11-1266-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

R.E., Individually, on behalf of J.E., M.E., Individually, on behalf of J.E.,

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

The Council of Parent Attorneys and Advocates (COPAA) is an independent, nonprofit organization of attorneys, advocates, and parents in forty-seven states (including New York, Connecticut, and Vermont) and the District of Columbia who routinely are 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). Individuals with disabilities can be economically contributing members of society if they receive the education and support they need to utilize their strengths to enable them to live and work independently. For that reason, COPAA is committed to ensuring that children with disabilities receive a free appropriate public education (FAPE) in the least restrictive environment (LRE), as required by the Individuals with Disabilities Education Improvement Act (IDEA or Act).[1] COPAA has been *amicus curiae* in United States Supreme Court in *Forest Grove School District v. T.A.*, 129 S.Ct.

[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.

2484, 2492-93 (2009); *Schaffer v. Weast*, 546 U.S. 49 (2005); *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006); *Board of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Winkelman v. Parma City School District*, 550 U.S. 516 (2006), and in numerous cases in the United States Courts of Appeal. All parties to this litigation have consented to COPAA filing this Amicus Brief.

COPAA offers a unique perspective on issues raised by the Opinion and Order of the United States District Court for the Southern District of New York, District Judge Robert W. Sweet (District Court), dated March 11, 2011 (Order), because the Order affects the ability of children with disabilities and their families to receive a FAPE. The Order raises two critical issues. First, whether the appropriateness of a child's written Individual Education Program (IEP) should be judged either by the actual contents of the written document at the time it is created in a meeting with the parents present, as advocated by COPAA and Plaintiffs-Appellees, or as it is subsequently modified, unilaterally and not in writing, by school staff in testimony at a due process hearing explaining what program the student could have received had the parents enrolled the student in the school district's proposed school placement, as advocated by the Defendant-Appellant, the New York City Department of Education. Second, whether, where the child has behavioral issues that interfere with the child's ability to receive an education, the

district is required to conduct a functional behavioral analysis (FBA) and draft a behavior intervention plan (BIP) in order to meet its responsibility to deliver FAPE, as advocated by COPAA.

These issues are of profound importance to COPAA because they address the development and design of a child's written education program, known as an Individual Education Program or IEP, a document that the United States Supreme Court has deemed to be the "centerpiece of the [Act's] education delivery system for disabled children…." *Honig v. Doe*, 484 U.S. 305, 311 (1988). COPAA respectfully submits this brief in support of the Plaintiffs-Appellees, R.E. and M.E., individually and on behalf of J.E., (the Parents), and urges this Court to affirm the Order of the District Court and adopt its reasoning, which is consistent with the Act: that the adequacy of a disabled student's IEP is determined by the contents of the document at the time it is created.

II. SUMMARY OF ARGUMENT

The crux of the School District's position on appeal is best summarized in its own words: "The very nature of the forms used to create the IEP, FBA, and BIP make it apparent that they are summary documents not intended to include a detailed description of the educational services a school district intends to provide." (App. Br. at 23). This statement is plainly inconsistent with the Act. The Act makes it clear that the IEP is a "written statement" of, *inter alia*, the

child's academic levels, goals for the school year, and the "special education and related services and supplementary aids and services… to be provided to the child…." 20 U.S.C. § 1414(d)(1)(A)(i) (emphasis added). This language is the basis of the Supreme Court's determination that the IEP is to be a "comprehensive" – not a summary – "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 v. Dep't of Educ.*, 471 U.S. 359, 367 (1985) (emphasis added). It is also why the Supreme Court has held that parents are not required to try out the school district's proposed program. *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. at 2492-93.

