10-2181-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

M.H., on behalf of P.H., E.K., on behalf of P.H.,

Plaintiffs-Appellees,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York (New York City)

BRIEF OF *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF PLAINTIFFS-APPELLEES

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I. INTERESTS OF THE AMICUS

Council of Parent Attorneys and Advocates (COPAA), is an independent, nonprofit organization of attorneys, advocates, and parents in forty-three states (including New York, Connecticut, and Vermont) and the District of Columbia who are routinely involved in special education due process hearings throughout the country. The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. §1400(c)(1) (2006). Children with severe disabilities are among the most vulnerable in our society and COPAA is particularly concerned with assuring a free appropriate public education in the least restrictive environment, as required by the Individuals with Disabilities Educations Act (IDEA or Act).[1] All parties to this litigation have consented to COPAA filing this Amicus Brief.

COPAA offers an unique perspective on an issue raised by an Opinion and Order of the United States District Court for the Southern District of New York,

[1] Pursuant to Local Rule 29.1, counsel for COPAA, Greenberg Traurig, LLP, states: (1) Greenberg Traurig, LLP authored the brief in whole with comments from COPAA; (2) Greenberg Traurig, LLP funded the preparation and submission of the brief as counsel for COPAA; and (3) no other person contributed money that was intended to fund the preparation or submission of the brief. 2d Cir. R. 29.1.

District Judge Loretta A. Preska, dated May 10, 2010 (Order), because the Order affects all parties to proceedings under the Act. The issue is whether, pursuant to the Act and Supreme Court precedent, the District Court applied the proper standard of review in the consideration of the administrative decisions of a New York Impartial Hearing Officer (IHO) and the New York State Review Officer (SRO). COPAA respectfully submits this brief in support of the Plaintiffs-Appellees, M.H. and E.K. individually and on behalf of P.H., (the Parents) and asserts that the Order applied the correct standard of review of the decision of the SRO.

This issue is of particular importance because the standard of review applied by federal courts in cases brought under the Act has been found to be case dispositive. In a study conducted of randomly selected state and federal court cases decided between January 1975 and March of 1995, it was found that of the courts that articulated a standard of review, different versions were applied. James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 Exceptional Children 467, 472 (1999). The study also determined that the standard of review is critical to the outcome of a case: where judges gave a great deal of weight to the underlying proceedings, little change occurred between the court and administrative decisions; and where less or no weight was applied, more change occurred. *Id.* This issue is important this Circuit

in particular because New York accounted for approximately 25% of the total adjudicated special education hearings nationwide from 2008 through 2009. Perry A. Zirkel and Gina Scala, *Due Process Hearing System Under the IDEA: A State-By-State Survey*, 21 J. Disability Pol. Stud. 3, 5 (2010). Thus, New York district courts are likely to review many cases brought under the Act and clarity on the standard of review will make a significant difference to whether children with disabilities receive appropriate educational services.

II. SUMMARY OF ARGUMENT

Under the Act, a party aggrieved by a decision in the impartial due process hearing may seek review in federal court. 20 U.S.C. § 1415(i)(2) (2006). "Congress expressly rejected provisions [of the Act] that would have… severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by the evidence, the Conference Committee explained that courts were to make "'independent decision[s] based upon the preponderance of the evidence'" from the records of the proceeding and, if submitted, additional evidence. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205 (1982) (*quoting* S. Rep. No. 94-455, at 5 (1975), *reprinted in* U.S.C.C.A.N. 1503, 1503); *see* 20 U.S.C. § 1415(i)(2). Thus, "in review of an IDEA due process hearing, courts give 'less deference than is conventional in review of other agency

actions.'" *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 438 (9th Cir. 2010) (quoting *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472 (9th Cir. 1993.))

The standard of review in cases brought under the Act provides federal courts with more authority to make determinations as to the propriety of administrative decisions than federal courts have under the Administrative Procedures Act's (APA), which requires an "arbitrary," "capricious," or "unsupported by substantial evidence" standard of review. *See* 5 U.S.C. § 706 (2006). In drafting the Act, Congress explicitly rejected a standard review akin to that in the APA. *See Rowley*, 458 U.S. at 205. The Supreme Court, in interpreting the Act, determined that while making an independent decision based upon the evidence, federal courts should give "due weight" to the administrative proceedings. *Id*. at 206.

