15-4076-cv

United States Court of Appeals

for the

Second Circuit

A.M., individually and on behalf of E.H., a child with disability,

Plaintiff-Appellant,

– v. –

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
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No. 15-4076 Caption: A.M., individually and on behalf of E.H., a child with a disability v. New York City Department of Education

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1. Amicus is not a publicly held corporation or other publicly held entity;

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3. Amicus does not have 10% or more of stock owned by a corporation.

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INTERESTS OF THE AMICUS

Council of Parent Attorneys and Advocates (COPAA) is an independent, nationwide 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. COPAA's primary goal 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 Education Act (IDEA or Act) requires.[1] COPAA's interest in this case is its deep commitment to all children with disabilities to obtain needed special education services. The bedrock of the IDEA is that appropriate special education services are determined based on

[1] Pursuant to Fed. R. App. P. 29(5), Andrew Feinstein, counsel for COPAA, affirms that (1) counsel for amicus authored the brief in whole with comments from COPAA members; and (2) no other person contributed money that was intended to fund the preparation or submission of the brief. FRAP 29(5).

individual consideration of a disabled child's needs, through the development of an Individualized Education Program ("IEP").

Both parties have consented to this filing.

SUMMARY OF ARGUMENT

The issue before the Hearing Officer (IHO) and the State Review Officer (SRO) was whether or not student, E.H., required a specific methodology in order to make meaningful progress commensurate with his abilities. The administrative decisions, finding that E.H. did not require one-on-one Applied Behavioral Analysis (ABA), were neither well-reasoned nor supported by the record, *T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 160 (2d Cir. 2014) (citing *M.H. v. N.Y. City Dep't of Educ.*, 685 F.3d 217, 241 (2d Cir. 2012)); and *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.*, *54*6 F.3d 111, 118 (2d Cir. 2008). Not only was one-on-one ABA recommended by all the evaluators who has worked with E.H., but also the district had failed to offer any method of instruction whatsoever in its IEP.

An evaluation of the appropriateness of an IEP offer must take into account the appropriateness of a school district's offer of methodology given the information available to the IEP team at the time of the meeting. *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir.2012). Because it failed to consider the

offer in light of the information available at the time of the meeting, the district court's handling of the issue of methodology was incomplete and erroneous.

Second, as a general matter, the Act mandates that courts make independent determinations as to whether a school district has complied with the Act based upon the evidence in the record.

ARGUMENT

I. Congress Passed the IDEA to Ensure an Appropriate for All Children with Disabilities

In the 1970s, Congress held hearings investigating the quality of educational instruction provided to children with disabilities. The EHA hearings established that public school districts had wholly excluded millions of children with a multitude of disabilities or placed those children in programs where they received no educational benefit. *Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare,* 93d Cong., 1st Sess. (1973-74) (Senate Hearings). At that time, statistics showed that "only 55 percent of the school-aged handicapped children and 22 percent of the pre-school-aged handicapped children [were] receiving special educational services." Senator Randolph, *Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare,* 94th Cong., 1st Sess., 1 (1975). Parents and educators discussed the widespread failure of states to provide the extent of supportive

services necessary to meet the needs of children with varying degrees and forms of disabilities. Statistics compiled for Congress by the Office of Education at that time revealed that children of all ages and with a range of handicapping conditions were affected. For example, pupils excluded or receiving inappropriate education included 82% of "emotionally disturbed" children; 82% of "hard-of-hearing" children; 67% of "deaf-blind" and "other multi-handicapped" children; and 88% of those classified "learning disabled." *Senate Report, S. Rep. No. 168, 94th Cong.*, 1st Sess. 5-8 (1975) reprinted in 1976 U.S. Code Cong. & Ad. News, 1425, 1429-32 (*Senate Report No. 168*) at 8; *House Report, H.R. Rep. No. 332*, 94th Cong., 1st Sess. (1975) (*House Report No. 332)*; at 11- 12.

