10-2418-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

M.S., individually, M.S., collectively and on behalf of D.S., L.S., individually, L.S., collectively and on behalf on D.S.,

Plaintiffs-Appellants,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant-Appellee.

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-APPELLANTS

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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 the Individuals with Disabilities Educations Act ("IDEA" or "Act") requires.[1] All parties to this litigation have consented to COPAA filing this Amicus Brief.

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[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.

COPAA offers an unique perspective on the central issue raised by an Order of the United States District Court for the Southern District of New York, District Judge Lewis A. Kaplan, dated May 14, 2010 ("Order"), adopting the Proposed Findings of Fact and Recommendations dated March 12, 2010 ("Recommendation") of Magistrate Judge James C. Francis, IV ("Magistrate Judge"), because the Order affects all parties to proceedings under the Act. The issue is whether, pursuant to the Act and Supreme Court precedent, the Magistrate Judge and 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"). The standard of review applied by the Magistrate Judge was case dispositive, as he himself stated: "[t]he outcome of this case hinges upon the degree of deference that must be afforded the determinations of the SRO and IHO." (SPA-35.)[2] COPAA respectfully submits this brief in support of the Plaintiffs-Appellants, and asserts that the Recommendation adopted by the Order applied an erroneous standard of review that was expressly rejected by Congress and the Supreme Court and that is not consistent with the law of this Circuit.

This issue is of particular importance not only because it was case dispositive here, but also because the standard of review applied by federal courts

[2] The Special Appendix filed by the parties in this case on or about October 28, 2010 is hereinafter referred to as "SPA."

in cases brought pursuant to the Act have also been found to be case dispositive. In a study conducted of randomly selected state and federal court cases decided between January 1975 through 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 articulated a high degree of due weight to underlying proceedings, little change occurred between the court and administrative decisions; and where less or no due weight was applied, more change occurred. *Id.* This issue is of importance to 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 see many cases brought under the Act and clarity on the standard of review will make a great deal of 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. Rowle*y, 458 U.S. 176, 206 (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). In interpreting the Act, the Supreme Court determined that the while making an independent decision based upon the evidence, federal courts should give "due weight" to the administrative proceedings. *Rowley,* 458 U.S. at 206. If federal courts find that the school district has complied with the procedural and substantive requirements of the Act, determinations as to educational methodology are left to the school officials. *Id.*, at 208.[3]

[3] Issues of educational methodology have been significant changed since the adoption of IDEA 2004. *See* 20 U.S.C. § 1414 (2006); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

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"). *See* 5 U.S.C. § 706 (2006) (requiring federal courts to apply an "arbitrary," "capricious," or "unsupported by substantial evidence" standard of review). In fact when drafting the Act, Congress explicitly rejected a standard review akin to that in the APA. *See Rowley*, 458 U.S. at 206. Instead, 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 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 determine that school district complied with the requirements of the Act.

In this case, Plaintiffs-Appellants M.S. and L.S. (the "Parents") brought an action in district court challenging an administrative determination that Defendant-Appellee New York City Department of Education (the "School District") offered a free appropriate public education ("FAPE") to their son, D.S. (SPA-2.) Both

parties moved for summary judgment before a Magistrate Judge. (*Id.*) The Magistrate Judge found that evidence of the School District's attempts to meet the Act's procedural and substantive requirements were "troubling," "agree[d] with [the Parents] that it is doubtful that D.S.'s IEP was sufficiently individualized," and "share[d] their concern that D.S. would not progress at [recommended school placement]." (SPA-49, 55.) Nevertheless, the Magistrate Judge asserted incorrectly that he was required to give due weight to both the legal conclusions of the SRO and the mixed questions of law and fact raised by the Parents. (*See generally* SPA-35-42.) In doing so, the Magistrate Judge failed to exercise the authority granted to him under the Act to make an independent *de novo* determination as to whether the School District created an IEP for D.S. that conformed with the Act's requirements, *Rowley*, 458 U.S. at 206, and, instead, rubberstamped the legal conclusions of the IHO and SRO that he questioned. The Magistrate Judge recommended that the district court deny the Parents' motion for summary judgment and grant the School District's motion for summary judgment.

The Parents objected to the Recommendation. (SPA-1.) With little explanation, the district court adopted the Recommendation, stating merely that:

> I have considered the plaintiffs' objections and concluded that there is no error of law or fact contained in the Report and Recommendation. I differ from the magistrate judge only as to the suggestion that he might have decided the matter differently but for feeling constrained by the degree of deference owed to administrative

> decisions in this context under established Second Circuit precedent. It is entirely unnecessary for me to express any view on that question.