Federal courts use "due weight" interchangeably with the word "deference," and these words merely mean that the courts should give weight to factual findings of the administrative decisions, including the type of credibility determinations made by judges as to witnesses on a day-by-day basis. *See Cabouli v. Chappaqua Central Sch. Dist.*, 202 F. App'x. 519, 522 (2d Cir. 2006). The Act and case law reject the conclusion that due weight means obedience to administrative decisions unless the decision was arbitrary, capricious, or unsupported by the evidence. *Rowley*, 458 U.S. at 205-06.

In essence, the standard of review articulated by the Act and the Supreme Court in cases brought in federal courts under the Act is as follows: (1) review legal conclusions of administrative decisions *de novo* without giving due weight to the administrative decisions; (2) review mixed questions of law and fact, such as whether the school district offered a free appropriate public education (FAPE), *de novo* without giving due weight to the administrative decisions; (3) give due weight to the factual findings of the administrative decisions that are supported by the preponderance of the evidence; and (4) defer to the educational policies recommended by school officials if the court determines that school district complied with the procedural and substantive requirements of the Act. *See Muller v. Comm. on Special Educ. of the E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 102 (2d Cir. 1998); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1122 (2d Cir. 1997); *Jennifer D. v. N.Y. City Dep't of Educ.*, 550 F. Supp. 2d 420, 432 (S.D.N.Y. 2008).

In the case before this Court, the Parents brought an action in district court, individually and on behalf of their son P.H., challenging an administrative decision by the SRO that Defendant-Appellant New York City Department of Education (the School District) offered a free FAPE to P.H. (SPA4.)[2] Both the Parents and the School District moved for summary judgment before District Court Judge Preska (the District Court). (*Id.*)

[2] The Special Appendix filed by the parties in this case on October 13, 2010 is referred to here as SPA.

The District Court correctly recognized that under the standard of review established by the Supreme Court and this Circuit, district courts are to give due weight to factual findings of the administrative decisions that are supported by the preponderance of the evidence and to defer to the educational policies recommended by school officials if the district court determines that the school district complied with the procedural and substantive requirements of the Act. (SPA47-48.) The District Court also correctly stated that due weight and deference "does not excuse the SRO from reaching carefully reasoned conclusions," (SPA-60-61,) that the SRO's conclusions are entitled to due weight "only if his discussion is well reasoned," (SPA68,) and are not to be accorded due weight when the SRO's conclusions are "not 'reasoned and supported by the record'…." (SPA64) (quoting *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir. 2007)). Based upon its application of the correct standard of review, the District Court found that most of the conclusions in the SRO's decision were not well reasoned and were not supported by a preponderance of the evidence. Accordingly, the District Court granted the Parents' motion for summary judgment and denied the School District's Motion for summary judgment. (SPA103.)

The standard of review applied by the District Court is in harmony with the standard of review set forth in the Act, *Rowley*, and Second Circuit case law. Thus, this Circuit should affirm the District Court's Order in full.

III. ARGUMENT

This Circuit reviews *de novo* the decisions district courts in IDEA cases. *Gagliardo* 489 F.3d at 112. It may only overturn a district court's findings of fact if they are clearly erroneous. *Davis v. N.Y.C. Housing Auth.*, 278 F.3d 64, 78 (2d Cir. 2002). The district court's conclusions as to questions of law, or as to mixed questions of fact and law, are reviewed *de novo. Id.* at 79.

A. Under the Act And Supreme Court Precedent, Federal Courts Are Required To Conduct A *De Novo* Review Of Questions Concerning Procedural And Substantive Violations of the Act

The express purpose of the Act is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1)(A) (2006); *see Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367 (1985). In exchange for receipt of federal funds, New York has agreed, and is required, to guarantee a FAPE to ***every*** child with a disability. 20 U.S.C. § 1412(a)(1)(A) (2006). This is accomplished through the development of an individualized education program (IEP), a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Burlington*, 471 U.S. at 367.

1. The District Courts Are Empowered to Determine Whether the School District Has Complied With Both the Procedural Safeguards and Substantive Requirements of the Act

The Act provides both procedural safeguards and substantive requirements to be followed in the development of an IEP. *Rowley*, 458 U.S. 193-94, 205-06. In *Rowley*, the Supreme Court confirmed that Congress empowered federal courts to determine whether States have complied with the Act's procedural safeguards and substantive requirements, including whether the child's "[IEP] developed through the [Act's] procedures [was] reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-07.