In light of the gross disparities Congress found regarding the access to educational programming for students with disabilities, Congress enacted Public Law 94-142, the Education for All Handicapped Children Act (EHA) in 1975, which through various amendments has become the IDEA. The IDEA requires that state and local public education agencies enact policies and procedures to ensure that all students with disabilities receive a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

In enacting the EHA, Congress did not merely require access. Congress mandated that children with disabilities receive a free appropriate public education. While the IDEA itself fails to provide a substantive standard giving content to the term "appropriate", the statute itself says it will provide a "full educational opportunity to all handicapped children." *Id.* § 1412(2)(A). This goal is repeated throughout the legislative history. The Senate Report says that the Act "guarantee[s] that handicapped children are provided equal educational opportunity." S.Rep.No.94-168, p. 9 (1975), U.S.Code Cong. & Admin.News 1975, p. 1433. Numerous drafters of the legislation echoed the same. *See* 121 Cong.Rec. 19482-19483 (1975) (remarks of Sen. Randolph); *id.*, at 19504 (Sen. Humphrey); *id.*, at 19505 (Sen Beall); *id.*, at 23704 (Rep. Brademas); *id.*, at 25538 (Rep. Cornell); *id.*, at 25540 (Rep. Grassley); *id.*, at 37025 (Rep. Perkins); *id.*, at *214 37030 (Rep. Mink); *id.*, at 37412 (Sen. Taft); *id.*, at 37413 (Sen. Williams); *id.*, at 37418-37419 (Sen. Cranston); *id.*, at 37419-37420 (Sen. Beall). The legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children.

The *Rowley* court said, "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982).* Defining

"appropriate" as "meaningful" does not really advance the argument. The Act details as specifically as possible the kind of specialized education each handicapped child must receive. The basic floor of opportunity is instead intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible.

The term "free appropriate public education" is a defined term in the Individuals with Disabilities Education Act ("IDEA") at 20 U.S.C. § 1401 (8), the statute states:

> The term "free appropriate public education" means special education and related services that--
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include appropriate preschool, elementary, or secondary school education in the State involved; and
> (D) are in conformity with the individualized education program required under section 1414(d) of this title.

While this definition has been called "cryptic," *Rowley* at 188, the test of free appropriate public education is whether the student is likely to receive educational benefit. As the *Rowley* majority held:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with

> "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.
>
> 458 U.S. at 200-201.

Then, in footnote 23, the Court sets forth independence and self-sufficiency as the goals of the free appropriate public education:

> This view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency. After referring to statistics showing that many handicapped children were excluded from public education, the Senate Report states:
>
> "The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep., at 9. See also H. R. Rep., at 11.
>
> The desire to provide handicapped children with an attainable degree of personal independence obviously anticipated that state educational programs would confer educational benefits upon such children.
>
> 458 U.S. at 201.

The *Rowley* court's minimal substantive requirements of a free appropriate public education have been, over time, enhanced by other courts. Thus, in

Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238 (3d Cir. 1999), the Third Circuit reviewed the development as follows:

> IDEA leaves to the courts the task of interpreting "free appropriate public education." *See Rowley*, 458 U.S. at 188-89. The Supreme Court began this task in *Board of Education v. Rowley*, 458 U.S. 176 (1982), holding that while an IEP need not maximize the potential of a disabled student, it must provide "meaningful" access to education, *id.* at 192, and confer "some educational benefit" upon the child for whom it is designed. *Id.* at 200. In determining the quantum of educational benefit necessary to satisfy IDEA, the Court explicitly rejected a bright-line rule. Noting that children of different abilities are capable of greatly different achievements, the Court instead adopted an approach that requires a court to consider the potential of the disabled student before it. See *id.* at 202; *see also Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985) (stating that Rowley holds that "no single substantive standard can describe how much educational benefit is sufficient to satisfy [IDEA]").
>
> We first interpreted the phrase "free appropriate public education" in *Board of Education v. Diamond*, 808 F.2d 987 (3d Cir. 1986), when we rejected the notion that the provision of any educational benefit satisfies IDEA, holding that IDEA "clearly imposes a higher standard." *Id.* at 991. Examining the quantum of benefit necessary for an IEP to satisfy IDEA, we held in *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) that IDEA "calls for more than a trivial educational benefit" and requires a satisfactory IEP to provide "significant learning." *id.* at 182, and confer "meaningful benefit." *Id.* at 184. We also rejected the notion that what was "appropriate" could be reduced to a single standard, *id.*, holding the benefit "must be gauged in relation to the child's potential." *Id.* at 185. When students display considerable intellectual potential, IDEA requires "a great deal more than a negligible [benefit]." *Id.* at 182.
>
> 172 F.3d at 247.

