UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M.S. and L.S., individually and collectively and on behalf of D.S.,	:	
	:	No. 09 Civ. 4454
Plaintiff,	:	
	:	(LAK/JCF)
v.	:	
	:	
NEW YORK CITY DEPARTMENT OF EDUCATION,	:	
	:	
Defendant.	:	

MEMORANDUM OF LAW OF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE MAGISTRATE

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I. INTEREST OF THE AMICUS

The amicus curiae organization, Advocates for Children of New York, Inc. ("AFC"), is a non-profit organization that represents low-income children with disabilities and their parents in defending their federal and state based rights to a free appropriate public education ("FAPE"). AFC offers a perspective on the central issue raised by the Proposed Findings of Fact and Recommendations dated March 12, 2010 ("Recommendation"), Magistrate James C. Francis, IV, which affects all parties to proceedings under the Individuals With Disabilities Education Improvement Act ("IDEA"). Namely, the proper standard of deference that a District Court must give administrative decisions of State Impartial Hearing Officers ("IHO") and the New York State Review Officer ("SRO"). AFC respectfully submits this memorandum of law to describe further this pressing issue that impacts IDEA proceedings in federal courts across the United States.

II. SUMMARY OF ARGUMENT

The Recommendation weighed competing motions for summary judgment by Plaintiffs M.S. and L.S. (the "Parents") and Defendant New York City Department of Education ("DOE"). The Magistrate found that evidence of the DOE's attempts at meeting the IDEA's procedural and substantive requirements were "troubling," "agree[d] with [the Parents] that it is doubtful that [their child's] IEP was sufficiently individualized," and "share[d] their concerns that [their child] would not progress at [recommended school placement]." (Recommendation at 48, 54.) Notwithstanding his concerns, the Magistrate believed himself constrained to find that his recommendation be "hinge[d] upon the degree of deference that must be afforded the determinations of the SRO and the IHO". (*Id.* at 34).

The Magistrate's recommendation is directly contrary to the standard of review in an IDEA case as declared by the Supreme Court in *Board of Education of the Hendrick Hudson*

Central School District v. Rowley, 458 U.S. 176, 205, 102 S.Ct. 3034, 3050, 73 L.Ed.2d 690 (1982). In *Rowley*, the Supreme Court declared that federal courts are to "make 'independent decision[s] based upon a preponderance of the evidence'" in actions brought under the IDEA. *Id.* (quoting S.Conf.Rep. No. 94-455, p. 5 (1975), U.S.Code Cong. & Admin. News 1975, p. 1503). In failing to apply the correct standard of review, the Magistrate recommended, in a manner inconsistent with the law, that this Court deny the Parents' motion for summary judgment and grant the DOE's motion for summary judgment. Thus, this Court should reject the Magistrate's Recommendation, apply the proper standard of review, grant the Parents' Motion for Summary Judgment and deny the DOE's Motion. 28 U.S.C. § 636(b)(1)(B); *see Grissa v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989).

III. ARGUMENT

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

The express purpose of the IDEA is "to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs...." 20 U.S.C. § 1400(d)(1)(A). This is accomplished through the development of an individualized education program ("IEP"), which is a brief "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Town of Burlington v. Dep't of Educ. for Mass.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985). The IDEA sets forth both procedural safeguards and substantive requirements to be applied in the development of an IEP. 20 U.S.C. § 1415. Parents are entitled to an impartial due process hearing when they contend that the school district has failed to comply with the procedural safeguards and substantive

requirements, thereby denying the child of a FAPE. *Id.* Either party aggrieved by the decision in the impartial due process hearing may seek review in federal court. *See* 20 U.S.C. §1415(i)(2).[1]

In *Rowley*, the Supreme Court confirmed that Congress empowered federal courts to determine whether States have complied with the IDEA's procedural safeguards and substantive requirements, including whether the child's "individualized educational program developed through the [IDEA's] procedures [was] reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206-07, 102 S.Ct. at 3051. In reviewing whether the state complied with the procedural and substantive due process provided under the IDEA, the Supreme Court established a two step inquiry: "First, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized education program developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* (footnotes omitted). The Supreme Court in *Rowley* confirms, consistent with Congressional mandate, "[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 [IDEA], but also to determine that the State has created an IEP for the child in question that conforms with the requirements of the section 1401(19)."[2] *Id.*, n. 27 (emphasis added).[3]