Defendant-Appellant New York City Department of Education (the School District) asks this Court to adopt the position that the appropriateness of an IEP is determined not by the contents of the written document proposed and discussed at a meeting at which the parents were present but by the program a student allegedly would have received had the student chosen to attend the school district's proposed school placement without regard to whether the parents were ever notified of such program. This position circumvents the Act's procedural safeguard of prior written notice. *See* 20 U.S.C. § 1415(b). Under the School District's position, parents who find their child's written IEP inadequate to permit their child to progress in school would be required to "try out" the school district's school

placement prior to commencing a legal proceeding, in the hope that the school staff will somehow remedy the IEP's shortfalls. In other words, Parents would be required to place their child in an inappropriate school program for an indeterminate length of time, effectively denying the child an appropriate education for the duration. This position flies in the face of the United States Supreme Court's holding that parents ***are not*** required to try out the school district's proposed program. *See Forest Grove*, 129 S.Ct. at 2492-93. Adoption of the School District's position would also eviscerate one of the critical procedural safeguards in the Act: the statutory notice provision requiring that parents receive notice of and have the right to participate in the development of the specialized program recommended to educate their disabled child. If after receiving notice and attempt to improve the plan the parents remain dissatisfied, they may seek relief. *See* 20 U.S.C. § 1415(b).

The District Court recognized correctly that the Act does not require parents to try out a defectively-designed proposed program, that the IEP is the only information that parents can rely upon in determining whether the program proposed by the school district is appropriate, and that the "SRO's reliance upon the teacher's testimony to remedy the deficits found by the IHO in the IEP was unwarranted." (SPA28-30.) For the reasons set forth herein, this Circuit should affirm the District Court's Order in full.

III. ARGUMENT

A. Standard of Review

This Circuit reviews *de novo* district court decisions in IDEA cases. *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir. 2007). It may only overturn a district court's findings of fact if they are clearly erroneous. *Davis v. N.Y.C. Hous. Auth.*, 278 F.3d 64, 78 (2d Cir. 2002). A 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.

B. The IEP Is the Centerpiece of the Act

1. The IEP is the Act's "Education Delivery System" Providing Notice to Parents of the Program Recommended for Their Child.

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); *see Burlington*, 471 U.S. at 367. 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).

A FAPE is defined in the Act as, *inter alia*: "special education and related services that… are provided in conformity with the [IEP]...." 20 U.S.C. § 1401(9). Thus, a FAPE is provided to a student with disabilities through the development of

an IEP, which is defined as a "written statement for each child with a disability," 20 U.S.C. § 1401(14), that must include, *inter alia*:

- "a statement of the child's present levels of academic achievement and functional performance";
- "a statement of measurable annual goals… designed to … meet each of the child's other educational needs that result from the child's disability";
- "a description of how the child's progress toward meeting the annual goals described … will be measured," and;
- "***a statement of the special education and related services and supplementary aids and services***, based on peer-reviewed research to the extent practicable, ***to be provided to the child***.…"

20 U.S.C. § 1414(d)(1)(A)(i) (emphasis added).

In summary, the IEP 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." *Burlington*, 471 U.S. at 367 (emphasis added). Indeed, the Supreme Court has deemed the IEP to be the "centerpiece of the [Act's] education delivery system for disabled children…." *Honig*, 484 U.S. at 311.[2] The services set forth in the IEP must be in effect and implemented at the beginning of each school year. *See* 20 U.S.C. § 1414(d)(2)(A); *Gagliardo*, 489 F.3d at 107.

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

2. A FAPE Is Provided If the School District Complies With the Procedural and Substantive Requirements of the Act.

The Act provides that "procedures [must] be followed in formulating personalized educational programs [i.e. IEPs] for handicapped children." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 193-94, 205-06 (1982); *see* 20 U.S.C. § 1415. One such procedure is that a school district provide "[w]ritten prior notice to the parents of the child… whenever the local educational agency… proposes to initiate or change… the educational placement of the child, or the provision of a free appropriate public education to the child," 20 U.S.C. § 1415(b)(3) (emphasis added), including a "description of the action proposed or refused by the agency…." *Id.*, § 1415(c)(1)(A). The Act also requires that an IEP meet certain substantive requirements, *Rowley*, 458 U.S. at 193-94, 205-06, such as "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must… comport with the child's IEP." *Id.* at 203 (emphasis added); *see* 20 U.S.C. § 1414(d)(1)(A). To meet the substantive requirements of the Act and provide a student with a FAPE, the team must develop an IEP reasonably calculated to enable the child to receive educational benefits, i.e. provide significant learning and confer a meaningful benefit, gauged to the student's potential. *See Rowley*, 458 U.S. at 187-88, 203; *Mrs. B. ex rel. M.M. 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). Parents are entitled to the "opportunity… to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a [FAPE] to such child…" 20 U.S.C. § 1415(b)(1).