The Second Circuit has explicitly endorsed the *Polk* approach, *Mr. & Mrs. P., 54*6 F.3d at 118, *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1121 (2d Cir. 1997), *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998). Thus, under Second Circuit law, the Student's IEP must provide significant learning, provide a meaningful benefit, and be gauged to the Student's potential. The IEP proposed by the Board must confer meaningful, non-trivial educational benefit on the student.

Passing grades are not enough to indicate a child has received educational benefit. It is worth reviewing the language of *Rowley* on the subject. First, the five-member majority stated:

> The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.

458 U.S. at 202. To ensure that a black letter rule that passing grades means that a student received meaningful educational benefit was not falsely extracted from the decision, then Justice Rehnquist went on to state, "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* The language in *Walczak* and

Mrs. B. is even more guarded about the use of grading and advancement as indicia of meaningful educational benefit.

The overriding rule in making educational placement decisions is that the program of special education and related services contained in the child's IEP forms the basis for placement decisions, 20 U.S.C. §1414(d). The IDEA requires the relevant public education authority to prepare and review at least annually an "individualized education program" for each child with a disability. 20 U.S.C. §1414(d)(4)(A)(i). The IEP is the primary vehicle for ensuring that a disabled child's educational program is individually tailored based on the child's unique abilities and needs. *See* 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.345-300.350. A child's IEP describes, among other elements, the child's present levels of educational performance, measurable annual goals for addressing the child's educational needs that result from the child's disability and the individualized instruction and services that will be provided to help the child. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §300.347.

The bedrock of the IDEA is that appropriate special education services are determined based on individual consideration of a disabled child's needs, through the development of an IEP. Placement decisions need to be "based on" the child's IEP. *See,* e.g. 34 C.F.R. § 300.552(b). And the child's IEP needs to be based on sound evaluation and must be reasonably calculated to provide meaningful, non-

trivial educational benefit. That means that the method of teaching used must be one specifically designed to benefit the individual student in question. Where there is strong expert opinion, based on sound evaluation, that one method of instruction provides educational benefit for the child in question and no evaluation-based evidence than another method of instruction provides meaningful, non-trivial educational benefit for the child in question, the school district is not at liberty to select the unsupported method and then hide behind the canard that methodology is within the sole discretion of the school.

A. An Appropriate Evaluation Provides the Foundation for Individualized Programming under the IDEA

To provide a free appropriate public education ("FAPE") in compliance with the IDEA, a state educational agency receiving federal funds must evaluate a student to determine whether she has "unique educational needs" requiring the provision of special education. 20 U.S.C. § 1414;[2] *see also Rowley*, at 176, 193-94, 205-06 (IDEA's procedures designed to result in personalized educational programs for children with disabilities). When evaluating what a child's programming should be, IEP teams are required to identify a student's areas of deficit and to develop a program that addresses the child's unique educational

[2] New York has set forth regulations to implement the goals of the Act, which closely tracks the Act. *See Frank G. v. Bd. of Educ.*, 459 F.3d 356, 363 (2d Cir. 2006); N.Y. Comp. Codes R. & Regs. tit. 8 § 200.1 *et seq.*

needs. 20 U.S.C. § 1414(d)(1)(B). Further, when considering what programming is necessary "to meet the unique needs" of the student, *Id.*, the team must keep in mind that the "term 'unique educational needs' [should be] be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs." *Walczak* at 131. With this information in hand, the team must then create a plan, consisting of a statement of the "special education and related services and supplementary aids and services" the student must receive in order to "advance appropriately toward attaining the annual goals" and "make progress." 20 U.S.C. § 1414(d)(1)(A)(IV).

In this case, the parent provided sound evaluation results indicating that one-to-one ABA therapy was necessary for the student to make meaningful education progress. Evaluators included staff of the Manhattan Children's Center and the Rusk Institute, in both cases after intense observation. Ignoring this expert advice, the school district proposed a 6:1:1 special education class and no methodology for instruction.

