In The

United States Court of Appeals

for the

Third Circuit

Case Nos. 16-3021, 3022, 3034, 3035

THE SCHOOL DISTRICT OF PHILADELPHIA,
Appellant,

v.

ROBERT KIRSCH; KAREN MISHER,
PARENTS OF A.K., A MINOR

Appeal from an Order entered in the United States District Court for the Eastern District of Pennsylvania, No. 2-14-cv-04910

BRIEF FOR AMICUS CURIAE, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
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Nos. 16-3021, 3022, 3034, 3035 Caption: *The School District of Philadelphia v. Robert Kirsch and Karen Mishner, Parents of a Minor, A.K. and N.K.*
Pursuant to FRAP 26.1
Council of Parent Attorneys and Advocates who is Amicus Curiae, makes the following disclosure:

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

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/s/ Michael D. Raffaele
Michael D. Raffaele

Attorney for Amicus Curiae, Council of Parent Attorneys and Advocates

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Council of Parent Attorneys and Advocates (COPAA) is an independent, nonprofit organization of attorneys, advocates, parents, and students in forty-three states (including Delaware, New Jersey, Pennsylvania and the Virgin Islands) and the District of Columbia who are routinely involved in special education due process hearings throughout the country. The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. §1400 (c)(1) (2006) . 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 as required by the Individuals with Disabilities Education Improvement Act ("IDEA"). 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 individual consideration of a disabled child's needs, through the development of an Individualized Education Program (IEP).

Appellees and Appellants have both consented to this filing.

COPAA offers a unique perspective on an issue raised by an Opinion and Order of the United States District Court for the Eastern District of Pennsylvania, District Judge Thomas N. O'Neill, Jr., dated June 1, 2016 (Order), because the Order affects all parties to proceedings under the Act. The issue is whether, pursuant to the Act and longstanding precedent, the District Court (1) applied the proper standard of review and deference in the consideration of the Hearing Officer (IHO) and (2) whether the reimbursement remedy ordered by the hearing officer was appropriate under the Act and Supreme Court precedent. COPAA respectfully submits this brief in support of the Defendants-Appellees/Cross Appellants.

This issue is of particular importance because the deference calculus applied by federal courts to administrative decisions and recommendations made by Magistrate Judges in cases brought under the Act has been found to be case dispositive. Moreover, the issue of remedy, particularly in cases that involve either reimbursement for monies paid for educational services or for monies owed and for which parents are contractually obligated to pay is of critical importance to all families in evaluating their options in challenging educational programs offered by

School Districts through the IEP process. As such, COPAA hopes that this Court will endeavor to clarify that, as a matter of law, families who do not engage in any of the conduct prohibited under the act in 20 U.S.C. § 1412(a)(10)(C)(iii) are entitled to seek reimbursement of educationally related costs (already paid for and owed by way of contract) as an equitable remedy for a School District's failure to provide a Free and Appropriate Public Education.

STATEMENT PURSUANT TO FED R. APP. P. 29

COPAA and its counsel independently authored and submitted this Brief. COPAA has no relationships or involvements as identified in Fed. R. App. P. 29.

FACTUAL BACKGROUND

Amicus adopts fully by reference herein the Statement of the Case in the Brief for Appellee at pp. 2-28.

ARGUMENT

I. An Appropriate IEP is Integral to Achievement of IDEA's Significant and Substantive Educational Rights

In considering all challenges to the conduct of School Districts when educating a student with a disability, it is critical to keep in mind Congress' clear intent in developing the educational procedures and mandates included in the IDEA. With this history and agenda in mind, it is entirely clear that Congress *did not* intend for a family's right to reimbursement for educational programming

procured in the absence of any offer from a School District to be reduced because the family did not upend students for whom such a mid-year change in placement would be disastrous.

A. Congress Passed IDEA to Address Well-Documented Discrimination in Public Education for Children with Disabilities

In the 1970s, Congress investigated the quality of educational instruction provided to children with disabilities. These hearings established that public School Districts throughout the county wholly excluded millions of children with a multitude of disabilities, or had placed children with disabilities 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). 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 before Congress 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.