Procedural requirements, set forth in 20 U.S.C. § 1415, are "procedures to be followed in formulating personalized educational programs [i.e. IEPs] for handicapped children," *id.* at 193-94, such as "full participation of concerned parties throughout the development of the IEP…." *Id.* at 205-06. The substantive requirements of the Act are that the IEP must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP." *Id.* at 203. In summary, to meet the substantive requirements of the Act, the IEP developed through the Act's procedures must be reasonably calculated to enable

the child to receive educational benefits, i.e. a FAPE. *Id.* at 187-88, 203. If, and only if, the court determines that the school district has complied with the procedural safeguards and substantive requirements of the Act, determinations as to educational methodology are left to the school officials. *Id.* at 208.

This means that district courts are tasked to review both whether the school district followed the procedures of the Act in developing the IEP and whether the program proposed by the school district in the IEP is designed to enable the child in question to receive an educational benefit.[3] *Id.* at 187-88, 203. To accomplish this task, a district court needs to determine whether the educational method chosen by the school district will enable the child in question to learn. If the record demonstrates that the educational method chosen by the school district ***does not*** meet the child's unique needs, i.e. that the child is not being afforded the opportunity to make meaningful educational progress, a district court must find that the school district has not provided the child with a FAPE under the IDEA. *Id.* at 206-07. On the other hand, if the record demonstrates that the educational method chosen by the school district ***does*** offer the child the opportunity to make

[3] The *Rowley* court's minimal substantive requirements of a FAPE have been, over time, enhanced by other courts. Under Second Circuit law, the Student's IEP must provide significant learning, provide a meaningful benefit, and be gauged to the Student's potential. *See Mrs. B.*, 103 F.3d at 1121; *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998); *see Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) (the IDEA "calls for more than a trivial educational benefit" and requires a satisfactory IEP to provide "significant learning" and confer "meaningful benefit" and that benefit "must be gauged in relation to the child's potential.")

meaningful educational progress, then the district court cannot make its own independent decision about whether the methodology chosen by the school district is better or worse than one chosen by the parents. *Id.*

By way of example, if a high school English class curriculum calls for the reading of Hamlet, a parent cannot argue that the class should read King Lear instead, if both books will provide the child with meaningful educational benefit. Similarly, if a school decides to use the Wilson Language Training (Wilson) for its first grade reading program and the Wilson program provides the student with an opportunity to make meaningful educational progress, a parent cannot argue that the school should use Orton-Gillingham instead. On the other hand, if the student, because of the nature of his or her disability, is unable to make progress using Wilson, the parent has every right to assert, and a court has every right to determine, that the use of Wilson does not provide FAPE for the individual child.

What is important is that, in the first example concerning reading programs, the determination of whether to use Wilson or Orton-Gillingham is a question of methodology, solely within the discretion of the school district. In the second instance, however, the very same question, i.e. whether to use Wilson or Orton-Gillingham, is no longer a question of methodology and is no longer an issue within the exclusive discretion of the school district. Stated otherwise, educational decisions that do not effect whether the child receives FAPE are exclusively within

the province of the local school district and are not reviewable by the courts. Educational decisions that determine whether the child receives FAPE are not within the exclusive province of the school board and are reviewable in due process hearings and by the courts.

This reasoning was applied in Rowley, where Amy Rowley's parents contested the school district's decision that Amy, who was deaf, did not need a sign language interpreter. *Id.* at 184-85. The Supreme Court found that the evidence in the record demonstrated that Amy was succeeding in school without the sign language interpreter and with the program proposed by the school district, including a hearing aid, tutoring and speech therapy. *Id.* at 184-85, 209-10. Because the Supreme Court found that Amy was receiving an educational benefit, i.e. FAPE, from the methodology chosen by the school district, the substantive requirement of the Act had been satisfied and the Supreme Court would not opine on whether a sign language interpreter might help Amy even more, leaving that decision to the school district. *Id.* at 209-10.

If parents contend that a school district has failed to comply with procedural safeguards and substantive requirements that result in the denial of a FAPE to their child, they are entitled to an impartial due process hearing. 20 U.S.C. § 1415(i)(2). In New York, the school district bears the burden to prove that it has provided a FAPE. N.Y. Educ. Law § 4404(1)(c) (McKinney 2009). New York has a two-