(*Id.*).[4]

The standard of review applied in the Recommendation and adopted by the district court is directly contrary to the standard of review set forth in the Act, *Rowley*, and Second Circuit case law. Thus, this Circuit should reverse the district court's Order and either remand with directions to apply the correct standard of review or enter judgment for the Parents based upon the record and arguments presented by the Parents.

[4] Because the District Court accepted the Magistrate Judge's Recommendation with little explanation, this brief focuses on the Recommendation.

III. ARGUMENT

This Circuit reviews *de novo* the decision of the district court. *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir. 2007).

A. Under the Act And Supreme Court Precedent, Federal Courts Are Required To Conduct An Independent *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"), which is 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." *Town of Burlington v. Dep't of Educ. for Mass.*, 471 U.S. 359 (1985). The Act requires that an IEP set forth measurable annual academic and functional goals, which are a critical element of a FAPE. 20 U.S.C. § 1414(d)(1)(A)(i)(II).

The Act provides both procedural safeguards and substantive requirements to be followed in the development of an IEP. 20 U.S.C. § 1415. Parents are

entitled to an impartial due process hearing when they contend that the school district has failed to comply with procedural safeguards and substantive requirements that result in the denial of a FAPE to their child. *Id*. 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). Either party aggrieved by the decision in the impartial due process hearing may seek review in federal court. *See* 20 U.S.C. § 1415(i)(2).

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. . . .'" *Rowley*, 458 U.S. at 206; *see* 20 U.S.C. § 1415(i)(2). 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 "individualized educational program developed through the [Act's] procedures [was] reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206-07. Because the Act requires courts to receive the record of the administrative proceeding, *Rowley* found that the Act implied that "due weight shall be given to these proceedings." 458 U.S. at 206.

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. *Cabouli v. Chappaqua Central Sch. Dist.*, 202 F. App'x. 519, 522 (2d Cir. 2006) ("The district court should have deferred to the state administrators on the issue of credibility when it found [the witness's] testimony 'disconcerting' and of uncertain reliability."); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) ("the district court did not point to any objective evidence that led it to reject the administrative officers' conclusions that the 1995-96 IEP was adequate to provide [a FAPE]"). 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. v. N.Y. City Dep't of Educ.*, 550 F. Supp. 2d 420, 432 (S.D.N.Y. 2008) ("[T]he SRO's decision does not enumerate the relevant factors or engage in an analysis of whether the IEP provided for a placement in the least restrictive environment. Because the SRO did not make any findings on this issue, the decision of the SRO is not entitled to deference with respect to [the issue.]").[5]

[5] *See also C.B. v. N.B.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) (declining 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 (9th Cir. 2009) (affirming district court's reversal of administrative decision); *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) (The court "must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole").

Moreover, district courts do not give due weight to administrative decisions concerning legal conclusions and mixed questions of law and fact,[6] such as whether the facts of the case demonstrate compliance with the Act's provisions. *See Muller v. Comm. on Special Educ. of the East Islip Union Free Sch. Dist.*, 145 F.3d 95, 102 (2d Cir. 1998) (affirming the district court's decision in favor of the

[6] *K.L.A. v. Windham Southeast Supervisory Union*, 371 Fed.Appx. 151, 153 (2d Cir. 2010) (whether the facts of the case complied with the Act's statutory and regulatory provisions is a mixed question of law and fact); *W.G. v. Bd. of Trustees of Target Sch. Dist. No. 23*, 960 F.2d 1479, 1483 (9th Cir. 1992) ("Whether the school district's proposed IEP was a [FAPE] as required by the Education for All Handicapped Children Act, amended as the Individuals with Disabilities Education Act, is a mixed question of law and fact that we review *de novo*.") *superceded by statute on other grounds,* 20 U.S.C. § 1415(b) (2005).

parent, reversing the SRO, where the "facts of this case . . . were not in dispute, but only the legal conclusions to be drawn from those facts, the state administrative officials were in no better position than the district court to make conclusions… based on the record."); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1122 (2d Cir. 1997) (affirming district court's reversal of hearing officer's decision in favor of district, because "the 'due weight' we ordinarily must give to the state administrative proceedings is not implicated with respect to that conclusion, because it concerns an issue of law; namely, the proper interpretation of the federal statute and its requirements").[7]