In light of the findings of gross disparities in educational opportunities and benefits afforded to students with disabilities, Congress enacted Public Law 94-142, the Education for All Handicapped Children Act 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) (2006) .

B. IDEA Creates Substantive Standards for an Appropriate Education

In enacting these laws, Congress did not merely require access to education, but went further in also mandating that children with disabilities receive a free appropriate public education. The IDEA’s goal is to provide a "full educational opportunity to all handicapped children." *Id.* § 1412(a)(2)(A). Legislative history repeatedly reflects this goal. The Senate Report says that the Act "guarantee[s] that handicapped children are provided equal educational opportunity." *S.Rep.No.94-168*, at. 9 (1975), reprinted in 1975 U.S.Code Cong. & Admin.News, at 1433. Numerous drafters of the legislation expressed the same aspiration. *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)..

Seven years after passage of the EHA, the Supreme Court held that IDEA requires "personalized instruction . . . with sufficient supportive services to permit the child to benefit from the instruction," provided that the instruction and services (i) are "provided at public expense and under public supervision;" (ii) "meet the State's educational standards;" (iii) "approximate the grade levels used in the State's regular education;" and (iv) "comport with the child's IEP." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 189 (198); *see also* 20 U.S.C. § 1401(8).

While this definition has been called "cryptic," *Rowley*, 458 U.S 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

Importantly, in footnote 23, the Court set 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."
>
> 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 [citations omitted].

C. IDEA Mandates Provision of an IEP to Meet the Statute's Substantive Educational Standards

The IEP is the primary vehicle for ensuring that a child's educational program is individually tailored to meet 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 IEP drives educational placement decisions, which must be based upon the program of special education and related services contained in the child's IEP. 20 U.S.C. §1414(d) ; 34 C.F.R. § 300.552(b) . IDEA mandates review and revision of the student's IEP at least annually. 20 U.S.C. §1414(d)(4)(A)(i).

The failure to make a timely offer of an IEP has a substantive impact on the student if the student's education within the School District "would have been different if school officials had fulfilled their statutory responsibilities on time." *Leggett v. District of Columbia*, 793 F.3d 59, 68 (D.C. Cir. 2015). School Districts must have an IEP in place prior to the start of any given school year. 20 U.S.C. § 1414(d)(2)(A). In this case, the School District never made a final offer of FAPE to A.K. or N.K. *See Appellee's Br*. at 16-18. Given A.K. and N.K.'s well-documented special education needs, the failure to propose an IEP in a timely manner amounted to a substantive deprivation of FAPE, *Leggett*, 793 F.3d at 68 which triggered the family's need to investigate and procure outside educational programming for their children.

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

As detailed above, the express purpose of the Act is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1)(A) (2006); *see Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367 (1985). In exchange for receipt of federal funds, Pennsylvania has agreed, and is required, to guarantee a FAPE to every child with a disability. 20 U.S.C. § 1412(a)(1)(A) (2006). This is accomplished through the development of an IEP, which is a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Burlington*, 471 U.S. at 367. This program must be tailored to meet the students' unique and individual needs, and it must be one from which he can derive meaningful educational benefit. It cannot be a program with low expectations and, instead, must ensure that students are provided with the instruction and support necessary to bring about, to the maximum extent possible, the remediation of the challenges resulting from their disability. 20 U.S.C. § 1400(c)(4) and (5); *see also*, 20 U.S.C. § 1414(d)(1)(A). When a local education agency fails to fulfill its obligation to timely and appropriately plan for a student's placement and services,

and/or (as the case is here) fails to offer any appropriate placement and services, the student may seek administrative review of, and appropriate relief from, such failure by filing a "due process complaint notice." 20 U.S.C. § 1415(b)(7).