tiered system of administrative review. The first tier entitles parents dissatisfied with a proposed IEP to have it reviewed before an IHO appointed by the State Board of Education. See N.Y. Educ. Law § 4404(1) (McKinney 2001). Any party aggrieved with the decision of the IHO may proceed to the second tier, an appeal before a SRO. See N.Y. Educ. Law § 4404(2). Of the 50 states and the District of Columbia, 10 states have a two-tiered system and 40 states and D.C. have a one-tiered system, i.e. the IHO is the first and final administrative arbiter. Perry A. Zirkel and Gina Scala, *Due Process Hearing System Under the IDEA: A State-By-State Survey*, 21 J. Disability Pol. Stud. 3, 5 (2010). Either party aggrieved by the decision by the final administrative hearing officer may seek review in federal court. *See* 20 U.S.C. § 1415(i)(2). In a two-tiered system, the Second Circuit has held that if the decision of the SRO conflicts with the decision of the IHO and it is well reasoned and supported by the evidence, the decision of the IHO may be afforded diminished weight. *Gagliardo*, 489 F.3d at 114 n. 2.[4]

[4] It is curious that the decision of the IHO is given less consideration than the decision of the SRO. The SRO is in no better position than the IHO to make conclusions based on the record, and in fact the IHO is in a better position having been able to judge the credibility of witnesses. Regardless, that is not an issue in this case as the District Court found that the SRO's decision was not well reasoned, thus was not given more consideration than the IHO.

2. District Courts Review Questions of Law De Novo, Mixed Questions of Fact and Law De Novo, And Factual Findings For Error

In reviewing whether a state complied with the procedural and substantive due process provided under the Act, *Rowley* established a two step inquiry: "First, has the State complied with the procedures set forth in the [Act]? And second, is the individualized education program developed through the [Act's] procedures reasonably calculated to enable the child to receive educational benefits?" 458 U.S. at 207-208 (footnotes omitted). Consistent with Congressional mandate, *Rowley* confirmed that "[t]his inquiry will ***require*** a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the [Act], but also to determine that the State has created an IEP for the child in question that conforms with" the Act's procedural and substantive requirements. *Id.* at 207, n.27 (emphasis added). In conducting that review, the Act requires that federal courts receive and review the records of the proceedings and "make 'independent decision[s] based upon a preponderance of the evidence. . . .'" *Id.*, at 206; *see* 20 U.S.C. § 1415(i)(2). Courts have interpreted this to mean that factual findings of the administrative decisions that are supported by the evidence in the record, and especially credibility determinations of witnesses, are accorded due weight by reviewing courts. *See Cabouli*, 202 F. App'x. at 522 ("The district court should have deferred to the state administrators on the issue of credibility…."). Where the

factual findings of the administrative decisions are not supported by the record, district courts are not required to give due weight to those findings. *See Jennifer D.*, 550 F. Supp. 2d at 432 (where the SRO's decision did not enumerate factors or engage in an analysis of whether the IEP provided for a placement in the least restrictive environment, "the decision of the SRO [was] not entitled to deference…"); *C.B. v. N.Y. City Dep't of Educ.*, No 02-CV-4620, 2005 WL 1388964, at *13 (E.D.N.Y. June 10, 2005) ("[T]he court may reject factual findings that are not supported by the record or are controverted by the record."); *Warton v. New Fairfield BD. of Educ.*, 217 F.Supp.2d 261, 276 n.3 (D. Conn. 2002) (in a one-tiered system, declined to defer to the IHO in part because the IHO failed to "specifically address the comparison of educational benefits" between general and special education).

Although the Second Circuit has not squarely addressed this issue, the First and Ninth Circuits have held that after a review of the factual findings of the administrative decisions, "[i]n the end… the court is free to determine independently how much weight to give the state hearing officer's determination's." *Ashland Sch. Dist. v. R.J.*, 588 F.3d 1004, 1009 (9th Cir. 2009); *see also Town of Burlington v. Dep't of Educ. for Com. of Mass.*, 736 F.2d 773, 792 (1st Cir. 1984), *aff'd sub nom.*, 471 U.S. 359 (1985) (a court must carefully consider findings and try to respond to a hearing officer's resolution of each

material issue. After consideration, a court is free to accept or reject the findings in part or in whole); *Doe v. Arnig*, 692 F.2d 800, 806 (1st Cir. 1982) ("resolution of individualized factual issues . . . is for the court . . . ."), *overruled on other grounds by Doe v. Brookline Sch. Comm*. 722 F.2d 910 (1st Cir. 1983).