B. The IEP is the IDEA's "Education Delivery System" Providing Notice to Parents of the Program and School Recommended For Their Child

The express purpose of the IDEA is to "ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. §

1400(d)(1)(A); *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 who has a disability that impedes access to education. 20 U.S.C. § 1412(a)(1)(A).

A FAPE is provided to a child with disabilities through the development of an IEP, which is both 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." *Sch. Comm. of Burlington*, 471 U.S. at 367. An IEP must be reasonably calculated to enable the child to receive educational benefits. *Rowley* at 187-88, 203 (1982).

II. The IDEA Requires IEP Teams to Consider Methodology as a Component of Any Offer

A. The Code of Federal Regulations identified methodology as a necessary element of any offer of FAPE

While the Individuals with Disabilities Education Act (IDEA) is silent on the issue of methodology, the federal regulations promulgated to interpret it are not. Section 300.39(a) of the Code of Federal Regulations defines special education as specially designed instruction. 34 C.F.R. § 300.39(a). Section 300.39(b)(3) further defines specially designed instruction as "adapting, as appropriate to the needs of an eligible child under this part, the content, *methodology*, or delivery of instruction—(i) to address the unique needs of the child that results from the

child's disability; and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.369(b) (emphasis added). Accordingly, when an IEP team is tasked with including a statement of the "special education and related services and supplementary aids and services" a student requires in order to "advance appropriately toward attaining the annual goals," to "be involved in and make progress in the general education curriculum . . . extracurricular and other nonacademic activities," and to "be educated and participate with other children with disabilities and nondisabled children in . . . activities,"20 U.S.C. §§ 1414(d)(1)(A)(i)(IV)(aa-cc), by the Code of Federal Regulation's own definition, the IEP team must *also* include a statement regarding the "content, *methodology*, or delivery of instruction." 34 C.F.R. § 300.39(b) (emphasis added).[3] Because the IEP document in this case failed to identify the methodology to be used with E.H. and rejected the methodology recommended by outside evaluators, it failed to offer the student a FAPE.

B. *Rowley*

The decisions below dismiss the fact that the school district failed to deal with the various assessments making clear that E.H. required a specific

[3] However, this is an oversimplified misstatement of relevant law and policy. It is the Federal Department of Education's "longstanding position" that methodology may be included in the IEP if "specific instructional methods are necessary for the child to receive FAPE." 71 Fed. Reg. 46,665 (Aug. 14, 2006).

methodology in order to be able to make meaningful progress commensurate with his abilities, saying that it is a matter of methodology and solely within the discretion of the school district. This suggestion is incomplete and is undermined by the federal implementing regulations and case law.

First, the lower courts rely on a misapplication of the *Rowley* decision to support a complete lack of specific inquiry into the merits of the school district's decisions. The *Rowley* court, in fact, said,

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

458 U.S. at 202. The *Rowley* decision was limited to its facts by the Court itself. As such, the SRO's and district court's refusal to examine the school district's decision-making is inappropriate and not in line with the law, which specifically requires an inquiry into the methodologies a student might need in order to make progress. 34 C.F.R. § 300.39(a-b).

Notwithstanding this self-limiting language, the *Rowley* court went on to provide strong advice to courts.

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating

> the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." § 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to §1415 (e)(2).
>
> We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

458 U.S. at 207-08 (internal citation omitted). This last phrase has been cited by 70 courts and virtually every single Circuit Court of Appeals in the 30 years since *Rowley* was decided. *See Lessard v. Wilton-Lyndeborough Coop. Sch. Dist*., 518 F.3d 18, 29 (1st Cir. 2008) (literacy program for child with intellectual disability), *M.H. v. N.Y. City Dep't of Educ.*, 685 F.3d 217, 240 (2d Cir. 2012) (instructional method for child with autism), *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 179 (3d Cir. 1988) (meaningful educational benefit for child with encephalopathy), *Cty. Sch. Bd. v. Z.P.*, 399 F.3d 298, 308 (4th Cir. 2005)

