than the omission of an
12 FBA" because "the presence or absence of a parent-counseling
13 provision does not necessarily have a direct effect on the
14 substantive adequacy of the plan." *R.E.*, 694 F.3d at 191.
15 "Moreover, because school districts are required . . . to
16 provide parent counseling, they remain accountable for their
17 failure to do so no matter the contents of the IEP." *Id.*
18 (citing N.Y. Comp. Codes R. & Regs. tit. 8 § 200.13(d)).
19 If a parent wants counseling for her own sake, New York
20 provides her a remedy. Accordingly, failure to provide
21 counseling ordinarily does not result in a FAPE denial or
22 warrant tuition reimbursement. *See id.*

1 Here, the IHO again summarily decided that parent
2 counseling and training was required and that parent
3 workshops that would have been provided to the Parents by
4 the Ocean School would not give the Parents the tools
5 necessary to perform follow-up at home. IHO Decision at 27-
6 28. The IHO, however, did not explain those conclusions.
7 The SRO concluded that the counseling omission did not deny
8 M.W. a FAPE because Mom was a certified special education
9 teacher who had received, through her own initiative,
10 training and counseling in the therapies that M.W. had
11 previously used, and because the public school assigned to
12 M.W. provided training and counseling. The SRO also noted
13 that the BIP required collaboration between
14 paraprofessional, the Parents, and teacher in order to
15 implement and support the recommended behavior-modification
16 strategies.

17 We defer to that analysis. The Parents have not
18 persuaded us that the parental counseling omission would
19 deprive M.W. of FAPE. The SRO's analysis noted that Mom's
20 experience and the supports in the BIP provide adequate
21 assurance that M.W.'s developmental plan and education would
22 continue at home.

1

2 **C. Retrospective Justifications**

3 The Parents assert that the SRO routinely relied upon
4 impermissible retrospective justifications to fill in the
5 IEP's inadequacies. In *R.E.*, we held "that retrospective
6 testimony that the school district *would have* provided
7 additional services beyond those listed in the IEP may not
8 be considered in a *Burlington/Carter* proceeding." *R.E.*, 694
9 F.3d at 186. (emphasis added). However, the case also
10 expressly "reject[ed] . . . a rigid 'four corners' rule
11 prohibiting testimony that goes beyond the face of the IEP.
12 While testimony that materially alters the written plan is
13 not permitted, testimony may be received that *explains* or
14 *justifies* the services listed in the IEP." *Id.* (emphasis
15 added). For example:

16 [I]f an IEP states that a specific
17 teaching method will be used to instruct a
18 student, the school district may introduce
19 testimony at the subsequent hearing to
20 describe that teaching method and explain
21 why it was appropriate for the student.
22 The district, however, may not introduce
23 testimony that a different teaching
24 method, not mentioned in the IEP, would
25 have been used.

26
27 *Id.* at 186-87.

28 Here, Parents contend that the SRO impermissibly
29 credited retrospective testimony that justified the FBA

1 omission based on the BIP's broad, collaborative support
2 strategies and how those strategies would change as the
3 student's needs changed. That argument, however, misses the
4 SRO's central analysis: the BIP was developed with specific
5 goals, strategies, and supports, but the collaborative
6 approach ensured that implementation could change as M.W.'s
7 needs changed and ensured that behavioral modification
8 strategies would continue at home. That seems especially
9 appropriate when a student's autism presents unique
10 challenges each day. Accordingly, the analysis did not rely
11 on retrospective justifications. The DOE admits that there
12 was no FBA, and the SRO did not rely upon a promise not
13 contained in the IEP to address the omission.

