

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3
4 August Term, 2013

5 (Argued: November 6, 2013

Decided: July 25, 2014)

6 Docket No. 13-158
7
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9 DOMINGA REYES, on behalf of and as Parent and Guardian of R.P., a student
10 with a disability,

11 *Plaintiff-Appellant,*

12 - v -

13 NEW YORK CITY DEPARTMENT OF EDUCATION,

14 *Defendant-Appellee.**
15 -----

16 Before: SACK, HALL, and LIVINGSTON, *Circuit Judges.*

17 Appeal from a judgment of the United States District Court for the
18 Southern District of New York (William H. Pauley III, *Judge*) upholding a New
19 York State Review Officer's final administrative decision overturning an

* The Clerk of the Court is respectfully directed to amend the official caption to conform to the caption set forth above.

1 Impartial Hearing Officer's award of tuition reimbursement under the
2 Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* Because we
3 conclude that the proposed individualized education program and school
4 placement failed to provide R.P. with the free appropriate public education
5 guaranteed to him by the Act, we REVERSE and REMAND to the district court
6 for further proceedings.

7 ERIN McCORMACK-HERBERT (Michael D.
8 Hampden, *of counsel*), Partnership for Children's
9 Rights, New York, NY, *for Appellant*.

10 KATHY H. CHANG (Michael A. Cardozo,
11 Corporation Counsel, and Larry A. Sonnenshein,
12 *of counsel*), Corporation Counsel of the City of
13 New York, New York, NY, *for Appellee*.

14 SACK, *Circuit Judge*:

15 The Individuals with Disabilities Education Act ("IDEA") promises each
16 child with a disability a free appropriate public education ("FAPE"),¹ 20 U.S.C.
17 § 1400(d)(1)(A), which must be "reasonably calculated to enable the child to
18 receive educational benefits," *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). To

¹ **Glossary of Acronyms:** As in *M.H. v. New York City Department of Education*, 685 F.3d 217 (2d Cir. 2012), "[t]his opinion, dealing as it does with the IDEA and practices thereunder, is replete with acronyms. In addition to their definition in the text, a separate glossary of acronyms is therefore set forth in the Appendix to this opinion." *Id.* at 223 n.1.

1 fulfill this promise, the IDEA allows parents who think that their local school
2 district is not providing their child a FAPE to enroll the child in a private school
3 program unilaterally and thereafter seek reimbursement for the private school
4 tuition from the school district. 20 U.S.C. § 1412(a)(10)(C)(ii). Deciding that the
5 individualized education program ("IEP") proposed by the New York City
6 Department of Education ("DOE") for the 2010-2011 school year failed to provide
7 her son a FAPE, Reyes enrolled him at the private Rebecca School in Manhattan
8 and brought a due-process complaint seeking tuition reimbursement. An
9 impartial hearing officer ("IHO") granted her relief, but a state review officer
10 ("SRO") reversed that decision on appeal. Reyes then filed a civil action in the
11 United States District Court for the Southern District of New York. The district
12 court (William H. Pauley III, *Judge*) affirmed the SRO's decision.

13 Reyes appealed, arguing principally that the SRO relied on retrospective
14 testimony impermissible under *R.E. v. New York City Department of Education*, 694
15 F.3d 167, 186 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2802 (2013). We reverse the
16 judgment and remand the cause to the district court for further proceedings.

17 **STATUTORY BACKGROUND**

18 The Individuals with Disabilities Education Act requires all states receiving
19 federal funds to provide "all children with disabilities" a "free appropriate public

1 education," 20 U.S.C. § 1412(a)(1)(A), to "prepare them for further education,
2 employment, and independent living," *id.* § 1400(d)(1)(A). A FAPE consists of
3 "special education and related services tailored to meet the unique needs of a
4 particular child," *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir.
5 1998) (internal quotation marks omitted), which are "reasonably calculated to
6 enable the child to receive educational benefits," *Rowley*, 458 U.S. at 207, and
7 provided in conformity with an individualized education program, or IEP, 20
8 U.S.C. § 1401(9)(D). The IEP, which the school district is required to prepare
9 annually, must include the child's present levels of academic achievement and
10 functional performance, goals and objectives for the child, and the special
11 education and related services to be provided to the child so that he or she can
12 advance toward attaining those goals and objectives. 20 U.S.C. § 1414(d). Under
13 New York law, local Committees on Special Education ("CSEs") are responsible
14 for developing appropriate IEPs. N.Y. Educ. Law § 4402(1)(b)(1).