To make their determination under the IDEA, federal courts are required to receive and review the records of the proceedings, may hear additional evidence, and then are required to "bas[e] [their] decision on the preponderance of the evidence...." 20 U.S.C. § 1415(i)(2); *see*

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[1] Section 1415(i)(2) states in relevant part that the federal court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." .

[2] At the time of the *Rowley* decision, section 1401(19) of the IDEA set forth the definition and requirements for an IEP. Currently, the relevant section is 1414(1)(A).

[3] Consistent with the legislative history of the IDEA, the Supreme Court held that "Congress expressly rejected provisions that would so severely restrict the role of the reviewing courts" from "review[ing] the substance of the state program." *Id.* at 206 (citing S.Conf.Rep. No. 94-455, p. 5 (1975), U.S.Code Cong. & Admin. News 1975, p. 1503.)

Rowley, 458 U.S. at 206, 102 S.Ct. at 3051. The Second Circuit is consistent with *Rowley*, requiring that district courts make an independent review of the record for both procedural and substantive compliance with the IDEA based upon a preponderance of the evidence. *See M.H. v. Monroe-Woodbury Cent. Sch. Dist.*, 250 Fed. Appx. 428, 430 (2d Cir. 2007) (ruling that "the record does not demonstrate by a preponderance of the evidence that [the school district's] IEP was inadequate to meet [the student's] needs" and "[t]o the extent the district court found a lack of evidentiary support for the SRO and IHO decisions, it failed to consider the full record, mindful that plaintiffs bear the ultimate burden of proof."); *see also Mr. X v. New York City Dep't of Educ.*, 975 F. Supp. 546, 558 (S.D.N.Y. 1997) ("[I]f the conclusions of the hearing and review officers are 'unsupported by the record as a whole and incorrect as a matter of law, they simply [do] not merit deference.'") (quoting *Evans. v.. Bd. of Educ. of Rhinebeck Comm. Sch. Dist.*, 930 F. Supp. 83, 102 (S.D.N.Y. 1996)).[4] Other circuits agree that the district court has the authority to make its own findings of fact based upon the evidence in the record.[5]

Determinations of compliance with "substantive" requirements of the IDEA consist of (1) whether the substantive requirements (for example, whether the IEP is sufficiently individualized to confer an educational benefit), and (2) whether one educational method versus another is the appropriate way to accomplish an IEP's goals and objectives. Although *Rowley* declared preponderance of the evidence to be the correct standard of review for determining procedural and substantive compliance with the IDEA, in weighing the sufficiency of the "educational

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[4] New York's State Education law was revised in late 2007 to place the burden of proof on the school district to show that it had provided a FAPE. *See* N.Y. Educ. Law § 4404(1)(c); (Recommendation at 42.)

5 *See Ashland Sch. Dist. v. R.J.*, 588 F.3d 1004 (9th Cir. 2009) (affirming district court's reversal of administrative decision, which had found in favor of parents' request for tuition payment, and setting forth that although courts must give deference to the state hearing officer's findings "[i]n the end, however, the court is free to determine independently how much weight to give the state hearing officer's determinations."); *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1010 (8th Circuit 2006) (affirming the district court's reversal of administrative decision, which had favored the parents, where ("[t]he district court must independently determine whether the child has received a FAPE, giving 'due weight' to the administrative proceedings.")

method", the district court must give "due weight", not completely defer, to the determinations made in the administrative proceeding. *Rowley*, 458 at 206, 102 S.Ct. at 3051.