14 The Parents also assert that reliance on Mom's
15 educational background and the placement school's counseling
16 programs retrospectively justifies the omission of parental
17 counseling. But, as we have just stated, when the IEP
18 suffers from a conceded procedural infirmity, we first
19 review whether that procedural violation substantively
20 deprived the student of a FAPE before determining whether
21 the SRO corrected the substantive failure by impermissibly
22 crediting future promises. In making her determination, the
23 SRO did not conclude that the IEP's omission of parental

1 counseling denied M.W. of a FAPE and that the omission was
2 made sound by promises not contained in the IEP. Instead,
3 the SRO concluded that the parental counseling omission did
4 not deny M.W. a FAPE in the first instance because of the
5 BIP's collaborative approach to behavior modification, Mom's
6 education, and the school workshops. The SRO concluded that
7 the Parents were equipped to manage M.W.'s needs without New
8 York's mandated counseling. Accordingly, the SRO did not
9 rely upon impermissible retrospection and we defer to her
10 analysis.

11 **III. Substantive Adequacy and Least Restrictive**
12 **Environment**

13 The Parents also challenge the substantive adequacy of
14 the IEP. "Substantive inadequacy automatically entitles the
15 parents to reimbursement." *R.E.*, 694 F.3d at 190. The
16 "state need not 'maximize the potential of handicapped
17 children,' but the door of public education must be opened
18 in a 'meaningful way.'" *P. ex. rel. Mr. and Mrs. P. v.*
19 *Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008)
20 (quoting *Walczak*, 142 F.3d at 130 (internal quotation marks
21 omitted)). That is, the "IEP must provide the opportunity
22 for more than only 'trivial advancement.'" *Id.*

1

2 **A. Least Restrictive Environment**

3 The IDEA “expresses a strong preference” for educating
4 disabled students alongside their non-disabled peers; that
5 is, in their least restrictive environment (“LRE”).
6 *Walczak*, 142 F.3d at 122. Specifically, the IDEA provides
7 that disabled children be educated “[t]o the maximum extent
8 appropriate . . . with children who are not disabled,” and
9 cautions that “special classes, separate schooling, or other
10 removal of children with disabilities from the regular
11 educational environment” should only occur “when the nature
12 or severity of the disability of a child is such that
13 education in regular classes with the use of supplementary
14 aids and services cannot be achieved satisfactorily.” 20
15 U.S.C. § 1412(a)(5)(A) (emphasis added).

16 “[W]hile mainstreaming is an important objective, we
17 are mindful that the presumption in favor of mainstreaming
18 must be weighed against the importance of providing an
19 appropriate education to handicapped students.” *Newington*,
20 546 F.3d at 119 (quotation marks and citation omitted). The
21 “tension between the IDEA’s goal of providing an education
22 suited to a student’s particular needs and its goal of
23 educating that student with his non-disabled peers as much

1 as circumstances allow" dictates a "case-by-case analysis in
2 reviewing whether both of those goals have been *optimally*
3 accommodated under particular circumstances." *Id.* (emphasis
4 added)

5 We have previously used a two-pronged test to determine
6 whether a school district has met the LRE mandate mindful of
7 "our deferential position with respect to state educational
8 authorities crafting educational policy" when applying it.

9 *Id.* at 120. First, can the student "be satisfactorily
10 educated in the regular classroom, with the use of
11 supplemental aids and services[?]" *Id.* at 121. To answer
12 that question we consider: "(1) whether the school district
13 has made reasonable efforts to accommodate the child in a
14 regular classroom; (2) the educational benefits available to
15 the child in a regular class, with appropriate supplementary
16 aids and services, as compared to the benefits provided in a
17 special education class; and (3) the possible negative
18 effects of the inclusion of the child on the education of
19 the other students." *Id.* at 120. If a school district
20 actually "remov[es] the child from [a] regular classroom
21 [into] a segregated, special education class," a second
22 question confronts us: "whether the school has included the
23 child in school programs with nondisabled children to the

1 maximum extent appropriate." *Id.* (quotation omitted).

2 These two questions, however, do not adequately address
3 M.W.'s placement in a general education environment with
4 integrated co-teaching services, a placement somewhere in
5 between a regular classroom and a segregated, special
6 education classroom. New York regulations set out the
7 definition of integrated co-teaching.