C. District Courts Are Required to Satisfy Themselves that the Evidence In the Record Supports the Administrative Decisions.

Parents who 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 children are entitled to an impartial due process hearing. 20 U.S.C. § 1415(f)(1)(A). 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 is 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. *Id.*, § 4404(1). Any party aggrieved with the decision of the IHO may proceed to the second tier, an appeal to the SRO. *Id.*, § 4404(2). Either party aggrieved by the decision of the final administrative hearing officer may seek review in federal court. *See* 20 U.S.C. § 1415(i)(2).

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[.]" *Rowley*, 458 U.S. at 207. *Rowley* established a two-step inquiry for federal courts for the review of administrative decisions: "First, has the State complied with the procedures set forth in the Act? And second, is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* at 206-207 (footnotes omitted). Consistent with Congressional mandate, "[t]his inquiry will require a court … to determine that the State has created an IEP for the child in question which conforms with" the Act's procedural and substantive requirements and "make 'independent decision[s] based on a preponderance of the evidence. . . .'" *Id.* at 206 n.27, 205 (emphasis added).

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. ex rel. Travis D. v. N.Y.C. Dep't of Educ.*, 550 F. Supp. 2d 420, 432 (S.D.N.Y. 2008) (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…"). Moreover, district courts do not give due weight to administrative decisions concerning legal conclusions or mixed questions of law and fact, such as whether the school district has provided a child a FAPE through an IEP. *See Muller v. Comm. on Special Educ. of E. Islip Union Free Sch. Dist.*, 145 F.3d 95,

102 (2d Cir. 1998); *K.L.A. v. Windham S.E. Supervisory Union*, 371 Fed.Appx. 151, 153 (2d Cir. 2010). If a court determines that the school district has complied with the Act, determinations as to educational methodology are left to the school officials. *Rowley*, 458 U.S. at 208. In a two-tiered system, where the SRO's decision is not "thorough and careful," District Courts in New York have reversed the SRO. *See E.S. v. Katonah-Lewisboro Sch. Dist.*, 742 F.Supp.2d 417, 443 (S.D.N.Y. 2010); *M.H. v. N.Y.C. Dep't of Educ.*, 712 F.Supp.2d 125, 154-55 (S.D.N.Y. 2010).

D. This Court Should Affirm the Decision of the District Court that the School District Failed to Offer J.E. a FAPE.

The School District urges that this Court find the sufficiency of the IEP should be determined not by what is set forth in the IEP, but rather should be judged by the services the School District alleged – months after the creation of the IEP and the commencement of the school year – it could have provided to the student if the parents had enrolled the student in the proposed school placement. The Act and the case law reject this position and, instead, support the proposition that determining whether the School District has provided a FAPE must be made based on whether the services offered in the written IEP are appropriate for the unique needs of the child and will confer a meaningful educational benefit.

1. The IEP is the Legally Enforceable Educational Program for the Child.

The Supreme Court has held that parents are not required to try out the school district's proposed program. *Cf. Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. at 2492-93 (holding that private services merited reimbursement if the public institution did not provide a FAPE, even if the student had never received special education services at the public institution); *see N.S. v. D.C.*, 709 F.Supp.2d 57, 72 (D.D.C. 2010) ("parents are not required to wait and see a proposed IEP in action before concluding that it is inadequate and choosing to enroll their child in an appropriate private school"). "Under the [Act]… 'in determining whether an IEP [is] appropriate, the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined.'" *Dumont Bd. of Educ. v. J.T.*, Civil Action No. 09-5048, 2010 WL 1875584 at *7 (D.N.J. May 10, 2010) (quoting *Lascari v. Bd. of Educ.*, 560 A.2d 1180, 1189 (N.J. 1989)).