In reviewing whether the 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,

[7] *Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1221 (3d Cir. 1993) (the "district court did not fail to give 'due weight' to the agency proceedings on this issue since the ALJ did not even consider whether the School District had made efforts to include [the child] in a regular classroom with supplementary aids and services, as is required by IDEA"); *Doe v. Arnig*, 692 F.2d 800, 806 (1st Cir. 1982) ("resolution of individualized factual issues . . . falls within the scope of the question which *Rowley* says is for the court . . . ."), *overruled on other grounds by Doe v. Brookline Sch. Comm*. 722 F.2d 910 (1st Cir. 1983).

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).

Because courts lack specialized knowledge and experience to resolve questions of educational policy, "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." *Id*. at 208. This holding was intended to protect the States' autonomy when creating educational policies if those policies meet the requirements of the Act. *Id*; *see supra* note 4. The Supreme Court was not suggesting that administrative officers were necessarily more knowledgeable than judges about educational policy, which they may not be. Last year just over 50% of the IHOs had a background in the field of law and/or special education. Zirkel & Scala, *supra* page 3, at 7. Indeed, in New York, neither the IHO nor the SRO is required to have experience in special education or education law, though experience is preferred. *See* 8 NYCRR §§ 200.1(x)(1), § 279.1(c); Governor's Office of Employee Relations, StateJobsNY.com http://www.statejobsny.com/details.asp?retrieve=3064-201092-162816-488 (last visited Nov. 2, 2010).

Rowley established the appropriate standard of review under the Act and applied it to the facts of its case. First, the *Rowley* Court found that the lower courts had erred in concluding that the school district had failed to comply with the Act because neither of the lower courts had found that the school district had failed to comply with the procedures of the Act. 458 U.S. at 208. Second, after an independent *de novo* review of the evidence, the Court noted that the district court had found that the evidence in the record established that Amy Rowley was performing better than the average child in her class; therefore, the Court found that the school district met the Act's substantive requirements because the IEP designed by the school district was reasonably calculated to enable the child to receive educational benefits. *Id.* Thus, *Rowley* illustrates that 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.

B. The Second Circuit Has Followed the Act and *Rowley*

The Second Circuit has closely followed the language of the Act and the decisions of the Supreme Court. *See Muller*, 145 F.3d at 102; *Mrs. B.*, 103 F.3d at 1122. In determining the standard of review in this case, the Magistrate Judge relied predominately on the Second Circuit case *Grim v. Rhinebeck Central School District*, 346 F.3d 377 (2d Cir. 2003), but misinterpreted the standard of review

that the *Grim* court articulated. In *Grim*, the Second Circuit reversed the district court's reversal of an SRO decision in favor of the school district. 346 F.3d 377. As set forth more fully in section III.C., *infra*, as required by the Act, the *Grim* court made an independent determination as to legal conclusions, without giving due weight to the administrative decisions, and gave due weight to the factual findings of the administrative decisions, such as credibility determinations. *Id.* at 382-3.

This holding was consistent with the Act and *Rowley*. 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 Grim*, 346 F.3d at 383; *Cabouli*, 202 Fed.Appx at 522. The Act and case law reject the conclusion that due weight means obedience to administrative hearing officers unless the decision was arbitrary, capricious, or unsupported by the evidence. *Rowley*, 458 U.S. at 206. It means ascribing some extra weight to discretionary decisions made. Federal courts still has to guard against violations of the law. However, when it comes to a discretionary decision with which individuals in good faith can disagree based upon the facts, due weight means that the administrative factual determinations and local school officials' decisions as to educational methodology are entitled

additional consideration.

C. The Magistrate Judge Erred in Applying a Far Too Restrictive Standard of Review, Thus the District Court's Adoption of the Recommendation Was Erroneous

The Magistrate Judge stated that the standard of review applied in this case was outcome determinative. (SPA 35.) In determining the proper standard of review, the Magistrate Judge relied primarily upon the Second Circuit case *Grim*. (SPA 36-42.) He found that:

> it is clear from Grim II itself that its principle of deference applies beyond instances in which the court must decide a controversial issue educational policy.
> * * * * * * * * * * *
> Grim II appears to mandate deference to administrative decisions on most issues relating to educational policy.
> * * * * * * * * * * *
> A court could well play a role in adjudicating such [factual] disagreement. While there is no question that a court should refrain from deciding how best to educate a child, it should be equally clear that a court would be adept at determining if someone with such expertise properly made such a determination. A federal court is quite competent to examine whether a hearing officer correctly weighed the evidence. Nevertheless, ***this Circuit leaves little room to analyze substantive deficiencies in the evidence presented by the DOE at the hearing.***
> * * * * * * * * * * *
> Grim II instructs district courts to defer to the IHO's and SRO's determinations regarding procedural as well as substantive issues.