15 Any parent who thinks that the school district is failing to provide his or
16 her child a FAPE may unilaterally enroll the child in a private school and seek
17 tuition reimbursement from the school district. 20 U.S.C. § 1412(a)(10)(C)(ii).
18 However, parents pursue this option at their financial risk: Reimbursement will
19 be granted only if (1) the proposed IEP failed to provide the student with an

1 appropriate public education; (2) the parent's private placement was appropriate
2 to the child's needs; and (3) equitable considerations support the parent's claim.
3 *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370, 374 (1985); *see also*
4 *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993) (reaffirming
5 *Burlington*); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009) (reaffirming
6 *Carter* and *Burlington*). This analysis is also known as the *Burlington/Carter* test.
7 *R.E.*, 694 F.3d at 185.

8 To seek tuition reimbursement, a parent must file a "due-process
9 complaint," which entitles him or her to an "impartial due process hearing" before
10 an IHO. 20 U.S.C. § 1415(b)(6), (f); N.Y. Educ. Law § 4404(1). Under New York
11 law, the school district bears the burden of proof, "including the burden of
12 persuasion and burden of production," to establish that its proposed IEP
13 provided the child a FAPE, while the parent bears the burdens of persuasion and
14 production regarding the appropriateness of the private placement. N.Y. Educ.
15 Law § 4404(1)©.² But to the extent that a court "must determine whether the state

² Under New York law,

[t]he board of education or trustees of the school district or the state agency responsible for providing education to students with disabilities shall have the burden of proof, including the burden of persuasion and burden of production, in any such impartial hearing, except that a parent or person in parental relation seeking tuition

1 administrative decisions were supported by a preponderance of the evidence,
2 which party bore the burden of persuasion in the state review scheme is only
3 relevant if the evidence was in equipoise." *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d
4 217, 225 n.3 (2d Cir. 2012). Either party may appeal the IHO's decision to an SRO,
5 N.Y. Educ. Law § 4404(2), whose determination may in turn be appealed by
6 bringing a civil action in either state or federal court, *id.* § 4404(3)(a); 20 U.S.C.
7 § 1415(i)(2)(A).

8 **FACTUAL AND PROCEDURAL BACKGROUND**

9 Reyes's son, R.P., is a nineteen-year-old autistic student with deficits in
10 cognitive functioning; receptive, expressive, and pragmatic language abilities;
11 and fine and gross motor skills. In addition to autism, he has been diagnosed
12 with sensory integration dysfunction, moderate mental retardation, and
13 attention-deficit/hyperactivity disorder. R.P.'s sensory needs are significant: If
14 he does not receive various kinds of sensory input at regular intervals
15 throughout the day (a "sensory diet"), he is unable to maintain control over his

reimbursement for a unilateral parental placement shall have the
burden of persuasion and burden of production on the
appropriateness of such placement.

N.Y. Educ. Law § 4404(1)(c).

1 behavior and may speak in a very loud voice, press on his eyes, rock his body
2 back and forth, knock over objects, or pace.

3 R.P. was sixteen years old during the 2010-2011 school year at issue and
4 had been attending the Rebecca School in Manhattan, "a therapeutic private
5 school for students with neurodevelopmental delays in relating and
6 communicating," since May 2007. Compl. ¶ 48. DOE paid for his placement at
7 the Rebecca School in the 2009-2010 school year pursuant to a November 19,
8 2010, IHO decision.