(instructional method for child with autism), *White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003) (school assignment for child with cochlear implant), *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004) (instructional method for child with autism)[4], *Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290, 294 (7th Cir. 1988) (sign language or cued speech for child with severe hearing impairment), *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376 (8th Cir. 1996) (transition services for child with orthopedic impairment), *Bend-Lapine Sch. Dist. v. DW*, 152 F.3d 923, 1998 WL 442952, at *4 (9th Cir. 1998) (literacy instruction for child with learning disability), *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1318 (10th Cir. 2008) (instructional method for child with autism), *Todd D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir. 1991) (out-of-district placement for child with schizophrenia). Citing this language, school districts across the country have rejected, at IEP Team meetings, parents' requests for a particular educational methodology. What is ignored in this analysis, however, is the Supreme Court's actual wording of where the restriction resides. By its express terms, the Supreme Court only sought to preclude the courts from making methodological

[4] The Sixth Circuit has not quoted the *Rowley* language directly, but has quoted the language from *Rodriguez*, which served as the basis for the *Rowley* language. *Rettig v. Kent City Sch. Dist.*, 720 F.2d 463, 466 (6th Cir. 1983). *Deal*, cited above, does not directly quote the *Rowley* language but applies the same test.

determinations. Nothing in the *Rowley* language can be read to suggest that IEP Teams should be foreclosed from discussing methodology.

Foreclosing discussion of methodology at IEP Team meetings runs afoul of the Supreme Court's view of the role of the parents at IEP Team meetings. The Supreme Court made it clear that their participation is critical:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage or the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon *full participation* of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Rowley at 205-206 (emphasis added). Indeed the *Rowley* court cleared stated that educational methodology should be determined at IEP Team meetings:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method *most suitable* to the child's needs, was left by the Act to state and local educational agencies *in cooperation with the parents* or guardians of the child.

Id. at 207. (emphasis added).

This means that at the IEP Team meeting the goals and objectives are to be established for the student. Once those goals have been developed, the IEP Team is to select the best possible method to achieve those goals. The parents are to be full participants, with the other IEP Team members, in discussing and deciding

what that educational method should be. Moreover, since this is an IEP Team decision, it is subject to review at an impartial hearing and, if available, state level review. The role of the court is then to review the administrative determination to see if it was made in accordance with the law. In other words, it is not the job of the court to determine the relative merits of alternative educational methodologies. But, it is the job of the court to see whether the methodology selected would provide meaningful, non-trivial educational benefit to the child. Where there is strong expert endorsement of one methodology, which is rejected without any evaluative basis by the school district, it is incumbent upon the court to reject the methodological determination of the district.

In addition, school districts must ensure that the IEP is appropriate for the student. *Id.* The warning to courts not to second guess a school district's choice of educational methodology does not mean that the court should ignore its obligation to enforce the IDEA. *Oberti v. Board of Education*, 995 F.2d 1204, 1214 (3rd Cir. 1993). Moreover, there is nothing to prohibit including an instructional method on an IEP. *Ridgewood Board of Ed. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999) (IEPs included Orton-Gillingham and Wilson reading methods). Thus, in a void, if a student is capable of making progress in two different methodologies, courts have long held that the determination of which methodology should be used is an issue to be left to the states, and the local educational agencies. However, where the

evidence demonstrates that a specific methodology is critical in order to enable a student to make meaningful, non-trivial education progress, the issue is no longer one of methodology, but one of whether a FAPE is provided.

Second, as a general matter, the Act mandates that courts make independent determinations as to whether a school district has complied with the Act based upon the evidence in the record. *M.H. v. New York City Dept. of Educ.*, 685 F.3d 217, 245 (2d Cir. 2012); *Lilibask ex. rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 83 n. 3 (2d Cir. 2005); *See, also*, 20 U.S.C. § 1415(i)(2)(C); *Ashland Sch. Dist. v. Parents of Student R.J.*, 588 F.3d 1004, 1009 (9th Cir. 2009); *see also Burlington v. Dep't of Educ*., 736 F.2d 773, 791-92 (1st Cir. 1984), *aff'd sub nom. Sch. Comm. of Burlington v. Dep't of Educ., Id.* In this case there was not the type of specific inquiry into the factual underpinnings of E.H.'s disability and needs to merit an affirmance of the IHO and SRO decisions.