(SPA 37-38, 44) (emphasis added.)

In formulating this standard of review, the Magistrate Judge failed to recognize the authority granted to him by the Act and *Rowley* to: (1) review *de*

novo the mixed questions of law and fact, such as whether the School District complied with the procedural and substantive requirements of the Act and offered a FAPE, without giving due weigh to the administrative decisions; (2) give due weight to factual findings of the SRO; and (3) defer to educational policies recommended by school officials only after concluding that the School District complied with the Act. In relinquishing this authority, the Magistrate Judge reviewed the SRO decision with a standard akin to the APA arbitrary, capricious, or unsubstantiated by the evidence standard of review, a standard of review that Congress and *Rowley* explicitly rejected. *Rowley*, 458 U.S. at 206.

1. The Magistrate Judge Misinterpreted *Grim* In Giving Due Weight to the SRO Decision As To Whether the School District Complied with the Procedural Requirements of the Act

In this case, the Parents alleged several procedural violations of the Act, including that in creating an IEP for D.S., the School District did not consider an evaluation submitted by the Parents and recycled the critical goals and objective from the previous years IEP. (SPA-47-50.) The Magistrate Judge found that the Parents' claims concerning procedural violations of the Act in the creation of D.S.'s IEP were "troubling," (SPA-49,) and that he shared the Parents' "skepticism" that the School District complied with those requirements. (SPA-51.) The Magistrate Judge noted that "procedural compliance with the IDEA does not appear to require expertise in the field of education," but nevertheless believed that

Grim constrained him to give due weight to the IHO's and SRO's determination on the mixed question of law and fact of whether the School District violated the procedures of the Act resulting in an insufficient IEP and a deprivation of FAPE, (SPA 44-45, 49.) The Magistrate Judge misinterpreted *Grim*.

The *Grim* court considered whether delays in the development and review of the three challenged IEPs violated the procedural requirements of the Act. 346 F.3d at 382. It reversed the district court's determination that such delays violated the procedural requirements of the Act because it disagreed with the district court as to the "legal effect of the delay," finding that the delays did not deprive the child of a FAPE under the Act. *Id.* at 382, 384. In doing so, the *Grim* court did not give any due weight to the administrative decisions, but instead made an independent determination on the mixed question of law and fact as to whether the district's conduct violated the Act's procedural requirements and whether any violation resulted in a deprivation of a FAPE. *Id.*

The *Grim* court also addressed an issue that is raised in this case: whether the goals and objectives in an IEP are sufficient. *Id.* at 342. The *Grim* court held that due weight should be given to administrative determinations as to whether the IEPs' goals and objectives were sufficient, whether the issue is deemed procedural or substantive. *Id.* Due weight, of course, does not require a court to affirm an administrative determination that the IEP goals and strategies are sufficient where

the record evidence demonstrates that the IEP was not sufficiently individualized to enable the child to receive educational benefits, as was the case here. *Rowley*, 458 U.S. at 206. The Magistrate Judge found that the copying of D.S.'s goals and short-term objectives from an old IEP to the IEP at issue was "disturbing," that "it seem[ed] inappropriate that no adjustment was made" to those goals and objectives over the course of the year, and he was doubted that the goals and objectives had actually been reviewed during the meeting or were sufficiently individualized to enable D.S. to obtain an educational benefit. (SPA-50, 51, 55.) Nevertheless, the Magistrate Judge presumed incorrectly that he did not have the authority to reverse the SRO based upon his independent determination that the facts in the case did not meet the legal requirements of the Act. (SPA-55-56.) To the contrary, Congress rejected provisions that "would… so severely restrict[] the role of reviewing courts," *Rowley*, 458 U.S. at 206, and the Magistrate Judge erred in so severely restricting his review.