9 On May 17, 2010, a CSE meeting was convened to develop R.P.'s IEP for
10 the 2010-2011 school year. Reyes, a DOE psychologist named Rose Fochetta, a
11 DOE special education teacher, and a parent member³ attended. R.P.'s then-
12 teacher at the Rebecca School participated by telephone. To determine R.P.'s
13 abilities and instructional needs, the CSE team considered a classroom
14 observation conducted on November 12, 2009; two psychological evaluations,
15 conducted on December 23, 2009, and January 26, 2010; and a May 2010 progress

³ New York law requires that the CSE include an "additional parent," not employed by the school district, who resides in the area and whose child is either a student with a disability, a student formerly classified as disabled, or a disabled child who has recently graduated. N.Y. Educ. Law § 4402(1)(b)(1)(a).

1 report regarding R.P.'s performance at the Rebecca School for the 2009-2010
2 school year.

3 The IEP produced by the CSE team recommended that R.P. be placed in a
4 special "6:1:1" class (six students, one special education teacher, and one
5 classroom paraprofessional) with various related services, including occupational
6 therapy, speech and language therapy, physical therapy, and counseling. The
7 IEP also recommended that R.P. be assigned a one-on-one ("1:1")
8 paraprofessional for three months "to ease the transition" from private to public
9 school.

10 On or about June 15, 2010, DOE sent Reyes a Final Notice of
11 Recommendation offering R.P. a seat at P.S. 79. Reyes visited P.S. 79 on June 25,
12 2010, with Rebecca School occupational therapy supervisor Mary Wiener. On
13 that visit, Reyes and Wiener toured the school, observed two 6:1:1 classrooms,
14 spoke with classroom teachers and an occupational therapist, and visited the
15 therapy room and the cafeteria. Both classes that Reyes and Wiener observed
16 employed the TEACCH⁴ methodology, with students seated at individual

⁴ TEACCH is the acronym for a method of teaching autistic children called "Treatment and Education of Autistic and Related Communication-Handicapped Children." *See M.H.*, 685 F.3d at 259 (Appendix). For a description of the technique, see, for example, Autism Web: A Parent's Guide to Autism Spectrum Disorders, *available at* <http://www.autismweb.com/teacch.htm> (last visited July

1 workstations and working independently. Neither classroom teacher was
2 familiar with the term "sensory diet," a personalized regimen of activities that
3 provides the sensory input a child like R.P. requires to stay focused throughout
4 the day. Reyes and Wiener were also told that P.S. 79 did not have a "sensory
5 gym," a facility with specialized equipment that provides therapeutic sensory
6 inputs. They observed tables, mats, and balls, but no swings or other equipment
7 designed to create a sense of movement (referred to as "vestibular" equipment).
8 When Wiener asked about the absence of such equipment, she was told that the
9 school had none. As Wiener testified, she and Reyes were also told by a P.S. 79
10 occupational therapist that the school was "currently understaffed for
11 occupational therapists and that they were using contractors, but that not all of
12 the children's mandates were being met." Hearing Tr. at 258, J.A. 567.

13 Reyes ultimately rejected the proposed placement because she thought the
14 school's TEACCH methodology was not appropriate for R.P., the school did not
15 provide an adequate sensory diet or sensory equipment, the school did not
16 provide an adequate level of individual attention, and the school was unable to
17 meet R.P.'s related services mandate. On June 14, 2010, Reyes enrolled R.P. in a
18 ten-month program at the Rebecca School for the 2010-2011 school year.

22, 2014).

1 Reyes filed the due process complaint that initiated this action on March 4,
2 2011. On April 29, 2011, the IHO issued an Order on Pendency requiring that
3 DOE pay R.P.'s tuition at the Rebecca School during the course of the litigation.
4 *See* 20 U.S.C. § 1415(j) (providing that "during the pendency of . . . proceedings
5 . . . the child shall remain in the then-current educational placement of the child").