Numerous Circuit courts have found it appropriate to limit the review of whether a student has been provided a FAPE to what is offered in the IEP, an approach deemed the "four corners" rule. *See D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564-565 (3d Cir. 2010) ("a court should determine the appropriateness of an IEP as of the time it was made"); *County Sch. Bd. of Henrico v. Z.P.*, 399 F.3d 298, 306 n.5 (4th Cir. 2005) ("The School District complains that the hearing officer ignored the fact that an aide was hired for [the student] after the IEP was

written. We believe that the hearing officer properly focused on what was actually contained in the written IEP when determining the appropriateness of that IEP."); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001) ("The district court erred in relying on the [hearing officer's] finding that [the school district] had the capacity to offer [the child] an appropriate program. The district court should have limited its assessment to the terms of the draft IEP document itself. Although there was evidence in the record indicating what could have been provided at [the proposed school] only those services identified or described in the draft IEP should have been considered in evaluating the appropriateness of the program offered."); *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1316 (10th Cir. 2008) ("when analyzing the substantive compliance of an IEP, the court should restrict our examination to the written document"). "These Courts have arrived at this approach because the [Act] defines an IEP as 'a written statement for each child with a disability that is developed, reviewed and revised,' and the Supreme Court requires courts to focus on whether 'the [IEP] developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits[.]'" *Millay v. Surry Sch. Dep't*, 707 F.Supp.2d 56, 61 (D.Me. 2010) (internal citations omitted). Therefore, "[t]aken together, the statutory definition of an IEP and the Court's command that the courts must focus the inquiry on the draft IEP as written." *Sytsema*, 538 F.3d at 1315.

The Second Circuit has neither adopted nor rejected the "four corners" rule.[3] This case presents the textbook case as to why the Court should follow its sister Circuits and adopt the "four corners" rule in affirming the decision of the District Court. Here, the only written notice the Parents possessed as to the services the School District offered J.E. was the IEP, which did not mandate that their son be educated in a classroom with the 1:1 student-to-teacher instruction he so desperately needed. The Parents were not provided with any written notice that the teacher at the proposed school would offer their son any additional services that could remedy the failure to the School District to offer 1:1 instruction. The School District made no effort to convene a new IEP Team meeting to propose enhancing the Student's IEP. The District Court correctly held, consistent with the Act, that the retrospective testimony of the teacher could not cure the deficiencies. Indeed, the teacher's testimony about what could have been done to address J.E.'s needs demonstrates that the IEP, on its face, was insufficient because it required augmentation or alteration. *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008) (the purpose of the IEP is to present "a clear record of what placements and educational services were offered").

[3] *See E.M. v. N.Y.C. Dep't of Educ.*, No. 09 Civ. 10623, 2011 WL 1044905, at *9 (S.D.N.Y. March 14, 2011) (Noting, without accepting or rejecting the "four corners" rule that the Second Circuit has not held that the administrative decisions may not consider extrinsic evidence); *M.F. v. Irvington Union Free Sch. Dist.*, 719 F.Supp.2d 302, 310 (S.D.N.Y. 2010) (same).