2. The Magistrate Judge Misapplied *Grim* In Finding That A District Court Must, in the Face Of Contradictory Evidence, Give Due Weight To Administrative Decisions Concerning Whether the Substantive Requirements of the Act Have Been Met

The Parents made multiple claims that the School District violated the substantive requirements of the Act, including that the IEP was created without consideration as to an evaluation obtained by the Parents, the IEP was not sufficiently individualized, and that the School District recommended a school

placement only because it was available and not because it would enable D.S. to obtain an educational benefit. (SPA-52.) The Magistrate Judge "agree[d] with [the Parents] that it is doubtful that D.S.'s IEP was sufficiently individualized," and "share[d] their concern that D.S. would not progress at [the recommended school placement]." (SPA-55.) In making those statements, the Magistrate Judge noted that he lacked experience in the field of education, but that experience was not required to make the determination as to whether the IHO and SRO properly weighed the evidence. (SPA-55-56.) Regardless, the Magistrate Judge concluded that *Grim* and this Circuit required him to defer to the IHO and SRO (who he believed had experience in the field of education) on issues of whether the School District complied with the substantive requirements of the Act. (SPA-56.)

Whether the IHO or SRO had experience in the field of education, which as set forth in section I.A., *supra* may not have been the case, the Magistrate Judge misunderstood the holdings of *Rowley* and *Grim* on this matter. *Rowley* held that if the federal court determines that school district complied with the substantive requirements of the Act, only then does the federal court give extra consideration is given to educational methodology recommended by school officials who have educational experience. 458 U.S. at 208. Due weight is given only to the factual determinations of the IHO and SRO. *Id.* at 206. The Magistrate Judge was still required to conduct an independent *de novo* review as to whether "the [School

District had] created an IEP for [D.S.] that conforms with" the Act's substantive requirements. *Id.*, at 206, n.27; *cf. id.* at 215 (Blackmun, J. dissenting) ("It is clear enough to me that Congress decided to reduce substantially judicial deference to state administrative decisions.") Here, because the Magistrate Judge agreed with the Parents' that based upon the facts in the record, the IEP did not conform the to the substantive requirements of the Act, he was not required to defer to any educational methodology chosen by the School District. In constraining himself to defer to the IHO and SRO regardless of his own opinion, the Magistrate Judge eviscerated the purpose of federal court review under the Act.

The Magistrate Judge himself recognized the contradiction between his interpretation of *Grim* and the Act, stating "I question whether the degree of deference to educational administrators required by Grim II and other Second Circuit cases is consistent with the intent of Congress when it passed the IDEA." (SPA-42.) "[C]ase law appears to indicate that as long as the DOE is able to produce an expert to support its position at a hearing and receives a positive determination… the DOE's position is nearly assured victory in the federal courts." (SPA-38.) "A federal court is quite competent to examine whether a hearing officer correctly weighed the evidence. Nevertheless, this Circuit leaves little room to analyze substantive deficiencies in the evidence presented by the DOE at the hearing." (SPA-37-38.) In fact, this Circuit, the Act, and the Supreme

Court required the Magistrate Judge to conduct an independent *de novo* review. The Magistrate Judge's misapplication of *Grim* treads upon the rights of parties afforded to them by the Act by requiring nearly unexamined due weight to administrative decisions, essentially eviscerating the purpose of a federal court review and rendering the parents' rights a nullity. *See* 20 U.S.C. § 1415(i)(2); *Rowley*, 458 U.S. at 206-07. The emphasis on due weight to the final administrative determination is the traditional view of administrative review, and it is a review ***explicitly*** rejected by Congress when drafting the Act. *Rowley*, 458 U.S. at 206.

IV. CONCLUSION

For the reasons set forth above, COPAA respectfully requests that the Court should reverse the Order and either remand to the district court with directions to apply the correct standard of review or enter judgment for the Parents based upon the record and arguments presented by the Parents.

Dated: November 4, 2010
New York, New York

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Dated: November 4, 2010
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_____

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STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

Dave Jackson, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on 11/4/2010 deponent caused to be served 2 copy(s) of the within

Brief of Amicus Curiae Council of Parent Attorneys and Advocates in Support of Plaintiffs-Appellants

upon the attorneys at the address below, and by the following method:

By Hand

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By Hand

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Sworn to me this
Thursday, November 04, 2010

ALLISON R. WADE
Notary Public, State of New York
No. 01WA6191434
Qualified in New York County
Commission Expires 8/11/2012

Case Name: M.S. Individually v. NYC Department of Education

Docket/Case No (Index): 10-2418-cv