6 An impartial hearing was held over four days between April 28, 2011, and
7 July 21, 2011. At the hearing, Fochetta and Anne Duquette, a teacher at P.S. 79,
8 testified on DOE's behalf. Fochetta opined that R.P. "require[d] a lot of support,"
9 but that DOE's proposed placement of a 6:1:1 class with a 1:1 transitional
10 paraprofessional—a service that could have been "continue[d] . . . if it was
11 warranted"—"c[ould] promote progress." Hearing Tr. at 76, J.A. 359; *id.* at 74, J.A.
12 357. Duquette described how she implemented the TEACCH methodology in
13 her classroom and explained the tailored strategies that she would have
14 employed to meet R.P.'s particular needs. Hearing Tr. at 115-22, J.A. 398-405; *id.*
15 at 126-38, J.A. 409-21.

16 Reyes testified on her own behalf, as did five witnesses from the Rebecca
17 School. Tina McCourt, the School's Program Director, detailed R.P.'s significant
18 sensory needs and expressed her skepticism that R.P. could make progress in a

1 6:1:1 class or if instructed using the TEACCH methodology. She also asserted
2 that terminating the transitional paraprofessional's services after only three
3 months would confuse R.P. by ending a relationship upon which he had become
4 dependent. Wiener described and criticized the lack of sensory equipment
5 available at P.S. 79, while R.P.'s occupational therapist, speech pathologist, and
6 teacher at the Rebecca School further explained his needs and how the school's
7 staff met them.

8 The IHO concluded in a decision dated September 20, 2011, that DOE had
9 denied R.P. a FAPE. She found that the 6:1:1 class was inappropriate to meet
10 R.P.'s needs and that it was "insufficient" to augment that ratio by providing 1:1
11 paraprofessional support for three months only. IHO Decision, No. 132427, at 11
12 (Sept. 20, 2011), J.A. 198. Noting that DOE's argument that the paraprofessional's
13 services could have been extended beyond three months was merely
14 "speculative," the IHO declined to determine whether a 6:1:1 class with 1:1
15 paraprofessional support for the entire school year would have been sufficient.
16 *Id.* The IHO further found "no proof that the resources available at [P.S. 79]
17 would meet [R.P.'s] significant sensory needs" or that the TEACCH methodology
18 "[wa]s individualized to meet [R.P.'s] needs." *Id.* at 12, J.A. 199. The IHO
19 concluded that R.P.'s placement at the Rebecca School was appropriate and that

1 there was no equitable impediment to tuition reimbursement. She therefore
2 ordered DOE to pay R.P.'s Rebecca School tuition.

3 On September 27, 2011, DOE appealed the IHO's decision to the New York
4 State Education Department's Office of State Review. On November 22, 2011, the
5 SRO overturned the IHO's decision, finding that DOE had offered R.P. a FAPE
6 for the 2010-2011 school year. The SRO found that the record did not support the
7 IHO's determination that the 6:1:1 class was inadequate to address R.P.'s needs,
8 and further determined that, even if the record established that R.P. required 1:1
9 paraprofessional services, the IEP could have been modified to provide those
10 services. In support of this conclusion, the SRO cited the testimony of Fochetta,
11 the DOE psychologist, that the CSE recommended three months of 1:1
12 paraprofessional support with the "understanding" that R.P.'s need for the
13 service would be reassessed and that the service would be extended as needed.
14 SRO Decision, No. 11-124, at 13 (Nov. 22, 2011), J.A. 180. The SRO also concluded
15 that Reyes's "concerns regarding [P.S. 79's] ability to address [R.P.'s] sensory
16 needs, and the appropriateness of the TEACCH methodology utilized . . . [were]
17 not supported by the preponderance of the evidence contained in the hearing
18 record." *Id.* at 18, J.A. 185. The SRO did not reach the IHO's findings regarding

1 the appropriateness of R.P.'s placement at the Rebecca School or the balance of
2 the equities.