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

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

This means that District Courts are tasked to review administrative decisions considering either (or both) whether the School District followed the procedures of the Act in developing the IEP and whether the program proposed by the School District in the IEP is designed to enable the child in question to receive an educational benefit.[1] *Id.* at 187-88, 203. To accomplish this task, a District Court

[1] Procedural requirements are set forth in 20 U.S.C. § 1415 and are "procedures to be followed in formulating personalized educational programs [i.e. IEPs] for handicapped children," id., such as "full participation of concerned parties

needs to determine whether the educational methodology chosen by the School District will enable to the child in question to learn. If the record demonstrates that the educational method chosen by the School District does not meet the child's unique needs, i.e. that the child is not being afforded the opportunity to make meaningful educational progress, a District Court must find that the School District has not provided the child with a FAPE under the IDEA. *Id.* at 206-07. On the other hand, if the record demonstrates that the educational method chosen by the School District does offer the child the opportunity to make meaningful educational progress, then the District Court cannot make its own independent decision about whether the methodology chosen by the School District is better or worse than one chosen by the parents.[2] *Id.* The Defendants-Appellees outline in

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throughout the development of the IEP…." *Id*. at 206 The substantive requirements of the Act are that the IEP must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP." *Id.* at 203 In summary, to meet the substantive requirements of the Act, the IEP developed through the Act's procedures must be reasonably calculated to enable the child to receive educational benefits, i.e. a FAPE. *Id*. at 187-88, 203 If, and only if, the court determines that the school district has complied with the procedural safeguards and substantive requirements of the Act, determinations as to educational methodology are left to the school officials. *Id.* at 208

[2] By way of example, if a high school English class curriculum calls for the reading of Hamlet, a parent cannot argue that the class should read King Lear instead, if both books will provide the child with meaningful educational benefit. Similarly, if a school decides to use the Wilson Language Training (Wilson) for its first grade

their brief the required interventions and methodology required for A.K. and N. K. to receive FAPE. As noted, the specialized instruction required Applied Behavior Analysis (ABA), which the twins received during the 2012-13 school year for 36 hours a week. Defendants-Appellees sought a full day ABA program for the 2013-14 school year for the twins. Without these services the twins would not receive FAPE.

This methodology reasoning was applied in *Rowley*, where Amy Rowley's parents contested the School District's decision that Amy, who was deaf, did not need a sign language interpreter. *Id*. at 184-85. The Supreme Court found that the record demonstrated that Amy was succeeding in school without a sign language interpreter and with the program proposed by the School District, which included a hearing aid, tutoring and speech therapy. *Id.* at 184-85, 209-10. Because the Supreme Court found that Amy was receiving an educational benefit, i.e. FAPE,

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reading program and the Wilson program provides the student with an opportunity to make meaningful educational progress, a parent cannot argue that the school should use Orton-Gillingham instead. On the other hand, if the student, because of the nature of his or her disability, is unable to make progress using Wilson, the parent has every right to assert, and a court has every right to determine, that the use of Wilson does not provide FAPE for the individual child. What is important to note is that, in the first example concerning reading programs, the determination of whether to use Wilson or Orton-Gillingham is a question of methodology, solely within the discretion of the school district. In the second instance, however, the very same question, i.e. whether to use Wilson or Orton-Gillingham, is no longer a question of methodology and is no longer an issue within the exclusive discretion of the school district. Stated otherwise, educational decisions that do not effect whether the child receives FAPE are exclusively within the providence of the local school district and are not reviewable by the courts.

from the School District's chosen methodology, the substantive requirement of the Act had been satisfied and the Supreme Court would not opine on whether a sign language interpreter might help Amy *even more*, leaving that decision to the School District. *Id.* at 209-10.

If, however, parents contend that a School District has failed to comply with procedural safeguards and substantive requirements that result in the denial of a FAPE to their child, they are entitled to an impartial due process hearing. 20 U.S.C. § 1415(i)(2). Parents of children with disabilities are authorized by statute to file complaints concerning the identification, evaluation, placement or provision of a FAPE to their child. 20 U.S.C. § 1415(b)(6). Following the administrative hearing decision issued by an impartial hearing officer, a party aggrieved by the administrative findings may "bring a civil action" in "any State court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A).