Moreover, district courts do not give due weight to administrative decisions concerning legal conclusions and mixed questions of law and fact. *See Muller*, 145 F.3d at 102 (affirming a district court's decision in favor of the parent, reversing the SRO, where the facts were not disputed but only legal conclusions based on the facts); *Mrs. B.*, 103 F.3d at 1122 (affirming district court's reversal of hearing officer's decision in favor of district because the district court did not give due weight to legal issues). Whether the school district has provided a child a FAPE through an IEP is a mixed question of fact and law. *W.G. v. Bd. of Trustees of Target Sch. Dist. No. 23*, 960 F.2d 1479, 1483 (9th Cir. 1992) *superceded by statute on other grounds*, 20 U.S.C. § 1415(b) (2005); *see also K.L.A. v. Windham SE. Supervisory Union*, 371 Fed.Appx. 151, 153 (2d Cir. 2010). Accordingly, district courts have the authority to make independent determinations as to the legal conclusion concerning whether a school district has complied with the Act based upon the evidence in the record. *See Ashland Sch. Dist.*, 588 F.3d at 1009; *Burlington*, 736 F.2d at 792.

B. The District Court Applied the Correct Standard of Review

1. The District Court Was Entitled To Determine De Novo Whether the IHO Properly Considered Methodology Evidence

The SRO held that the IHO had improperly exceeded her jurisdiction by considering evidence of educational methodology because the Parents had not raised the issue in their Impartial Hearing Request, as required by the IDEA. (SPA49.)[5] Thus, the District Court addressed the question of whether the IHO was allowed to consider evidence concerning which educational methodology would assist P.H. to learn.

In determining this question of law, the District Court was not required to give due weight to the SRO's decision. See *Muller*, 145 F.3d at 102; *Mrs. B.*, 103 F.3d at 1122; c*f. Stissi v. Interstate & Ocean Transport Co. of Philadelphia*, 765 F.2d 370, 374 (2d Cir. 1985) ("the application of a statute's terms to undisputed facts is … a question of law.") Indeed, in its Appellant Brief, (App. Br.,) the School District does not dispute that this issue should be reviewed de novo. (App. Br. at 54-58.)

As an initial matter, educational methodology is part and parcel of a FAPE. Thus, in contesting whether the School District provided a FAPE in their impartial hearing request, it was not necessary for the Parents to specify that they objected to

[5] The IDEA states that a party shall not be permitted to raise issues at a due process hearing that are not raised in the impartial hearing request *unless* the other party consents. 20 U.S.C. § 1415(f)(3)(B).

the educational methodology proposed by the School District. Contesting FAPE preserved the Parents' right to make more specific arguments at the impartial hearing as to how the IEP and proposed placement were deficient. Regardless, the District Court found that the record reflected that it was the School District that first raised the question of which educational services would best suit P.H.'s needs by eliciting testimony that the educational methodology recommended by the School District was appropriate. (SPA53.) Further, the School District did not object when, in response, the Parents examined witnesses about the fact that P.H. required instruction under a different educational methodology. (SPA53-57.) The District Court also noted that while the SRO ruled that the IHO exceeded her jurisdiction in considering educational services, the SRO contradicted his own ruling by "expressly consider[ing] certain methodology testimony offered by the" School District. (SPA53.) For these and other reasons, the District Court concluded de novo that as a matter of law, the IHO properly considered the issue of which services best suited P.H.'s educational needs. (SPA58-59.) Having made such a determination, the District Court was within its authority to determine whether the factual findings of the IHO regarding which services are appropriate to meet P.H.'s educational needs was supported by the preponderance of the evidence and, if they were, to give due weight to the IHO's finding.

Misinterpreting Rowley, the School District contends in its Appellant Brief that even if the Parents had made allegations about educational methodology in their impartial hearing request, the IHO still did not have jurisdiction to review the issue. (App. Br. at 59.) The School District contends that the resolution of questions of educational methodology is for teachers, not the courts. (*Id.*) To the contrary, the substantive requirements of the Act explicitly require courts to determine whether a School District has provided the child with a FAPE, which includes determining whether the program recommended by the School District, including any recommended educational methodology, is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.[6] If courts did not have the authority to review whether educational methodology recommended by the school district was helping a child learn, it would undermine the Act's purpose to guarantee that all disabled children are provided with a FAPE. Thus, the District Court not only had the jurisdiction, but was required, to consider whether the program recommended by the School District, including educational methodology, was "reasonably calculated to enable the child to receive educational benefits." *Id.*, at 206-07.

[6] Indeed, the SRO he considered the School District's methodology evidence in determining whether it had offered P.H. a FAPE. (SPA53.)