3 Reyes appealed from the SRO's decision to the United States District Court
4 for the Southern District of New York. The parties cross-moved for summary
5 judgment. On December 11, 2012, following oral argument, the district court
6 upheld the conclusions of the SRO. *Reyes v. N.Y.C. Dep't of Educ.*, No. 12 Civ.
7 2113 (WHP), 2012 WL 6136493, 2012 U.S. Dist. LEXIS 175329 (S.D.N.Y. Dec. 11,
8 2012). The court concluded that although the SRO's reliance on Fochetta's
9 testimony that the IEP could be modified was impermissible, the remainder of
10 the evidence supported his determination that the IEP was substantively
11 adequate. *Id.*, 2012 WL 6136493 at *6, 2012 U.S. Dist. LEXIS 175329 at *16-*17.
12 The district court also upheld the SRO's conclusions that P.S. 79 could meet R.P.'s
13 sensory needs and that the TEACCH methodology was appropriate for R.P., and
14 declared any burden shifting on the part of the SRO "inconsequential." *Id.*, 2012
15 WL 6136493 at *5, *7-*8, 2012 U.S. Dist. LEXIS 175329 at *16, *19-*23. Because the
16 district court deferred to the SRO's conclusion that R.P. had been offered a FAPE,
17 it did not consider the appropriateness of the Rebecca School placement or the
18 balance of the equities. *Id.*, 2012 WL 6136493 at *8, 2012 U.S. Dist. LEXIS 175329
19 at *23.

1 Reyes appeals.

2 DISCUSSION

3 I. Standard of Review

4 A district court's grant of summary judgment in an IDEA case is reviewed
5 *de novo*. *A.C. ex rel. M.C. v. Bd. of Educ.*, 553 F.3d 165, 171 (2d Cir. 2009). After
6 conducting an independent review, this Court must base its decision on the
7 preponderance of the evidence, giving "'due weight'" to the state administrative
8 decision because "the judiciary generally 'lack[s] the specialized knowledge and
9 experience necessary to resolve persistent and difficult questions of educational
10 policy.'" *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112-113 (2d Cir. 2007)
11 (quoting *Rowley*, 458 U.S. at 206, 208).

12 In deciding what weight is due to an IDEA administrative decision, the
13 analysis often "will hinge on the kinds of considerations that normally determine
14 whether any particular judgment is persuasive." *M.H.*, 685 F.3d at 244. Such
15 considerations include the quality and thoroughness of the reasoning, the type of
16 determination under review, and whether the decision is based on the
17 administrative body's familiarity with the evidence and the witnesses. *Id.* "When
18 an IHO and the SRO reach conflicting conclusions, we defer to . . . the SRO's
19 decision." *R.E.*, 694 F.3d at 189 (internal quotation marks and brackets omitted).

1 But because the administrative decision-maker's "factual findings must be
2 'reasoned and supported by the record' to warrant deference," *M.H.*, 685 F.3d at
3 241 (quoting *Gagliardo*, 489 F.3d at 114), if a court concludes that an SRO's
4 decision is inadequately reasoned, "a better-reasoned IHO opinion may be
5 considered instead," *R.E.*, 694 F.3d at 189.

6 II. Issues for Judicial Review

7 Reyes argues on appeal that the district court erred in finding that any
8 burden shifting by the SRO was "inconsequential" and in deferring to the SRO's
9 findings that (1) the 6:1:1 class with three months of 1:1 paraprofessional support
10 was substantively adequate, (2) P.S. 79 was capable of addressing R.P.'s sensory
11 needs, and (3) the TEACCH methodology was appropriate for R.P.

12 A. Burden Shifting

13 In New York, "the local school board bears the initial burden of
14 establishing" the IEP's validity. *Id.* at 184; *see* N.Y. Educ. Law § 4404(1)©. The
15 IDEA, by contrast, is silent on the burden of proof; the Supreme Court has
16 interpreted the statute to place the burden of challenging an IEP on the party
17 bringing the challenge. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005).
18 It remains an open question whether states may deviate from the IDEA's default

1 rule, as New York does, by placing the initial burden on the school board. *See id.*
2 at 61-62 (declining to decide the issue).