In *Rowley*, the Supreme Court held that in giving due weight to the administrative proceeding concerning issues of educational method, the district court is required to search the record to determine whether the school district's choice of educational method is "appropriate." *Id.* at 208. The Second Circuit crystallized the district court's responsibility in reviewing educational method: "[f]or a federal court to conduct an 'independent' review of a challenged IEP without 'impermissibly meddling in state educational methodology' it must examine the record for any 'objective evidence' indicating whether the child is likely to make progress or regress under the proposed plan." *Walczak v. Fla. Union Free Sc. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (reversing the district court where it "did not point to any objective evidence that led it to reject the administrative officers' conclusions that the [IEP] was adequate to provide [the student] with an appropriate education."). Thus, the decision in *Rowley* turned on the appropriate "method" for educating the deaf, not whether other substantive requirements were implicated. *Id.* 458 U.S. at 208, 102 S.Ct. 3051, n. 29. Indeed, in making its ruling, the Supreme Court found persuasive that neither of the appellate court nor the district court determined that the child's IEP "failed to comply with the substantive requirements of the [IDEA]." *Id.* 458 at 209, 102 S.Ct. 3052.[6]

[6] *See Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 113-114 (2d Cir. 2007) (the Second Circuit found that the district court erred in rejecting the IHO's conclusions that the private school placement was not appropriate because the evidence in the record supported the IHO's decision and the district court had "[i]mport[e]d its own view on" what constituted the appropriate educational program) *M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers*, 231 F.3d 96 (2d Cir. 2000) (finding that the district court, after its independent review of the record improperly rejected part of the administrative decision by basing "its findings primarily on non-objective evidence... thus inappropriately substituted its own subjective judgment about what are appropriate measures for educational progress.")

B. The Magistrate Erroneously Deferred To the Findings of the IHO and SRO Concerning Procedural and Substantive Violations

It bears repeating that *Rowley* confirmed that preponderance of the evidence was the Congressionally mandated standard of review in IDEA cases. *Id.* 458 at 205, 102 S.Ct. 3050. ("In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make 'independent decision[s] based on a preponderance of the evidence.'") (quoting S.Conf.Rep.No.94-455, p. 50 (1975), U.S.Code Cong. & Admin.News 1975, p. 1503.) Further, contrary to the Magistrate's assertion, the Second Circuit case *Grim v. Rhinebeck Central School District*, 346 F.3d 377 (2d 2003), did not limit the court's authority to make an independent determination as to whether the DOE failed to show by a preponderance of the evidence that it complied with the IDEA procedures. In *Grim*, the district court had determined that delays in the development and review of the three challenged IEPs violated the procedural requirements of the IDEA. *Grim*, 346 F.3d at 381. The Second Circuit noted that under the relevant law not every procedural violation renders an IEP inadequate and found that the delays in the case did not deprive the student of valid IEPs. *Id.* However, the *Grim* Court did not hold that the district court did not have the authority to make its own determination, based upon the record, as to whether there had been a procedural violation. *Id.* It merely disputed the district court's "holding on the legal effect of the delay...." *Id.* at 382.

The Magistrate erred in determining the standard of review of procedural violations of the IDEA to be limited, and in finding that while the Parents' claims concerning procedural violations of the IDEA were "troubling" and that he shared their "skepticism" concerning the DOE's evidence, he was required to defer to the administrative findings on procedural issues.

(Recommendation at 48, 50.) Under *Rowley*, the DOE in this case was required to show by a preponderance of the evidence that it complied with the procedures under the IDEA. *Rowley*, 458 U.S. at 206-07, 102 S.Ct. at 3051.

The Magistrate made a similar error in his review of substantive issues that were unrelated to "educational method", erroneously finding that he had "little room to analyze substantive deficiencies in the evidence presented by the DOE at the hearing." (Recommendation at 37.) As set forth above, *Rowley* provides to the contrary, that federal courts are "***require[d]***... to satisfy [themselves] that ... the State has created an IEP for the child in question that conforms with the requirements of the [IDEA]." 458 U.S. at 207, 102 S.Ct. at 3051, n. 27; *see M.H. v. Monroe-Woodbury Cent. Sch. Dist.*, 250 Fed. Appx. 428, 430 (2d Cir. 2007).