2. The District Court Applied the Correct Standard of Review in Determining that the School District Had Violated the Procedural Requirements of the IDEA Resulting in a Denial of FAPE

At the due process hearing, the Parents alleged that the School District violated the procedural requirements of the IDEA, resulting in a denial of FAPE by, among other things: "determining P.H.'s goals on an arbitrary basis such that they failed to reflect the results of his evaluations… [and] failing to mandate the related service of counseling despite setting forth a counseling requirement in the IEP." (SPA59-60.) The SRO found that the School District complied with the IDEA's procedural requirements.

In determining whether the SRO erred, the District Court recognized that while it is appropriate to give administrative decisions due weight when they are supported by a preponderance of the evidence, "it does not excuse the SRO from reaching carefully reasoned conclusions," (SPA60,) and after an independent review of the record, the District Court was free to reject portions of the SRO decision that were not supported by a preponderance of the evidence. *See* 20 U.S.C. § 1415(i)(2); *Rowley*, 458 U.S. at 206; *Jennifer D.*, 550 F. Supp. 2d at 432. In its 100-page decision, the District Court examined the evidence in the record and for each of these procedural issues determined whether the evidence in the record supported either the determination of the IHO or of the SRO.

a. The District Court Correctly Agreed With the IHO That P.H.'s Academic Goals and Objectives Did Not Reflect P.H.'s Unique Characteristics.

The Parents contended, and the IHO agreed, that the School District set P.H.'s academic goals and objectives with the incorrect belief that P.H. was entering first grade, when he was entering kindergarten, and that upon learning of the mistake, did not adjust the goals in light of P.H.'s evaluations and the Parents' concerns. (SPA61-62.) P.H.'s short-term objectives were generic and were not designed with his unique needs and academic level in mind. (SPA64.)

The Act requires that an IEP set forth measurable annual academic and functional goals designed to meet the child's needs and to enable the child to make progress. 20 U.S.C. § 1414(d)(1)(A)(i)(II); *see* 34 C.F.R. 300.320(a)(2)(i)(A)-(B). The New York City Department of Education recognizes the importance of including measurable and appropriate goals and objectives in an IEP on its website in both its .pdfs "The IEP Roadmap: A Guide for Writing Quality [IEPs]" and "'Creating a Quality IEP" - The New IEP Manual." *See http://schools.nyc.gov/Offices/District75/Departments/IEP/forms.htm* (last visited February 9, 2011.) In "The IEP Roadmap: A Guide for Writing Quality [IEPs]", the New York City Department of Education emphasizes that the goals and objectives: "Are linked to the learning standards by ensuring student has the precursor skills and strategies necessary to achieve; Must be realistic and

reasonable considering: age, rate of learning, interest, abilities; Are geared toward developing skills needed for successful transition and generalization into other environments." *Id.* at p. 57. Thus, the measurability and appropriateness of the goals and objectives in an IEP are critical to providing a FAPE, as they assist the IEP team and the parent assess whether the child is benefiting from a particular program. 20 U.S.C. § 1414(d)(4). If goals and objectives are not measurable and capable of producing objective data, they cannot be appropriate under the IDEA. Subjective impressions of school staff lack the discipline and rigor necessary to meet the mandate of the statute.

The SRO reversed the IHO, finding that the goals were appropriate for P.H., reaching his conclusion by comparing the results of P.H.'s Bracken assessment[7] with the handwritten grade levels in the IEP's annual academic goals. (SPA62.) The District Court noted that it was not in a position to determine the appropriate weight to be given to a cognitive test called the Bracken assessment.[8] (SPA62-63); *see Rowley*, 458 U.S. at 208. However, the District Court reversed the SRO's determination because after a review of the SRO's decision and the evidence, the SRO's decision "[could not] be considered 'thorough and careful'"; "[b]y reversing only on the basis that the annual goals were not generic, the SRO failed

[7] The Bracken School Readiness Assessment is a cognitive test developed by Dr. Bruce A. Bracken. *See http://babrac.people.wm.edu/* (last visited February 9, 2011.)