3 We need not answer that question here. "Because the [SRO] . . . concluded
4 that the IEP[was] proper, and the courts are bound to exhibit deference to that
5 decision, the burden of demonstrating that the . . . [SRO] erred is properly
6 understood to fall on the plaintiff[]." *M.H.*, 685 F.3d at 225 n.3. Moreover,
7 because the standard here is preponderance of the evidence, "which party bore
8 the burden of persuasion in the state review scheme is only relevant if the
9 evidence was in equipoise." *Id.* As we explain below, we think that Reyes has
10 met her burden on appeal.⁵

⁵ The language of the SRO's decision does suggest that he required Reyes to prove that the IEP was adequate, thereby shifting the burden in contravention of New York law. In particular, the passage regarding P.S. 79's ability to meet R.P.'s sensory needs and its use of the TEACCH methodology suggests that the SRO required Reyes to prove that R.P.'s IEP was inadequate:

I find *the parent's concerns* regarding the assigned school's ability to address the student's sensory needs, and the appropriateness of the TEACCH methodology utilized in the assigned 6:1+1 special class to address the student's educational needs *are not supported by the preponderance of the evidence* contained in the hearing record.

SRO Decision at 18 (emphasis added), J.A. 185. While we do not address whether New York's assignment of the burden of proof is proper under *Schaffer*, the SRO's failure to adhere to state law decreases our confidence in the thoroughness of his decision.

1 *B. Challenges to the IEP's Substantive Adequacy*

2 Reyes's contentions that the 6:1:1 class with three months of 1:1
3 paraprofessional support was inadequate, that P.S. 79 was incapable of
4 addressing R.P.'s sensory needs, and that the TEACCH methodology was
5 inappropriate for R.P. all challenge the substantive adequacy of R.P.'s IEP. For
6 this reason, if Reyes prevails on any one of these arguments, DOE has failed to
7 prove that its proposed IEP provided R.P. with a FAPE. *See R.E.*, 694 F.3d at 190.

8 1. *The Class Ratio and the "Transitional" Paraprofessional.* Reyes argues that
9 the class ratio specified in the IEP, comprising both the 6:1:1 placement and the
10 dedicated paraprofessional for three months only, was inappropriate to meet
11 R.P.'s academic and behavioral needs. As a threshold matter, we must decide
12 whether the SRO improperly relied on testimony asserting that R.P.'s IEP could
13 have been modified to include additional services. Because we agree with the
14 district court that the SRO's reliance on this evidence was improper, *see Reyes*,
15 2012 WL 6136493, at *6, 2012 U.S. Dist. LEXIS 175329, at *16-*17, we consider
16 whether the IEP as written was sufficient to provide R.P. with a FAPE.

17 We first conclude that the SRO's reliance on testimony that the IEP could
18 be modified to extend the paraprofessional's services was improper under *R.E. v.*
19 *New York City Department of Education*, 694 F.3d at 174. *R.E.* prohibits using

1 retrospective testimony⁶ "to materially alter a deficient written IEP by
2 establishing that the student would have received services beyond those listed in
3 the IEP." *Id.* "The purpose of discouraging reliance on . . . 'retrospective'
4 testimony . . . is to ensure that parents can make placement decisions for their
5 children based solely on the information made available to them by the
6 Department at the time of the placement decision." *B.R. v. N.Y.C. Dep't of Educ.*,
7 910 F. Supp. 2d 670, 676-77 (S.D.N.Y. 2012) (citing *R.E.*, 694 F.3d at 186). At the
8 time when she had to decide where to place R.P., Reyes could not know whether
9 DOE would offer R.P. the services of a paraprofessional for more than the three
10 months specified in the IEP. We therefore think it contrary to the logic of *R.E.*,
11 and of the IDEA itself, to penalize her for relying upon the IEP's description of
12 services in making the placement decision.

13 DOE argues that the testimony here was not retrospective because the IEP
14 reflected the "understanding" that R.P.'s needs would be reevaluated at the end of
15 three months and his IEP amended to extend the paraprofessional's services if
16 they were still required. Appellee Br. at 32-34. We think it inappropriate,

⁶ "Retrospective testimony" is a term of art originated in this Circuit in 2012 to refer to testimony about additional services that *would have* been provided had the parent accepted the school district's proposed placement. *R.E.*, 694 F.3d at 185.

