25-2727

United States Court of Appeals

for the

Second Circuit

A. H., individually and on behalf of N.B. a child with a disability,
V. B., individually and on behalf of N.B. a child with a disability,

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

BRIEF FOR *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REQUEST FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of this entity:

Council of Parent Attorneys and Advocates

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

Respectfully submitted,

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INTERESTS OF THE AMICUS[1]

Council of Parent Attorneys and Advocates (COPAA) is a national not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA does not undertake individual representation but provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) that children are entitled to under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA or Act).[2] COPAA also supports its members in their efforts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*. (ADA).

COPAA brings the unique perspective of parents, advocates, and attorneys for children with disabilities. COPAA has filed as *amicus curiae* in the United States

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[1] Pursuant to Fed. R. App. P. 29(5), 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).

[2] The statute was originally named the Education of the Handicapped Act or EHA; it was renamed IDEA in 1990. *See Fry v. Napoleon Cmty. Schs*., 580 U.S. 154, 160 n.1 (2017). For the sake of simplicity, we refer only to IDEA in this brief. *Id.*

Supreme Court, including in *A.J.T. v. Osseo Area Schs.*, 605 U.S. 335 (2025); *Perez v. Sturgis Public Schs.,* 598 U.S. 142 (2023); *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386 (2017); *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007), and in the twelve United States Courts of Appeal that routinely hear special education appeals.

Amicus' interest in this case stems from its commitment to ensuring that students with disabilities have access to a free appropriate public education in all areas of disability with programming reasonably calculated to result in academic and functional progress. 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 Individualized Education Program (IEP). These issues are of profound importance to COPAA because they address the development and design of a child's 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).

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, N.B., required a specific methodology in order to make meaningful progress commensurate with his abilities, namely the provision of Applied Behavior Analysis, (ABA). The administrative decisions, finding that N.B. did not require one-on-one 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)); *Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 118 (2d Cir. 2008). Not only was one-on-one ABA recommended by all the evaluators who worked with N.B., but also the New York City Department of Education (DOE) 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 90 (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 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 IDEA based upon the evidence in the record. The district court in this case failed to do so. The court's decision must be reversed.

ARGUMENT

I. 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 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 qualifying 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. This comprehensive plan must be drafted in compliance with a detailed set of procedures that "emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. . . The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Endrew F.*580 U.S. at 391 (quoting *Board of Educ. of Henrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982)). 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 105,107 (2d Cir. 2007).

A. 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 has a two-tiered system of administrative review. The first tier provides parents dissatisfied with a proposed IEP with a review 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.

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 with 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).

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). 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 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 that 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.

B. An Appropriate Evaluation Provides the Foundation for Individualized Programming under 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;[3] *see also Rowley*, at 176, 193-94, 205-06 (IDEA's procedures designed to result in personalized educational

[3] 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.*, 459 F.3d 356, 363 (2d Cir. 2006); N.Y. Comp. Codes R. & Regs. tit. 8 § 200.1 *et seq.*

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 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 v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 131 (2d Cir. 1998). 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).

II. BECAUSE THE IEP IS IDEA'S "EDUCATION DELIVERY SYSTEM" PROVIDING NOTICE TO PARENTS OF THE PROGRAM AND SCHOOL RECOMMENDED FOR THEIR CHILD, IT MUST INCLUDE THE EDUCATIONAL SERVICES NECESSARY FOR THE CHILD TO MAKE APPROPRIATE EDUCATIONAL PROGRESS.

The express purpose of 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 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 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.

The school district must provide the services and supports listed on an IEP. The school can do more, but parents can only enforce their child's right to services and supports specifically listed on the IEP.

A. In R.E. this Court has already held that an IEP must be evaluated based on the services and supports provided in the IEP and gaps cannot be filed by retrospective evidence.

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 DOE's choice (or lack of choice) of educational methodology in situations where 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.*

This Court held that retrospective testimony could not be considered to determine whether the IEP Team acted properly and excluded the testimony of

the teacher upon which the SRO relied for being retrospective. The Court then found that the SRO'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] that the IEP was not reasonably calculated to create educational benefit for R.K." *Id.* at 194.

B. Other Circuit Courts Have Held That IEPs Must Include Educational Services Required for a Student to Make Educational Progress.

The First, Third, Fourth, and Fifth Circuits have similarly held that when a student requires a specific methodology to make educational progress, an IEP that does not include that methodology is not reasonably calculated to provide a FAPE. Thus, the Third Circuit held that the IEP needed to include the necessary methodology. 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.*

In *Falmouth School Department v. Doe*, 44 F.4th 23 (1st Cir. 2022), the First Circuit explained that, although school districts have discretion to choose among competing methodologies, "courts are entrusted with ascertaining adequacy of an IEP's educational components, and 'adequacy' includes, as the Supreme Court made clear in *Endrew F.*, whether the instruction offered is" specially designed to meet a child's unique needs through an IEP. *Id.* at 38 (cleaned up). Thus, the hearing officer and district court correctly concluded that the school district did not offer a FAPE because, given the acuity of the student's specific orthographic processing deficit, the methodology sought by

the parents would be "specially designed" to address it, while the school district's preferred program would not be. *Id.* at 36-37.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 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 *Houston Independent School District v. V.P. 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. 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.

Id. at 585.

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.

C. Because N.B. Required ABA Services, an IEP Without Those Services Was Inadequate.

The case before this Court is quite similar to *R.K.* Just like in *R.K.*, the reports considered by the IEP team in question all reached a consensus that N.B..

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." The Supreme Court in *Endrew F.* held that school authorities should "be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress in light of his circumstances." 580 U.S. at 404.

Here, the expert evidence adduced at the hearing established that N.B. required ABA services. The DOE did not disagree that he required ABA services. Instead, the District Court found that the DOE's witness "testified that he had never written an ABA-recommended service primarily pushing ABA and that the IEP does not need to expressly state ABA as a recommendation." SPA 9.

There is no dispute that a school district may provide ABA services to students when an IEP does not explicitly include ABA. However, in such circumstances, the ABA services are entirely discretionary and are not enforceable by parents. To be concrete, if the ABA services are not provided because the staff person entrusted with providing that service is on extended leave, the student would be entitled to compensatory education if the services is listed in the IEP but would have no recourse if it were not listed in the IEP.

Obviously, school districts prefer to have discretion to provide services

beyond the minimum mandated services in the IEP. That discretion means that they are not accountable if they do not provide the services.

That the DOE could have voluntarily provided ABA outside of the IEP's requirements is irrelevant to the question of whether the IEP provides FAPE. The IEP's minimum services must include those that are reasonably calculated to enable the student to make educational progress. There is substantial evidence in the record that the student in this case required ABA services to make educational progress. Therefore, an IEP that omitted those services was inadequate.

CONCLUSION

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

Dated February 13, 2026

Respectfully submitted,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point typeface.

s/Selene Almazan-Altobelli
Selene Almazan-Altobelli

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 13th day of February 2026. I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Selene Almazan-Altobelli
Selene Almazan-Altobelli