Under the Act, the Parents were not required to accept an inadequate IEP in the hopes that J.E. might somehow receive the services that he required. *See Forest Grove*, 129 S.Ct. at 2492-93 (holding that parents are not required to try out the school district's proposed program). The Act sets forth that the IEP must include all of the services to be provided to the child and that Parents are entitled to written notice when a school district proposes changes to these services. *See* 20 U.S.C. § 1401(14), 1414(d)(1)(A)(i), 1414(d)(2)(A); 1415(c)(1)(A). These requirements are safeguards that exist so that Parents have a written record of the services offered and can make an informed determination as to whether to accept or challenge them, and so that a reviewing court faced with a substantive challenge to those services has a clear record as to what was offered. *Millay*, 707 F.Supp.2d at 60. "As a practical matter, if there are no repercussions for a school's failure to comply with the notice requirements of [the Act], the requirement itself becomes optional, which it clearly is not, since the statutory notice provision provides a critical procedural safeguard for parents and gives them fair notice of what is at issue at the contested administrative hearing." *Id.* The SRO's decision rendered meaningless the procedural and substantive safeguards of the Act concerning the School District's obligation to provide notice to the Parents. The reviewing District Court properly judged whether J.E. received a FAPE based upon the clear record of what the School District did and did not offer the Parents. (SPA31.)

Even if this Court declines to adopt the four corners rule, it should still affirm the District Court. Courts that have neither adopted nor rejected the four corners rule remain in agreement that a school district must provide written notice – not oral or after-the-fact promises – of the substance of the program it intend to provide. *See C.G.*, 513 F.3d at 285 (the purpose of the IEP is to present "a clear record of what placements and educational services were offered);[4] *E.M. v. N.Y.C. Dep't of Educ.*, 2011 WL 1044905, at *9 (declining to apply the four corners rule because the issue at bar was whether a service recommended in the IEP was appropriate, noting that this was unlike cases that apply the four corners rule that "all involve admonishments that it is error to consider evidence that a school district could have offered additional programs or services that were not mentioned in the IEP") (emphasis added); *M.F.*, 719 F.Supp.2d at 310 (case distinguishable from *Sytsema*, *A.K.*, *Union School District*, and *Knable*, because the recommendation that the student be enrolled in a particular class was memorialized in a written record – not merely an oral offer – and thus was not speculation by the school district as to what "***could*** have [been] provided….") (emphasis added). For

[4] In *C.G.*, the First Circuit noted that it had not yet decided whether or not to adopt the "four corners" rule and that "we have no occasion to consider the advisability of that course today" because in *C.G.* the parents had disrupted the IEP process, rendering the IEP at issue not final and requiring the consideration of extrinsic evidence. 513 F.3d at 285-86. The First Circuit recognized that "even in those jurisdictions that have adopted the four corners rule, the rule would not apply" where the parents prohibit the completion of the IEP. *Id.* at 287. Here, the School District has never alleged that the parents in any way prohibited the completion of the IEP.

this reason, the District of Maine, recognizing that it could consider extrinsic evidence, found that whether the school district in its case had provided a FAPE should be judged on what was offered in the IEP and not based upon what the school district later claimed it would have offered. *Millay*, 707 F.Supp.2d at 61. Utilizing the same reasoning, this Court may affirm the District Court because there is no dispute that the Parents did not have written notice (or even oral notice) as to what the School District's proposed placement would have done to remedy the defects in the IEP.

2. Staffing Ratio is Not Education Methodology

The School District takes the position that the District Court erred by failing to "defer" to the SRO's determination that a 6:1:1 classroom ratio was an appropriate setting for J.E. based upon the testimony of the teacher in J.E.'s proposed class. As set forth in section III.C.1, as a matter of law, the SRO erred in basing his decision on the teacher's after-the-fact testimony. Thus, the District Court was not required to give any additional weight to the SRO's reversal of the IHO. *See Muller*, 145 F.3d at 102.

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. *See* 20 U.S.C. § 1415(i)(2)(C); *Ashland Sch. Dist. v. R.J.*, 588 F.3d 1004, 1009 (9th Cir. 2009); *see also Town of Burlington v. Dep't*

of Educ. of Mass., 736 F.2d 773, 791-92 (1st Cir. 1984), *aff'd sub nom.*, 471 U.S. 359 (1985); section III.B.2 *supra*. Here, the District Court correctly reviewed the evidence presented at the impartial hearing and concluded that there was no evidence to support the SRO's finding and, in fact, the evidence presented overwhelming supported the Parents' position that J.E. would not progress, even minimally, in a 6:1:1. (SPA 26-31.)