1 however, to take into account the possibility of mid-year amendments in
2 determining whether an IEP as originally formulated was substantively
3 adequate. The IDEA provides for the amendment of any IEP in the middle of the
4 school year with the parent's consent and according to a statutorily prescribed
5 process. 20 U.S.C. § 1414(d)(3)-(4). New York law also provides a procedure for
6 making such modifications. N.Y. Comp. Codes R. & Regs. tit. 8 § 200.4(g). An
7 IEP that contemplates or implies the possibility of amendments is therefore not
8 substantively different from an IEP that is silent on the issue. If the school district
9 were permitted to rely on the possibility of subsequent modifications to defend
10 the IEP as originally drafted, then it could defeat any challenge to any IEP by
11 hypothesizing about what amendments could have taken place over the course of
12 a year.

13 Such an approach would, we think, undermine a core purpose of the
14 IDEA: to ensure an orderly annual review of a child's needs and to provide for
15 them in a comprehensive plan. The IDEA requires that each IEP include "a
16 statement of measurable *annual* goals, including academic and functional goals,
17 designed to . . . enable the child to . . . make progress." 20 U.S.C. §
18 1414(d)(1)(A)(i)(II)(aa) (emphasis added). It also mandates that special education
19 and related services be provided to allow the child "to advance appropriately

toward attaining the annual goals." *Id.* § 1414(d)(1)(A)(i)(IV)(aa); *see also* N.Y. Comp. Codes R. & Regs. tit. 8 § 200.4(d)(2)(iii) (requiring that the IEP include "[m]easurable annual goals"). The IDEA further requires that each child's IEP be reviewed "periodically, but not less frequently than annually," 20 U.S.C. § 1414(d)(4)(A)(i), and be "in effect" "[a]t the beginning of each school year," *id.* § 1414 (d)(2)(A); *see also* N.Y. Comp. Codes R. & Regs. tit. 8 § 200.4(f) (requiring that IEPs be "reviewed and, if appropriate, revised, periodically but not less than annually"). If we were to accept DOE's arguments relying on the possibility that there could be a later amendment to R.P.'s IEP, then we would effectively require every parent to consider the likelihood of mid-year amendments in evaluating his or her child's IEP. This approach would create significant uncertainty regarding what special education and related services the child would actually receive over the course of the academic year, undermining the tuition reimbursement system and the IDEA's promise of a free appropriate public education for every child with a disability. *R.E.*, 694 F.3d at 186 ("In order for this system to function properly, parents must have sufficient information about the IEP to make an informed decision as to its adequacy prior to making a placement decision."). We therefore do not take into account the possibility of mid-year amendments when assessing the substantive adequacy of the IEP. For this

1 reason, we understand R.P.'s IEP to provide only for a 6:1:1 student-faculty-
2 paraprofessional ratio, with additional 1:1 paraprofessional support terminating
3 at the end of a three-month transition period.

4 In considering the substantive adequacy of R.P.'s IEP, we recognize that
5 school districts are not required to "maximize the potential" of students with
6 disabilities, but instead must offer only "a basic floor of opportunity." *Rowley*,
7 458 U.S. at 200 (internal quotation marks omitted). School districts do this when
8 they formulate an IEP that is "reasonably calculated to enable the child to receive
9 educational benefits," *id.* at 207, that is, "likely to produce progress, not
10 regression," *Walczak*, 142 F.3d at 130 (internal quotation marks omitted).

11 The SRO, rejecting the IHO's determination, did not find support in the
12 record for Reyes's argument that R.P. "required 1:1 paraprofessional services
13 extended beyond three months in order to receive educational benefits from the
14 district's recommended program." SRO Decision at 13, J.A. 180. The SRO based
15 his conclusion on McCourt's testimony that R.P. did not have a dedicated
16 paraprofessional at the Rebecca School. However, McCourt also testified that
17 R.P. did not require a one-on-one paraprofessional in that placement because the
18 school met his needs with its 8:1:3 staffing ratio, which effectively provided one
19 professional for every two students. The fact that R.P. did not need a dedicated