Indeed, the State Review Officer's decision is neither well-reasoned nor based on the record on this issue. The parent came forward with compelling evidence that one-to-one ABA was necessary for the student to make progress. The school psychologist testified, "although the May 2012 CSE did not recommend ABA, it also did not disapprove of the methodology or say ABA should not be used with the student." SRO Decision at p. 7. The school psychologist opined that the student could make progress under the IEP but

failed to explain the basis of that belief. Indeed, this is not a case of a school district asserting its unilateral right to determine methodology; this is a case of a school district refusing to even consider what methodology that would be used in educating the student.

C. This Court has reviewed this issue previously in *R.E.*

This Court has reviewed the issue of how one evaluates the appropriateness of an IEP offer previously in *R.E. v. N.Y. City Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012). *Id.* at 185. This Court declined to defer to the school district's choice (or lack of choice) of educational methodology in situations where parents are able to present expert testimony that the student required a particular methodology in order to make meaningful progress.

In one of the consolidated *R.E.* cases, *R.K.*, the parents alleged that the school district failed to provide their child a FAPE because, among other things, the IEP did not offer parent counseling and speech and language therapy, and the proposed placement provided insufficient 1:1 remedial instruction and ABA instruction. *Id.* at 193. The IHO in the *R.K.* case found for the parents because "[t]here [was] a consensus that the student need[ed] an ABA program, speech and language and occupational therapy." *Id.* The SRO in *R.K.* reversed, finding that the student did not need ABA because some of her evaluations did not specify a teaching method, basing his decision upon the testimony of the person

who allegedly would have been the student's teacher at the public school placement. *Id.* The magistrate judge in the district court found that the SRO's decision was poorly reasoned, and agreed with the IHO's findings that the school district had failed to offer a FAPE after noting that almost all of the reports considered at the IEP meeting in question reached a "clear consensus that R.K. required ABA support." *Id.* at 194. The magistrate found that "[t]he plan proposed in [R.K's] IEP offered her a 6:1:1 classroom with no dedicated aide and no guarantee of ABA therapy or any meaningful 1:1 support," and thus "was not reasonably calculated to create educational benefit for R.K," as concluded by the IHO. *Id.*

Based on the Court's determination that retrospective testimony would not be considered to determine whether the IEP Team acted properly, this Court concluded that, once the testimony of the teacher upon which the state review officer relied was disregarded for being outside of the scope of what was considered at the time of planning, it was clear that the state review officer's "conclusion was against the weight of the evidence and thus flawed, [thus] deference to it is not warranted. But having reviewed the record, [the Second Circuit] conclude[d] that the [impartial hearing officer's] decision was sufficiently supported, and [the Court] therefore defer[s] to the [impartial hearing officer's]

conclusion that the IEP was not reasonably calculated to create educational benefit for R.K." *Id.* at 194.

The case before this court is quite similar. Just like in *R.K.'s*, the reports considered by the IEP team in question all reached a consensus that E.H. required ABA support in order to make meaningful progress, but the IEP document provided "no guarantee of ABA therapy or any meaningful 1:1 support." In fact, in E.H.'s case there is even evidence that school staff agreed with the recommendation for an ABA methodology and 1:1 interventions. Tr. 316-317.

The Third Circuit has taken a similar view. In *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553 (3d Cir. 2010), an ALJ found that "based on the scoring results from evaluations and assessments and the weight of testimony from teachers and medical experts," a student's IEP failed to incorporate the recommendations necessary to address his needs. *Id.* at 566. "The absence of these recommendations, or any alternatives reasonably calculated to confer an educational benefit to D.S., led the ALJ to find the IEP inappropriate." *Id.* The District Court reversed. *Id.* While the Third Circuit agreed "with the District Court that the IEP did incorporate certain instructional techniques that were consistent with [the parents'] consultants' recommendations," it disagreed "with the District Court that the presence of these generalized instructions in the IEP contradicts the ALJ's ultimate factual conclusions -- which a reviewing court is

obliged to consider prima facie correct -- that (1) in order for D.S.'s ninth grade IEP to be reasonably calculated to enable D.S. to receive a meaningful educational benefit, it needed to incorporate the specific remedial techniques and provisions for accommodations that the teachers and evaluators who worked with him had proposed, and (2) the IEP failed to incorporate these specific remedial techniques and provisions for accommodations." *Id.*