The Magistrate declared that he "agree[d] with [the Parents] that it is doubtful that [their child's] IEP was sufficiently individualized," and "share[d] their concerns that [their child] would not progress at [the recommended school placement]." (Recommendation at 54.) Whether the IEP was sufficiently individualized and whether the information compiled to create a valid IEP are substantive issues that are unrelated to the method of education. Accordingly, the Magistrate should have conducted a *de novo* review applying the preponderance of the evidence standard and should not have deferred to the findings of the IHO and SRO.

C. District Courts Need Not Give Due Weight to All Issues Arising Under the IDEA

The Magistrate principally relied upon the Second Circuit's decision in *Grim v. Rhinebeck Central School District*, 346 F.3d 377 (2d Cir. 2003) in determining that deference and due weight are to be given to all aspects of the administrative decisions. Indeed, while *Grim* recognizes, on the one hand, that "federal courts reviewing administrative determinations under

the IDEA must base their decisions on 'the preponderance of the evidence'", it swallows that Congressional mandate by requiring "courts reviewing administrative decisions must give 'due weight' to the administrative proceedings." *Id.* at 380-81. *Grim* misstates that standard of review as set forth by the Supreme Court under *Rowley*, as described above.[7] The Magistrate recognized this tension between *Grim* and the IDEA, asserting that "case law appears to indicate that as long as the DOE is able to produce an expert to support its position at a hearing and receives a positive determination by at least one of the administrative officers, the DOE's position is nearly assured victory in the federal courts." (Recommendation at 37.) "I question whether the degree of deference to educational administrators required by [*Grim*] and other Second Circuit cases is consistent with the intent of Congress when it passed the IDEA." (*Id.* at 41.)

Regardless of *Grim's* sweepingly incorrect interpretation of the standard of deference with respect to most issues concerning compliance with substantive requirements, *Grim* applied the "objective evidence" standard in determining that there was sufficient evidence in the administrative record to support the finding by the IHO that the ***educational method*** for educating dyslexic students was appropriate. *Id.* at 382. Unlike in *Grim*, the substantive issues addressed here by the Magistrate were not related to educational methodology, namely: whether the IEP at issue was sufficiently individualized; whether there was sufficient objective evidence in the record that the IEP as designed would confer an educational benefit upon the child; and that the child would benefit from the recommended placement. (Recommendation at 54) ("I agree with the [Parents] that it is doubtful that [the child's] IEP was sufficiently individualized. I further share their concern that [the child] would not progress at P.S. 94.") The Magistrate even

[7] Cases following *Grim* similarly misapply *Rowley*. *See A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist.*, 553 F.3d 165 (2d Cir. 2009) (relying upon *Grim* in finding that deference must be given administrative decisions concerning whether an IEP was substantively sufficient under the IDEA).

recognized that these substantive issues do not address questions of educational methodology, stating that conclusions concerning these substantive issues "do not require 'the specialized knowledge and experience...'" (Recommendation at 55) (quoting *M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers*, 231 F.3d 96 (2d Cir. 2000)). Thus, the Magistrate erred in applying the "due weight" to "objective evidence" deference standard reserved for questions of "educational methodology", and should have applied the preponderance of the evidence standard of review to the substantive issues in this case. The Magistrate's misapplication of *Grim* treads upon the rights of parents afforded to them by the IDEA by requiring nearly unexamined deference to administrative decisions, essentially eviscerating the purpose of a federal court review and rendering the parents' rights a nullity. *See* 20 U.S.C. § 1415(i)(2); *Rowley*, 458 U.S. at 206-07. This Court should reject the Magistrate's Recommendation and make an independent determination based upon the record as to whether the DOE violated the substantive requirements of the IDEA. Upon this review, we respectfully submit that the Court will find that the DOE have violated those requirements.

IV. CONCLUSION

For the reasons set forth above, AFC respectfully requests that the Court reject the Recommendation of the Magistrate, grant summary judgment in favor of the Parents and deny the DOE's motion for summary judgment.

Dated: April 2, 2010
New York, New York

Respectfully submitted,

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