8 "To enable students with disabilities to be educated
9 with nondisabled students to the maximum extent appropriate,
10 specially designed instruction and supplementary services
11 may be provided in the regular class, including, as
12 appropriate, providing related services, resource room
13 programs and special class programs within the general
14 education classroom." N.Y. Comp. Codes R. & Regs. tit. 8 §
15 200.6(a)(1). "A school district may include integrated co-
16 teaching services in its continuum of services." *Id.* at §
17 200.6(g).

18 "Integrated co-teaching services means the provision of
19 specially designed instruction and academic instruction
20 provided to a group of students with disabilities and
21 nondisabled students." *Id.* "The maximum number of students
22 with disabilities receiving integrated co-teaching services
23 in a class shall be determined in accordance with the

1 students' individual needs [and the] number of students with
2 disabilities in such classes [cannot] exceed 12 students"
3 unless a variance was provided. *Id.* at § 200.6(g)(1). At a
4 minimum, the classroom must include a special education
5 teacher and a general education teacher. *Id.* at §
6 200.6(g)(2). In contrast, a special education classroom is
7 a "self-contained setting." See *Id.* at § 200.6(h)(4).

8 The Parents refer repeatedly to an "ICT classroom" and
9 they assert that the use of ICT services makes M.W.'s
10 placement akin to a segregated special education classroom
11 rather than a regular classroom with supports. Accordingly,
12 the Parents argue that the DOE failed to consider a regular
13 classroom with additional supports. Though it is fair to
14 say that a classroom with ICT services is not a "regular
15 classroom," it is likewise unfair to characterize the
16 placement as a segregated, special-education environment.
17 *Newington*, however, does not compel a choice between the two
18 extremes of a regular classroom and a special education
19 classroom. *Newington* only gives us a test to use when a
20 student is pulled out of a regular classroom and placed in a
21 special education classroom all or some of the time.
22 Accordingly, we do not have to decide whether this is a
23 regular classroom or a special education classroom. Though

1 M.W.'s placement adds a degree of complexity to the LRE test
2 articulated in *Newington*, we need only consider whether the
3 placement of M.W. in a general education environment with a
4 regular curriculum alongside typically developing peers but
5 supplemented with a special education teacher was overly
6 restrictive for M.W.

7 Both the IEP and the New York regulations characterize
8 ICT as a *service* in a general education environment rather
9 than a special education classroom. The IEP's "School
10 Environment and Service Recommendation" would have placed
11 M.W. in a general education environment for all areas of
12 instruction. ICT was listed as a supplementary aid and
13 service, along with the use of a behavior management
14 paraprofessional and M.W.'s other related services. The IEP
15 also noted that no areas of instruction were to be in a
16 special-class environment.

17 Moreover, both the IHO and SRO treated ICT as a service
18 and not a special-education classroom. The IHO concluded
19 that the DOE "failed to present any evidence that an ICT
20 program . . . provided sufficient *special education support*
21 for [M.W.] in the classroom." IHO Decision at 26 (emphasis
22 added). A close reading of the SRO's opinion reveals that
23 she also characterized the use of a special education

1 teacher, paraprofessional, and related services as
2 “provid[ing] special education *support*” and that M.W.
3 deserved to be in a “general education curriculum” alongside
4 typically developing peers on account of his high
5 functionality. See SRO Decision at 16 (emphasis added). On
6 these facts, M.W. has not persuaded us that the ICT services
7 were too restrictive and the record does not reflect that
8 New York’s statutory schema incorrectly classifies ICT
9 services as a placement less restrictive than a segregated,
10 special-education classroom. Accordingly, we decline to
11 analyze M.W.’s ICT classroom placement as a placement in a
12 special-education classroom.