Similarly, in the Fourth Circuit decision *County School Board of Henrico County, Va. v. Z.P. ex rel. R.P.*, 399 F.3d 298 (4th Cir. 2005), the hearing officer determined that the IEP for a child classified with autism failed to provide a FAPE because the child required one-to-one instruction in order to make academic progress. However, the school recommended by the IEP did not have sufficient one-to-one instruction, and the IEP did not provide for a full-time aide for the child. Citing *Rowley*, the Fourth Circuit stated that:

> at all levels of an IDEA proceeding, the opinions of the professional educators are entitled to respect.... The respect and deference that must be accorded to those professional opinions, however, does not give a district court license to ignore… that the findings of the *administrative proceeding* must be given due weight.
>
> Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate. The parents presented evidence (outlined above) tending to show that, because of the nature and severity of Z.P.'s problems, the IEP would not provide Z.P. with a

> educational benefit.…To conclude that the hearing officer erred simply because he did not accept the testimony of the School Board's witnesses, an argument that the School Board comes very close to making, would render meaningless the due process rights guaranteed to parents by the IDEA.
>
> To the extent that the district court concluded that the hearing officer's findings were not entitled to deference because the decision was premised on the hearing officer's preference for the ABA methodology used by the Faison School over the TEACCH methodology used at Twin Hickory, we again disagree. Neither a state administrative hearing officer nor a reviewing court may reject an otherwise appropriate IEP because of dissatisfaction with the educational methodology proposed in the IEP… As we have explained above, the hearing officer concluded that the School Board's IEP was not appropriate and did not provide Z.P. with a FAPE because Z.P.'s problems were so severe that they would have precluded him from accessing the curriculum that would have been provided at Twin Hickory. If the School Board's IEP were appropriate, then it would have been impermissible for the hearing officer to reject it simply because he thought the Faison program would be better for Z.P. But that is not what the hearing officer did. The hearing officer concluded, as a factual matter, that the School Board's IEP was not appropriate for Z.P., but that the Faison program was appropriate. Thus, the hearing officer did not impermissibly impose on the School Board what he believed was a better method for teaching Z.P.

Id. at 307-09.

The Fifth Circuit held likewise in *Hous. Indep. Sch. Dist. v. VP ex rel. Juan P.*, 582 F.3d 576 (5th Cir. 2009). In that case, the Fifth Circuit affirmed the district court's affirmance of a hearing officer's decision that the school district failed to offer a hearing-impaired student a FAPE because the student's IEPs were not specific enough with regard to her auditory-processing or audiological

deficiencies. The student's IEPs lacked strategies to assist with sequencing, gap detection and noise desensitization, strategies that the parents' expert testified the student required. *Id.* at 585. The Fifth Circuit specifically noted that:

> In light of [the expert's] testimony, we find no clear error with the district court's finding that noise desensitization, sequencing training, and gap-detection work were necessary to address V.P.'s specific auditory-processing problems. Further, there was evidence to support that they were not offered merely as a means of maximizing her potential or making her more competitive with the other members of her class. Based on the valid fact-finding concerning what was necessary to address her auditory needs, and applying our de novo review, we accept that her IEP was insufficiently individualized. Id.

District courts are still tasked to determine whether the evidence demonstrated that the educational method chosen by the school district enabled the child in question to learn. *See Rowley*, 458 U.S. at 206-07. By way of example, if a school decides to use the Wilson reading program to instruct its students with learning disabilities and the evidence demonstrates that the child in question can progress academically using Wilson, 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.

III. CONCLUSION

For the reasons stated above and in appellants' brief, COPAA respectfully requests that this Court reverse the Order of the district court.

Date: April 18, 2016

Respectfully submitted,

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Dated: April 18, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on the 18th day of April 2016. I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to:

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