[8] However, it must be noted that the IDEA specifically states that assessment cannot rely on a single instrument. 20 U.S.C. § 1414(b)(2)(B). Thus, the District Court could have determined that as a matter of law, the SRO erred in relying on the one assessment.

to consider the IHO's more important finding that the short-term objectives were generic because they were not modified to reflect the change in the grade level on P.H.'s annual goals." (SPA63) (emphasis in original.) The District Court also correctly found that, unlike the SRO, the IHO "expressly considered all the evidence before her and stated a basis for her findings that reflected a thorough analysis of that evidence" and "the IHO's decision [was] consistent with the preponderance of the evidence…." (SPA64-65.) Thus, in determining that the SRO's decision was not supported by the record, the District Court applied the correct standard of review in affirming the IHO's decision that P.H.'s academic goals and objectives did not reflect P.H.'s unique needs. (SPA65); *see Jennifer D.*, 550 F. Supp. 2d at 432.

b. The District Court Correctly Agreed With the IHO That P.H.'s Goals and Objectives Were Not Measurable

The Parents contended, and the IHO agreed, that P.H.'s goals and objectives were not measurable, as required by New York statute. (SPA66-67.) The SRO disagreed, finding that while the annual goals in P.H.'s IEP were immeasurable, the short-term non-academic goals were measurable curing any defect in the annual goals. (SPA67-68.) Notably, this is inconsistent with the SRO's determination that P.H.'s goals were correct based upon the results of P.H.'s Bracken assessment.

Because the SRO based his decision solely on non-academic goals, the District Court noted that his decision should only be accorded due weight with respect to academic goals if the SRO's discussion was "well reasoned and applies with equal force to [the academic] goals." (SPA68.) The District Court found that the record evidence supported the conclusion that both the non-academic and academic goals and the short-term objectives contained evaluative criteria, and thus declined to disturb the SRO's findings on those facts. (SPA68-69.) However, the District Court found that the SRO's conclusion that the short-term objectives contained evaluation procedures was contrary to the weight of the evidence. (SPA69.) The majority of the short-term objectives in P.H.'s IEP did not contain evaluation procedures, and not one of the academic short-term objectives even mentioned an evaluation procedure. (SPA69.) Because the "IHO's finding [on this matter] was 'reasoned and supported by the record'" the District Court gave the IHO's decision on this issue due weight. (SPA70) (quoting *Gagliardo*, 489 F.3d at 114.)

c. The District Court Correctly Agreed With the IHO That P.H.'s Non-Academic Goals Were Too Advanced.

The Parents asserted, and the IHO agreed, that P.H.'s annual goals and objectives in communication and socialization skills did not adequately reflect P.H.'s current skill levels, as required under New York law. (SPA71-72.) The SRO reversed without reference to the evidence, stating only that the goals

addressed P.H.'s needs. (SPA72.) The District Court did not give the SRO's decision on this point due weight because the SRO's decision was "conclusory" and failed to state a basis for his analysis. (SPA72-73) (*citing Jennifer D.*, 550 F. Supp. 2d at 432). The District Court found that the IHO's determination that P.H. was denied a FAPE because the P.H.'s "communication and socialization annual goals and short-term objectives were not tailored to his unique needs and abilities" was "consistent with the preponderance of the evidence" and reversed the SRO. (SPA73.)

In its Appellant Brief, the School District contends that the District Court erred in general by giving due weight to the decision of the IHO and not the final state authority, the SRO, suggesting that the District Court should have given more weight to the decision of the SRO because his decision was longer than the IHO's. (App. Br. at 61-63, 63 n. 17.) To the contrary, the length of an administrative decision does not entitle it to due weight. If that is the case, then the District Court's 100-page decision should be affirmed without review. Indeed, due weight is given when the decision is supported by the facts in the record. *See Jennifer D.*, 550 F. Supp. 2d at 432. Thus, where the factual findings of the administrative decisions are not supported by the record, district courts are not required to give due weight to those findings and are "free to determine independently how much weight to give the state hearing officer's determination's." *See Ashland Sch. Dist.*,

588 F.3d at 1009; *C.B.*, 2005 WL 1388964, at *13. Here, in deciding both to reverse and affirm portions of the SRO's decision, the District Court wrote a detailed 100-page decision, longer than the decisions of the IHO and SRO combined, that meticulously recited the evidence presented at the impartial hearing, explaining that it did not give due weight to portions of the SRO's that were not supported by the preponderance of the recited evidence and were not well reasoned. (SPA60, 63, 65, 69-70, 72-73, 80, 83-85.) The District Court also explained that it gave due weight to relevant portions of the IHO's decisions that were supported by the preponderance of the evidence as recited by the District Court. In doing so, the District Court correctly applied the standard of review for IDEA decisions as promulgated by Congress and the Supreme Court. *See* 20 U.S.C. § 1415(i)(2); *Rowley*, 458 U.S. at 207-208.