13 The question then in this case is whether the ICT
14 services were appropriate supports for M.W. within a general
15 education environment. The Parents contend that a classroom
16 with ICT services was overly restrictive because M.W. had
17 been educated alongside “exclusively non-disabled peers . .
18 . [and that he had proven] that with support, he could ‘make
19 it’ in a far less restrictive environment.” Br. at 22. The
20 Parents rely upon the IDEA’s prescription that children be
21 educated with non-disabled children *to the maximum* extent
22 appropriate, see 20 U.S.C. § 1412(a)(5)(A), whereas the FAPE
23 mandate only requires an “appropriate public education.”

1 They assert that any classroom restrictions that result in
2 raising the educational level afforded to the student beyond
3 what can be deemed "appropriate" are therefore
4 impermissible, maintaining that the "test is not whether a
5 student can learn 'more' or learn 'better' in a more
6 restrictive setting, but simply whether the student can
7 learn 'satisfactorily' with aids and services in a less
8 restrictive environment." Br. at 22. Our cases, however, do
9 not stand for that robust proposition.

10 The IDEA seeks to provide disabled children with a
11 meaningful public education while protecting them from being
12 inappropriately sequestered in a special-education
13 classroom. *Burlington*, 471 U.S. at 373 ("Congress was
14 concerned about the apparently widespread practice of
15 relegating handicapped children to private institutions or
16 warehousing them in special classes."). *Newington*
17 recognizes this apparent tension and instructs us to weigh
18 the presumption of mainstreaming against educational
19 benefits obtained in more restrictive settings through a
20 case-by-case analysis that seeks an *optimal* result across
21 the two requirements. Moreover, *Newington* characterized the
22 LRE requirement as a "strong preference" and cautioned that
23 the presumption in favor of mainstreaming must be weighed

1 against the importance of providing an appropriate education
2 to handicapped students; sometimes education in a regular
3 classroom cannot be achieved satisfactorily. *Newington*, 546
4 F.3d at 119. But, as just articulated, *Newington* does not
5 compel a choice between a regular classroom and a special
6 education classroom. Likewise, the IDEA contemplates that
7 the DOE will consider a continuum of related services and
8 options that will be a "best fit" for the student in
9 question.

10 Accordingly, the Parents' position ignores that we
11 weigh the benefits of a less-restrictive environment against
12 the backdrop of the educational benefits a child can receive
13 in such an environment. Therefore, we do not assume that
14 moving M.W. from an educational setting where he experienced
15 some progress into a more restrictive setting, *ipso facto*,
16 warrants tuition reimbursement for a private placement.
17 Instead, we examine whether the preponderance of the
18 evidence supports the SRO's conclusion that the IEP provided
19 M.W. an appropriate education in his least restrictive
20 environment.

21 The Parents also contend that the addition of ICT
22 services were inappropriate and too restrictive because M.W.
23 would be learning alongside as many as twelve other IEP

1 students. We reject the unsupported assertion that the
2 restrictiveness of the educational environment and related
3 services turns exclusively on the number of IEP students
4 present. "[T]he objective of providing an education
5 tailored to each student's particular needs does not admit
6 of statistical generalizations." *Newington*, 546 F.3d at
7 121-22.

8 Accordingly, we consider whether the ICT services were
9 overly restrictive along the continuum of services available
10 to M.W. in a general education environment. The IHO did not
11 make any conclusions or findings regarding the LRE *per se*.
12 She did, however, conclude in summary fashion that the
13 district "presented no documentary evidence to support the
14 appropriateness of the ICT placement" in light of M.W.'s
15 various developmental problems. IHO Opinion at 27. Because
16 the SRO thoroughly addressed the LRE mandate and the
17 appropriateness of the ICT services, we defer to her
18 conclusions.