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

In reviewing whether a state complied with the procedural and substantive rights provided under the Act, *Rowley* established a two-step inquiry: "First, has the State complied with the procedures set forth in the [Act]? And second, is the individualized education program developed through the [Act's] procedures

reasonably calculated to enable the child to receive educational benefits?" 458 U.S. at 207-208 (footnotes omitted). Consistent with Congressional mandate, *Rowley* confirmed that "[t]his inquiry will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the [Act], but also to determine that the State has created an IEP for the child in question that conforms with" the Act's procedural and substantive requirements. *Id.* at 207, n.27. In conducting that review, the Act requires that federal courts receive and review the records of the administrative proceedings and "make 'independent decision[s] based upon a preponderance of the evidence. . . .'" *Rowley*, 458 U.S. at 206; *see* 20 U.S.C. § 1415(i)(2). In evaluating the administrative records and orders, it is clear that the "[j]udicial review in IDEA cases differs substantively from judicial review in other agency actions, in which the courts are generally confined to the administrative record and are held to a highly deferential standard of review." *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 757 (3d Cir. 1995). Recently, the court of appeals described the standard of review as follows:

> When considering a petition for review challenging a state administrative decision under the IDEA, a District Court applies 'a nontraditional standard of review, sometimes referred to as 'modified de novo' review." *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564 (3d Cir. 2010) (citations omitted). Under this standard, a District Court must give "due weight" to the findings of the state hearing officer. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). "Factual findings from the administrative proceedings are to be considered prima

> facie correct. 'If a reviewing court fails to adhere to them, it is obliged to explain why. The court is not, however, to substitute its own notions of sound educational policy for those of local school authorities.'" *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 270 (3d Cir. 2003) (quoting *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 531 (4th Cir. 2002)). "Within the confines of these standards, a District Court is authorized to make findings based on the preponderance of the evidence and grant the relief it deems appropriate." *D.S.*, 602 F.3d at 564 (citations omitted); *see also Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004) (describing a District Court's burden as "unusual" in that it must make its own findings by a preponderance of the evidence, but nevertheless afford "due weight" to the administrative officer's determinations).

Ridley Sch. Dist. v. M.R., 680 F.3d 260, 268 (3d Cir. 2012); *see also P.V. v. Sch. Dist. of Philadelphia*, 2013 U.S. Dist. LEXIS 21913, *12-*14 (E.D. Pa. Feb. 19, 2013). "[W]here the District Court hears additional evidence it is 'free to accept or reject the agency findings depending on whether those findings are supported by the new, expanded record and whether they are consistent with the requirements of the [IDEA].'" *P.V.*, 2013 U.S. Dist. LEXIS 21913, at *13 (quoting *Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1220 (3d Cir. 1993)).

1. Questions of Law And Mixed Questions of Law and Fact

When considering an IDEA administrative decision courts exercise plenary review of an administrative hearing officer's application of legal standards. *Warren*

G. v. Cumberland County Sch. Dist., 190 F.3d 80, 93 (3d Cir. 1999). Federal courts owe no deference to an administrative officer's conclusions of law. *J.R. v. Mars Area Sch. Dist.*, 318 Fed. App'x 113, 118 (3d Cir. 2009).