3. The District Court Applied the Correct Standard of Review in Determining that the School District Had Violated the Substantive Requirements of the IDEA Resulting in a Denial of FAPE

The District Court addressed two issues concerning whether the School District failed to comply with the substantive requirements of the IDEA, denying P.H. a FAPE: (1) whether the program recommended in the IEP was appropriate; and (2) whether the placement recommended by the School District was appropriate. As to the first, the IHO found that the evidence supported the Parents' contention that P.H. required instruction for 30-40 hours per week using the

methodology Applied Behavior Analysis (ABA) with a 1:1 student-teacher ratio, concluding that the program recommended by the IEP was inappropriate because it did not utilize ABA and employed a 6:1:1 student-teacher ratio. (SPA79.) The SRO reversed the IHO after finding that the IHO lacked jurisdiction to consider issues of methodology. (SPA79-80.) The District Court found that the SRO's decision on this issue was not well-reasoned, thus not entitled to due weight, "because the SRO improperly excluded [the Parents'] substantial methodology evidence… which implied that the methodologies available within a 6:1:1 program were inappropriate for P.H. Notably, the SRO did not exclude the DOE's methodology evidence…." (SPA80) (emphasis added.) The District Court agreed with the decision of the IHO because the evidence supported the IHO's findings that the educational method chosen by the School District did not meet P.H.'s needs and did not help him learn, thus the program recommended by the School District denied P.H. a FAPE. Rowley, 458 U.S. at 206-07. Further, the evidence and the record demonstrated that the educational methodology chosen by the Parents did help P.H. learn, and the IHO was entitled to assign weight to any conflicting evidence. *See Cabouli*, 202 F. App'x. at 522; *Walczak*, 142 F.3d at 130.

The District Court also properly reversed the SRO's determination that the placement recommended by the School District, P.S. 15, was appropriate not only because the SRO failed to consider the Parents' methodology evidence, but

because the SRO ignored other facts that tended to show that P.S. 15 was not appropriate. (SPA83.) The District Court again found that the IHO's determination that the placement was inappropriate was supported by the evidence. (SPA84-85.) Thus, in determining that the SRO's decision was not entitled to due weight because it was not supported by the evidence or well-reasoned, the District Court applied the correct standard of review.

4. The District Court Applied the Correct Standard of Review in Determining that the Private Placement Chosen By The Parents Was Appropriate and That the Equities Favored Tuition Reimbursement

The SRO did not reach the question of whether the placement chosen by the Parents was appropriate or whether the equities favored granting the Parents reimbursement for the tuition at that School. (SPA86.) Having found that the School District failed to provide a FAPE, the District Court recognized that in order to grant the Parents the relief they sought it was required by law to determine whether that school was appropriate and whether the equities favored the relief sought. (SPA85-86.)

Exhaustively reviewing the evidence both in the record and cited to by the IHO, (SPA86-94,) the District Court correctly gave due weight to the IHO's determination that the school chosen by the Parents was appropriate because the decision was "well reasoned and supported by a preponderance of the evidence…." (SPA86, 91.) The District Court rejected the School District's argument that it

should assign greater weight to the evidence presented at the impartial hearing in favor of the School District because "[a]ssinging new weight to the evidence is precisely what a court avoids when it conducts a modified de novo review…." (SPA93); *see Cabouli*, 202 F. App'x. at 522.

In its Appellant Brief, the School District does not challenge the District Court's findings that the equities favored granting the Parents the relief sought. Indeed, the law is clear that the District Court was required to make that decision de novo on that question of law. *Lillbask v. Conn. Dep't of Educ.*, 397 F.3d at 82 (quoting *Mrs. B.*, 103 F.3d at 1122; (SPA94-103.)

The District Court carefully and fairly applied the correct standard of review throughout its Order, neither rubberstamping the administrative decisions of the IHO and SRO nor reviewing questions of fact entirely de novo. Indeed, the District Court's Order followed Congress's charge to make an "'independent decision based upon the preponderance of the evidence'" from the records of the proceeding, *Rowley*, 458 U.S. at 206 (quoting S. Rep. No. 94-455, at 5 (1975)); guaranteeing that both the School District and the Parents were able to avail themselves the judicial review guaranteed under the IDEA. 20 U.S.C. § 1415(i)(2). The Second Circuit should affirm this well reasoned Order in full.

IV. CONCLUSION

For the reasons set forth above, COPAA respectfully requests that the Court should affirm the Order in full and enter judgment for the Parents.

Dated: February 11, 2011
New York, New York

Respectfully submitted,

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