19 A careful review of the record reveals that M.W.'s
20 autism and related disorders caused behavioral issues that
21 disrupted class and impaired his educational development.
22 Chanie Graus, the psychologist and DOE representative,
23 concluded that M.W. would benefit "from two teachers in the

1 classroom versus one [because] it's really important for
2 [M.W.] to be exposed to typically developing students, since
3 he's under the autistic spectrum, but he's high
4 functioning." Tr. 433-34. Graus thought that putting M.W.
5 in a segregated special education classroom "would really be
6 detrimental to him." *Id.* at 434. Taking into consideration
7 his "average I.Q., and that he's only mildly delayed in
8 comparison to other students his grade," Graus said they
9 wanted M.W. "to be challenged and exposed to a general
10 education curriculum." *Id.* At the IEP meeting, no one
11 expressed disagreement with the recommendation for an ICT
12 classroom. Graus also concluded that a regular general
13 education classroom would be inappropriate because of his
14 emotional difficulties and that having a special education
15 teacher would be a benefit. *Id.* at 437.

16 A preponderance of the evidence supports the SRO's
17 conclusions that the IEP recommendation of ICT services in a
18 general education setting was appropriate and reasonable.
19 The DOE was not required to place M.W. in a regular
20 classroom where he was the only IEP student.

21 **B. Length of Program**

22 The Parents also argue the DOE's failure to provide a
23 12-month program denied M.W. a FAPE. The IHO determined

1 that the CSE failed to "justify the elimination of a 12-
2 month program" and the administrative record did not support
3 a "reduction in services from a 12-month program to a 10-
4 month program." IHO Decision at 26. The SRO noted that the
5 IHO "did not cite to any evidentiary basis for her
6 determination" and concluded that the determination that
7 "the district's decision not to offer 12-month services
8 denied the student a FAPE [was] not supported by the hearing
9 record." SRO Decision at 23. We defer to that conclusion.⁷

10 The Parents rely exclusively on the IHO's statement
11 that "the [DOE]'s own witness . . . stated [that] M.W.
12 *required* a 12-month program" to develop their argument. See
13 IHO Decision at 26 (citing Tr. at 761) (emphasis added).
14 That reliance is misplaced. The DOE witness was the special
15 education teacher who would have been leading M.W.'s ICT
16 services and who was not part of the IEP team. She said
17 that "being a teacher, . . . more is better, and for a child

⁷The IHO's misstatements of the record further justify this deference. The IHO credited the "district's own witness who stated based on her review of the June 10, 2010 IEP [M.W.] required a 12-month program." IHO Decision at 26. The district's witness was the special-education teacher who would have ran M.W.'s ICT services. In response to a question whether M.W. would benefit from a 12-month program she merely stated: "Oh, well, being a teacher, I - more is better, and for a child with such deficits, I think a 12 month would be good for this child. Anything to help him, you know." Tr. 762. She also testified that he would have made progress in a 10-month program. Tr. 770.

1 with such deficits, I think a 12 month [program] *would be*
2 *good* for the child." Tr. 761 (emphasis added). That
3 "concession" does not suggest that such a program would be
4 necessary or required to prevent regression. Moreover, the
5 administrative record reveals that regression was not a
6 topic discussed at the IEP meeting. See Tr. 638. Mom
7 testified that she was not seeking tuition reimbursement for
8 a 12-month program, only a 10-month program. Tr. at 1109.
9 Accordingly, we are not persuaded that the SRO erred in
10 concluding that the absence of 12-month services did not
11 deny M.W. a FAPE. We also do not agree that the cumulative
12 results of the alleged errors resulted in a FAPE denial.
13 See *R.E.*, 694 F.3d at 190.

14 Having considered all of the Parents' arguments on
15 appeal, we find them to be without merit. Accordingly, we
16 conclude that the SRO correctly determined that the IEP was
17 substantively adequate and, despite alleged procedural
18 flaws, provided M.W. a FAPE.

19 **Conclusion**

20 The district court's order of June 15, 2012, granting
21 summary judgment for Defendant-Appellee New York City
22 Department of Education is hereby AFFIRMED.