The School District suggests, without relevant citation, that whether the 6:1:1 classroom ratio was appropriate is the type of issue about which the district court is required to defer to the SRO. Under *Rowley*, the only issue to which the district court is required to give the SRO's decision any additional weight is a determination as to educational methodology. *Rowley*, 458 U.S. at 208. No authority exists and no logic argues that a classroom ratio is "educational methodology." Educational methodology refers to the methods chosen by the school district or school to instruct the student. *Id.* at 184-85, 207-08. Having six children in a classroom with one teacher and one paraprofessional is not a "method" used to instruct children with disabilities, it is the staffing ratio of the classroom, i.e. the fundamental determination of the level of support and adult assistance required by the particular student based on his individual special needs. The staffing ratio is a fundamental determinant of whether the student will receive a FAPE. Thus, the SRO's decision that a 6:1:1 classroom was appropriate is

exactly the sort of element of an appropriate education that the court needs to consider, without providing any extra weight to the determination of the SRO.[5]

Of course, even were staffing ratio characterized as "educational methodology," 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; *see* section III.B.2 *supra*. 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. Thus, even if one assumes incorrectly that a classroom staffing ratio is an educational methodology, the District Court utilized the correct standard of review. It evaluated whether the evidence presented at the hearing supported the SRO's decision that a 6:1:1 classroom ratio would allow J.E. to progress educationally, i.e.

[5] The cases cited by the School District do not conclude that classroom composition constitutes an educational methodology, only that, upon review of the evidence presented in the particular case, the evidence supported the finding of the SRO. *See T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 419; *E.H. v. Bd. of Educ.*, 361 Fed. Appx. 156, 159 (2d Cir. 2009); *Karl v. Bd. of Educ. of Genesco Cent. Sch. Dist.*, 736 F.2d 873, 877 (2d Cir. 1984).

provided a FAPE, and found that the evidence did not support that conclusion. *Rowley*, 458 U.S. at 206-07.

E. When Warranted, a FBA Is a Critical Pre-Requisite to the Development of the IEP, and When the School District Determines that a FBA Is Warranted, It Is Incumbent Upon the School District to Properly Perform the FBA.

The School District concedes that it failed to perform a FBA in compliance with the requirements of the Act and state regulations. The School District takes the position that the District Court placed too much weight on this failure and not enough weight on the testimony of the teacher as to how he could address J.E.'s behavioral problems. The issue here is whether the School District's failure to perform a FBA when the Student's behavior interfered with his right to gain educational benefit constituted a deprivation of FAPE. The District Court correctly agreed with the IHO that in this case, it had.

1. Performing and Writing a FBA Is Critical in Assisting Parents and School Officials Select Strategies to Address a Student's Interfering Behavioral Issues.

The Act mandates the use of positive behavioral supports where a child's behavior impedes the child's learning. 20 U.S.C. § 1414(d)(3)(B)(i). The development of behavioral intervention services stem from a functional behavioral assessment (FBA). 20 U.S.C. § 1415(k)(1)(D)(ii). Implementing the Act, New York has promulgated a regulation stating a FBA is the "process of determining why the student engages in behaviors that impede learning and how the student's

behavior relates to the environment." N.Y. Comp. Codes R. & Regs. tit. 8 § 200.1(r). In order to properly determine why a student engages in certain behaviors, the FBA is required to include "the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it." *Id.*

A school district must conduct a FBA "for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities." *Id.* § 200.4(b)(1)(v); *see also* 20 U.S.C. § 1414(d)(3)(B)(i). Based upon the results of the FBA, a school district creates a BIP, which is a plan designed to manage the interfering behaviors. *See Danielle G. v. N.Y.C. Dep't of Educ.*, No. 06-CV-2152, 2008 WL 3286579, at *10 (E.D.N.Y. Aug. 7, 2008); N.Y. Comp. Codes R. & Regs. tit. 8 § 200.22(b). The BIP must include a "baseline measure of the problem behavior; ... intervention strategies; ... [and] a schedule to measure the effectiveness of the interventions ...." *Id.* § 200.22(b)(4).