2. Questions of Fact

Courts have interpreted this to mean that factual findings of the administrative decisions that are supported by the evidence in the record, and especially credibility determinations of witnesses, are accorded due weight by reviewing courts. *See Cabouli v. Chappaqua Central Sch. Dist.*, 202 F. App'x. 519, 522 (2d Cir. 2006) ("The District Court should have deferred to the state administrators on the issue of credibility…."). Where the factual findings of the administrative decisions are not supported by the record, District Courts are not required to give due weight to those findings. *See Jennifer D. v. N.Y. City Dep't of Educ.*, 550 F. Supp. 2d 420,at 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…") *C.B. v. N.Y. City Dep't of Educ.*, No 02-CV-4620, 2005 WL 1388964, at *13 (E.D.N.Y. June 10, 2005) ("[T]he court may reject factual findings that are not supported by the record or are controverted by the record."); *Warton v. New Fairfield BD. of Educ.*, 217 F.Supp.2d 261, 276 n.3 (D. Conn. 2002) (in a one-tiered system, declined to defer to the IHO in part because the IHO

failed to "specifically address the comparison of educational benefits" between general and special education). *See also Town of Burlington v. Dep't of Educ. for Com. of Mass.*, 736 F.2d 773, 792 (1st Cir. 1984), aff'd sub nom., 471 U.S. 359 (1985) (a court must carefully consider findings and try to respond to a hearing officer's resolution of each material issue. In sum, after consideration, a court is free to accept or reject the factual findings in part or in whole. *Doe v. Anrig*, 692 F.2d 800, 806 (1st Cir. 1982) ("resolution of individualized factual issues . . . falls within the scope of the question which Rowley says is for the court . . . ."), overruled on other grounds by *Doe v. Brookline Sch. Comm*. 722 F.2d 910 (1st Cir. 1983).

That having been said, the party challenging the administrative decision bears the burden of persuasion. *Ridley*, 680 F.3d at 270. However, the burden of persuasion is the burden to convince the factfinder that one's propositions of fact are indeed true. *Id.* at 271 (citing *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 238 (3d Cir. 2007)). Thus, when the Hearing Officer's errors stem "largely from mistakes or omissions regarding the application of law" to facts the party does not dispute, the burden of persuasion is irrelevant. *Id*.

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

At the due process hearing, the Parents alleged that the School District violated the procedural requirements of the IDEA, resulting in a denial of FAPE by, among other things: failing to develop an IEP for N.K. and A.K. prior to the start of the school year.

In determining whether the Hearing Officer erred, the district court accepted the hearing officer's factual and credibility determinations that the parents did not cause the School District's failure to make a timely offer of FAPE. Furthermore, the District Court relied upon findings of fact by the hearing officer and cited to the hearing officer record in determining that the School District failed to offer FAPE to A.K. and N.K. *Op.* at 8. The District Court affirmed the hearing officer's decision that the District did not offer a FAPE from September to December 2013. App. 53a; affirmed the hearing officer's decision that the District offered A.K. and N.K. a FAPE in December 2013. App. 53a; granted judgment in favor of the District on Parents' counterclaims under the ADA and Section 504. App. 54a; ordered reimbursement for tuition and transportation at A Step Up Academy from September to December 2013, because the District failed to provide a FAPE during that period of time. App. 54a; ordered reimbursement, pursuant to 20 U.S.C. § 1415(j), for the "basic" costs of the twins' tuition and transportation at ASUA from December 2013 through the exhaustion of all appeals from the hearing officer's decision. App. 54a; and denied the District's motion to dismiss

Parents' counterclaims for lack of subject matter jurisdiction.

The Act requires that an IEP set forth measurable annual academic and functional goals designed to meet the child's needs and to enable the child to make progress. 20 U.S.C. § 1414(d)(1)(A)(i)(II); see 34 C.F.R. 300.320(a)(2)(i)(A)-(B). Thus, the measurability and appropriateness of the goals and objectives in an IEP are critical to providing a FAPE, as they assist the IEP team and the parent assess whether the child is benefiting from a particular program. 20 U.S.C. § 1414(d)(4). If goals and objectives are not measurable and capable of producing objective data, they cannot be appropriate under the IDEA. Subjective impressions of school staff lack the discipline and rigor necessary to meet the mandate of the statute. If goals and objectives were not required to be measurable and appropriate for the student's unique needs, there would be no purpose in including them on the IEP.