1 paraprofessional in a 2:1 environment does not necessarily indicate he would not
2 need one in DOE's less staff-intensive 3:1 environment. Indeed, McCourt
3 testified that the 6:1:1 placement "would not be a good placement for [R.P.]"
4 because it offered only a 3:1 model, and R.P.'s 2009-2010 teacher thought that the
5 6:1:1 placement was "too large" for him. Hearing Tr. at 209, J.A. 492; *id.* at 88, J.A.
6 371; CSE Meeting Minutes (May 20, 2010), J.A. 1014. And although the SRO cited
7 a Rebecca School progress report stating that R.P.'s ability to remain regulated for
8 longer periods of time had improved, as had his communication skills and ability
9 to ask for help to regulate himself, McCourt's testimony made clear that, in her
10 view, R.P. nonetheless required sensory breaks about every 20 minutes to be
11 "able to engage and attend and learn." Hearing Tr. at 205, J.A. 488.

12 The SRO also pointed to the November 2009 classroom observation which
13 detailed R.P.'s "abilities to answer questions posed by personnel, ask a peer a
14 question, accept redirection and prompts related to activities, and to determine
15 which activities were on the classroom schedule for the day." SRO Decision at 11,
16 J.A. 178. Yet these interactions took place in a classroom containing at first five
17 students and three adults, and later seven students and five adults. And over the
18 course of the thirty-minute evaluation, Fochetta, the DOE psychologist who
19 conducted the observation, noted that R.P. was rocking back and forth on six

1 separate occasions and had to be redirected toward class activities several times.
2 Even Fochetta, on whose testimony the SRO principally relied, recognized that
3 R.P. required a 1:1 paraprofessional at least transitionally and conceded that
4 "there [wa]s the potential for him needing it longer" than three months, which
5 "was a minimum." Hearing Tr. at 73, J.A. 356; *id.* at 102, J.A. 385.

6 In light of this evidence, we defer to the IHO's well-reasoned
7 determination that R.P. required the services of a 1:1 paraprofessional for longer
8 than the transitional three-month period afforded him by his IEP. The class ratio
9 specified in R.P.'s IEP therefore constituted a denial of FAPE.

10 2. *R.P.'s Sensory Needs and TEACCH Methodology.*⁷ Reyes also argues that
11 P.S. 79 was unable to meet R.P.'s sensory needs and that the TEACCH
12 methodology employed in every 6:1:1 class at the school would not enable R.P to
13 receive educational benefits. Because we find for Reyes on another ground, we
14 need not and do not address these issues. However, we do note that, to the
15 extent that the SRO relied on retrospective testimony⁸ to dismiss Reyes's concerns

⁷ See note 3, *supra*, for definition.

⁸ Such testimony included Duquette's representation that she would have tailored her implementation of the TEACCH methodology to R.P.'s individual needs, *see Reyes*, 2012 WL 6136493, at *8, 2012 U.S. Dist. LEXIS 175329, at *22, and McCourt's statement that R.P.'s "independence in the [Rebecca S]chool ha[d] gotten much better," SRO Decision at 17, J.A. 184, in the school year following

about the TEACCH methodology, such reliance was inappropriate under *R.E. v. New York City Department of Education*, 694 F.3d at 185-87.

CONCLUSION

Because we conclude that the Department of Education failed to offer R.P. a free appropriate public education, we REVERSE the judgment of the district court and REMAND the case to the district court to consider the appropriateness of Reyes's private placement and the balance of the equities.

Reyes's rejection of the DOE placement.

1 **APPENDIX**

2 **Glossary of Acronyms**

3	CSE	Local Committee on Special Education
4	DOE	New York City Department of Education
5	FAPE	Free Appropriate Public Education
6	IDEA	Individuals with Disabilities Education Act, 20 U.S.C. § 1400 <i>et seq.</i>
7	IEP	Individualized Education Program
8	IHO	Impartial Hearing Officer
9	R.P.	Son of plaintiff Reyes
10	SRO	State Review Officer
11	TEACCH	Treatment and Education of Autistic and Related
12		Communication-Handicapped Children, a method for teaching
13		children with autism