The FBA is a unique evaluation because it looks beyond the student's behaviors and focuses on identifying significant, student-specific social, affective,

cognitive, and/or environmental factors associated with the occurrence and non-occurrence of the specific behaviors. *Id.* § 200.1(r). The FBA presents a broad perspective and better understanding of the function or purpose behind student behavior, i.e. why a student engages in the behavior. The BIP develops strategies to address these behaviors based upon the FBAs analysis as to why the student exhibits the behaviors. *See Danielle G.*, 2008 WL 3286579, at *10; N.Y. Comp. Codes R. & Regs. tit. 8 § 200.22(b)). Thus, the creation of the BIP is dependent upon the FBA, much as the creation of the IEP is dependent upon evaluations and observations.

Accordingly, the FBA and BIP assist parents and school officials at IEP meetings to select interventions and strategies that directly address the problem behavior. *See* N.Y. Comp. Codes R. & Regs. tit. 8 § 200.4(d)(3)(i); *Harris v. D.C.*, 561 F.Supp.2d 63, 68 (D.D.C. 2008). Because the FBA provides information "central to formulating an IEP tailored to the needs of individual disabled children… it plays an integral role in the development of an IEP" and "the quality of a disabled child's education." *Harris*, 561 F.Supp.2d at 68. The BIP and FBA must be incorporated into the IEP, which in turn must be provided to the child's parents in advance of the commencement of the school year. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV); N.Y. Comp. Codes R. & Regs. tit. 8 § 200.4(d)(3)(i). An IEP's failure to provide an FBA and BIP to address behaviors impeding learning

may itself constitute the denial of a FAPE. *See Danielle G.*, 2008 WL 3286579, at *10-11, *15 (reversing findings of IHO and SRO and holding that IEP's failure to include an FBA and BIP, among other deficiencies, deprived student of a FAPE); *Lauren P. ex rel. David & AnneMarie P. v. Wissahickon Sch. Dist.*, Civil Action No. 05-5196, 2007 WL 1810671, at *9 (E.D.Pa. June 20, 2007) (ordering reimbursement of tuition where failure to create a BIP constituted denial of a FAPE), *aff'd in part, rev'd in part on other grounds*, 310 Fed.Appx. 552 (3d Cir. Feb. 12, 2009).[6] This principle is supported by the official commentary to the federal regulations, which expressly states that a "failure to ... consider and address [behaviors impeding learning] in developing and implementing the child's IEP would constitute a denial of [a] FAPE to the child." 34 C.F.R. Part 300, Appendix A, Notice of Interpretation, Section IV, Question 38.

[6] The case *R.K. v. New York City Department of Education*, No. 09-CV-4478, 2011 WL 1131492 (E.D.N.Y. Jan. 21, 2011), *report and recommendation adopted*, 2011 WL 1131522 (E.D.N.Y. March 28, 2011), addressed the same issues raised here: whether (1) describing problematic behavior and listing several goals for improvement in an IEP are adequate substitutes for the FBA and BIP, and; (2) the Court should overlook deficiencies in the IEP based on subsequent testimony that the recommended placement might have later sought to cure those deficiencies. In that case, the court correctly answered no to both issues. *Id.*, at *17-*20. The School District appealed *R.K.* to this Court and oral argument is scheduled to be heard on *R.K.* in tandem with the present case, as well as with *EZ-L.* v. *New York City Dep't of Educ.*, Civ. No. 11-655. *See* Court of Appeals Docket #: 11-1474, Doc. # 36. The Magistrate Judge's lengthy 66-page decision, adopted in its entirety by the District Court Judge, is well reasoned on this issue and should guide this Court's analysis.

2. The District Court Correctly Concluded that there Was Insufficient Evidence that the Behavioral Strategies in the IEP Would Address J.E.'s Needs in the Absence of a Properly Created FBA and BIP.