In its Appellant Brief, the School District contends that the District Court erred. The District Court gave due weight to relevant portions of the IHO's decisions that were supported by the preponderance of the evidence. In making the FAPE denial finding, the District Court correctly applied the standard of review for IDEA decisions as promulgated by Congress and the Supreme Court. *See* 20 U.S.C. § 14515(i)(2); *Rowley*, 458 U.S. at 207-208. Indeed, due weight is given when the decision is supported by the facts in the record. *See Jennifer D.*, 550 F. Supp. 2d at 432. Thus, where the factual findings of the administrative decisions

are not supported by the record, District Courts are not required to give due weight to those findings and are "free to determine independently how much weight to give the state hearing officer's determination's." *See Ashland Sch. Dist.*, 588 F.3d at 1009 (9th Cir. 2009); *C.B.*, 2005 WL 1388964, at *13. In making the FAPE denial finding, the District Court correctly applied the standard of review for IDEA decisions as promulgated by Congress and the Supreme Court. *See* 20 U.S.C. § 1415(i)(2); *Rowley*, 458 U.S. at 207-208.

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

Having found that the School District failed to provide a FAPE, the District Court recognized that in order to grant the Parents the relief they sought it was required by law to determine whether that school was appropriate and whether the equities favored the relief sought.

The District Court correctly gave due weight to the IHO's determination that the school district failed to provide FAPE to A.K. and N. K. and ordered tuition reimbursement, although woefully inadequate as an equitable remedy. Indeed, the District Court's Order followed Congress's charge to make an "'independent decision based upon the preponderance of the evidence'" from the records of the proceeding, *Rowley*, 458 U.S. at 206 (quoting S. Rep. No. 94-455, at 5 (1975);

guaranteeing that both the School District and the Parents were able to avail themselves the judicial review guaranteed under the IDEA. 20 U.S.C. § 1415(i)(2).

III. The District Court Incorrectly Reduced Reimbursement In a Manner Not Supported By The Law

Under the IDEA, when a School District has failed to offer a student with a FAPE, courts were granted broad discretion to "grant such relief as [they] determine[d] [wa]s appropriate." *Sch. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 360 (1985) (citing earlier version of the IDEA at 20 U.S.C. § 1415(e)(2)). Since the United States Supreme Court's decision in *Burlington,* such broad discretion included the ability to grant parents reimbursement for the cost of placement or services that they procure for their child in the absence of a FAPE through the School District. *See* 20 U.S.C. § 1412(a)(10)(C); *see Burlington* at 369–71. This right was codified in the 1997 IDEA Amendments. The scope of reimbursement was clarified in 1991 that reimbursement for educational services are not subject to limitations based on the grounds that the programming provided by the family did not meet state certification requirements. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). Under the Act, the only test as to whether or not a private program procured by the family is whether or not the program provided met the child's special needs. *M.S. v. Bd. Of Educ.*, 231 F.3d 96, 104 (2d Cir. 2000).

Instead, along these lines, the only way that reimbursement can be reduced under the Act are when (1) there is a failure to provide adequate notice prior to a child's removal from the School District program in violation of 20 U.S.C. § 1412 (a)(10)(c)(iii)(I); (2) a parent fails to make a child available for an evaluation prior to the removal from the public school in violation of 20 U.S.C. §1414(a)(10)(C)(iii)(II); or (3) the parent acts in an unreasonable manner in violation of 20 U.S.C. § 1414(a)(10)(C)(iii)(III). None of the above scenarios was found to exist in the underlying case. *Sch Dist. of Phila. v. Kirsch*, 2016 WL 7750667, *17-18 (E.D. Penn. November 30, 2015).

Despite this, the Hearing Officer asserted that no tuition reimbursement could be ordered for educational expenses after beyond December 2013 because the District made an appropriate offer of FAPE in the IEP document issued in December 2013. The District Court upheld the administrative decisions' limitation on reimbursement to September through December 2013, though provided the family the sought-after reimbursement remedy via another mechanism. *Id.* at *19.

While practically speaking one may argue that the error is harmless because here the student was awarded reimbursement for all placement costs, *Sch. Dist. of Phila. v. Kirsch*, 2016 WL 3079797 *2 (E.D. Penn. June 1, 2016) (limiting reimbursement to September through December 2013 but awarding reimbursement for placement costs beyond December 2013 as part of a stay put order filed

pursuant to 20 U.S.C. § 1415(j)), the District Court's order creates a chaotic and contradictory approach that could chill families from taking steps to provide appropriate programming to students in the absence of district offers. The District Court's finding ignores the realities that exist when families are forced to identify and procure private programming and placement for students in the absence of appropriate offers from the School District, and should be clarified by this Court.

When School Districts draft IEP offers, they are intended to cover a student's programming for a school year. 20 U.S.C. § 1414(d). Parents who are forced to act in the absence of an appropriate program for a portion (or, as in this case, for the entirety) of the student's school year endeavor to secure educational placements in private schools that can meet a particular student's needs. As was the case in below, these families are required to enter into irrevocable tuition contracts for the school year in which they seek placement and services for. Students are typically unable to secure educational placements on a month-to-month basis because schools must, in order to maintain appropriate educational programming, enter into their own commitments or faculty and other expenditures based on enrollment. As such, to limit reimbursement absent any equitable justification creates a confusing posture. While the order is silent on whether or not the reimbursement is ordered as compensatory education or whether there was an affirmative finding that the AUSA placement constituted a FAPE placement for the

purposes of the students ongoing IEP, in many instances, reimbursement is ordered as a form of compensatory education to which no stay put rights would attach. See 34 C.F.R. 300.8(d); see also *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112,118 (3d Cir. 2014) citing *Susquenita Sch. Dist. v. Raelee S.*, 82 F.3d 78, 83 (3d. Cir. 1996)("When the parents seek a *change* in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay put rule does not immediately come into play."). In such instances where reimbursement is limited to a specific time period, there is no clear law as to what a student's rights to recover for the non-specified period. In effect, this would mean that parents are being penalized and required to fund portions of an appropriate educational placement which they were only forced to obtain because of School District actions. school year, it would seem that families would be left in the bizarre situation of having to enter into a contract for an entire school year, having proven that such a course of action was appropriate, and yet be only eligible to obtain reimbursement for a portion of the amount of the contract they. Such a scenario would seem at odds with the clear conviction that "Congress could not have intended to require parents to either accept an inadequate public-school education" or to "bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act." *Forest Grove Sch. Dist v. T.A.*, 129 S.Ct. 2484, 2491 (2009) citing *Burlington*, 471 U.S. at 370.

Such a holding would conflict with the general remedial purpose underlying the IDEA and 1997 Amendments supporting reimbursement, and would leave parents without an adequate remedy. Instead, keeping in mind the special status that contractual obligations for educational services and placement confers on parents to seek reimbursement remedy, *E.M. v. New York Dep't of Educ.*, 758 F.3d 442, 445 (2d Cir. 2014), it would seem inconsistent to limit reimbursement to the amount allocated through the date of the administrative order, or some other point prior to the end of the educational services contract. The underlying court's dismissal of the parents' arguments that transitioning the student midyear would be harmful, educationally, for them, but that moving them would also not resolve the fact that the family was financially obligated to fund the entire years' worth of tuition per the terms of the enrollment contract was incorrect.

IV. CONCLUSION

For the reasons stated above and in Defendant-Appellees' /Cross Appellants' brief, COPAA respectfully requests that this Court reverse the district court's ruling that Parents are not entitled to reimbursement under 20 U.S.C. § 1415(j) for provision of a 1:1 aide, occupational therapy, and speech/language services; reverse the ruling that the provision of a December 213 IEP justified a reduction in reimbursement; reverse the grant of summary judgment on the 504/ADA claims; and remand for further proceedings consistent with the Court's ruling.

Date: January 4, 2017

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: January 4, 2017

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 5,628 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

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CERTIFICATE OF SERVICE

I certify that on January 4, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF.

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