The School District does not dispute that J.E. exhibited behaviors that obstructed his learning, thus requiring a FBA and BIP under the Act and New York regulations. The School District does not dispute that the FBA was not conducted or that the BIP could not be created without a proper FBA. Instead, the School District asserts that its failure to comply with the FBA requirement of federal and state law should be overlooked because J.E.'s IEP, created without the FBA and BIP, properly addressed J.E.'s behavioral issues. The SRO agreed with the School District's position based upon testimony from the teacher at the school placement recommended by the School District about how he would have been able to address J.E.'s behaviors. (SPA28.) As set forth in section III.C.2, the District Court correctly held that whether the School District provided a FAPE should be judged on the program offer made to the Parents and not based upon after-the-fact testimony of the School District's teacher as to what the teacher allegedly would have done to address J.E.'s behavioral needs had J.E. attended his class. *See also Harris*, 561 F.Supp.2d at 68 (The FBA and BIP cannot play their "integral role" in the development of an IEP adequately "tailored" to a child's individual needs where those tools would not have been crafted until months after the creation of

the IEP).[7] This after-the-fact testimony could not remedy the defects of the improperly created FBA and the resulting "useless" BIP. (SPA16-17.) Thus, the District Court correctly found that the evidence presented at the impartial hearing did not demonstrate that the IEP would appropriately address J.E.'s behavioral needs.

The instant case is distinguishable from *T.Y.* and *A.C.*, in which the Second Circuit found that a violation of the New York regulation was not, *per se*, a denial of FAPE. This court held that, where the IEP appropriately addressed the student's academically obstructing behaviors, FAPE was provided notwithstanding the violation of the regulation. *See T.Y.*, 584 F.3d at 419; *A.C. ex rel. M.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist.*, 553 F.3d 165, 172-73 (2d Cir. 2009). COPAA recognizes that mere violation of N.Y. Comp. Codes R. & Regs. tit. 8 § 200.1(r) does not *per se* constitute a denial of FAPE. An appropriately crafted IEP that addresses the student's academically obstructing behaviors can still provide FAPE. *See id.* While the failure to properly conduct an FBA may not constitute a deprivation of FAPE *per se*, the court should establish the rebuttable presumption that an FBA is needed to develop an acceptable BIP for the IEP for a disabled child who exhibits behaviors that obstruct the learning process. *See* N.Y. Comp. Codes

[7] Contrary to the School District's position, *T.Y.* does not support the proposition that the School District may correct deficiencies in the IEP at the administrative hearing. (App. Br. at 23-24.) In that case, the Court merely held that the deficiencies in the IEP did not rise to the level of a deprivation of FAPE in the first instance, not that a school district should be excused from providing a student of a FAPE until it decides or is told to remedy that deprivation

R. & Regs. tit. 8 § 200.4(d)(3)(i); *Harris v. DC*, 561 F. Supp. 2d 68; *Danielle G.*, 2008 WL 3286579, at *10-11, *15; *Lauren P.*, 2007 WL 1810671, at *9. Accordingly, when the School District fails to create an FBA pursuant to the regulation, the burden should be on the school district to explain how it can develop appropriate behavioral strategies that have been incorporated into the IEP. Without the proffer of a credible alternative strategy for developing positive behavioral supports, it is reasonable to conclude that the failure to properly perform the FBA resulted in a denial of FAPE for the student. Without the FBA to understand the "why" behind the behaviors, the IEP team needs to explain how it could properly consider how to address the behaviors impeding learning. Put another way, when the School District fails to follow the procedural requirements of the Act and New York regulations, and that failure affects the substance of the IEP, that failure constitutes a deprivation of FAPE. *See id.*; 34 C.F.R. Part 300, Appendix A, Notice of Interpretation, Section IV, Question 38.

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: October 19, 2011
New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Brief was served via ECF this 19th day of October, 2011, upon opposing counsel.

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