*State of New Jersey*

OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**G.W. ANDK.W. ON BEHALF OF M.W.,**
Petitioners,
v.
**RINGWOOD BORO BOARD OF EDUCATION,**
Respondent.

OAL DKT. NO. EDS 00219-22
AGENCY DKT. NO. 2022-33639

---

**Robert C. Thurston**, Esq., for petitioners (Thurston Law Offices, LLC, attorneys)

**Jessika Kleen**, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: February 14, 2022 Decided: February 24, 2022

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

## STATEMENT OF THE CASE

Petitioners, G.W. and K.W. on behalf of M.W., filed an Amended Due Process Petition on January 25, 2022, with the Office of Administrative Law ("OAL") alleging that the Ringwood Board of Education ("Respondent" or "Board") failed to implement M.W.'s October 4, 2021, Individualized Educational Program ("IEP") and the failure to implement the October 4, 2021 IEP, deprived M.W. of a Free and Appropriate Public Education ("FAPE").

## PROCEDURAL HISTORY

Petitioners filed a request for mediation dated November 4, 2021 under OAL Dkt. No. EDS 00220-22 with the Office of Special Education Policy and Procedure ("OSEP"), under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400 to 1482. This matter was converted to a Due Process Petition. Petitioners field a second Due Process Petition with OSEP dated December 8, 2021, under OAL Dkt. No. EDS 00219-22.

The matters were transmitted to the OAL on January 10, 2021. The undersigned was assigned the matters on January 13, 2022. A Case Management Conference was held on January 21, 2022. It was agreed to by the parties that the only issue to be heard before the undersigned is "whether or not M.W.'s October 4, 2021 IEP is being implemented and if it is not being implemented, is that failure to implement a denial of FAPE." (Emphasis Added). In light if same, Petitioners were given leave to file an Amended Due Process Petition under OAL Dkt. No. 00219-22, alleviating the need for OAL Dkt. No. EDS 00220-22. A Prehearing Order was entered on January 24, 2022, which set forth the above and addressed all pending In Limine Motions. Thereafter, on January 25, 2022, Petitioners filed the Amended Due Process Petition under OAL Dkt. No. EDS 00219-22 and withdrew OAL Dkt. No. EDS 00220-22, without prejudice. Respondent objected to Petitioners' Amended Due Process Petition, alleging it fell outside the scope of the Prehearing Order. Respondent made an Oral Motion to Strike the Amended Pleading on the first day of hearings and same was denied. Hearings were conducted on January 31, 2022, February 3, 2022, and February 7, 2022. Counsel was permitted to file written summations by February 14, 2022, at which time the record was closed. It should be noted that Petitioners moved for a Directed Verdict of Dismissal at the close of Respondent's case, which was denied.

## STATEMENT OF FACTS

The parties to this action stipulated to the following Facts identified below as points 1-17 and same were read into the record:

1. M.W., whose date of birth is xx-xx-xxxx is a child with a disability, primary diagnosis of Static Encephalopathy and other secondary diagnoses, including Attention Deficit Disorder, with Hyperactivity;
2. M.W. is eligible for Special Education and related services under IDEA;
3. G.W. and K.W. are M.W.'s parents and reside with M.W. at _____, Ringwood, Passaic County, New Jersey;
4. RBOE is a public school system in Passaic County, New Jersey, with its principal place of business located at _____ Ringwood, New Jersey 07456;
5. RBOE is a Local Educational Agency ("LEA") as the term is defined by 20 U.S.C. §1401(19) and 34 CFR §300.28;
6. RBOE receives Federal funds under IDEA through a distribution from the New Jersey Department of Education ("NJDOE");
7. RBOE includes public schools covering grades K-8;
8. On or about October 4, 2021, Petitioners and RBOE agreed to an IEP for M.W., identified as the 10/4/21 IEP;
9. Petitioners signed the 10/4/21 IEP;
10. The 10/4/21 IEP was approved and signed by RBOE;
11. The 10/4/21 IEP is the 'Stay Put' IEP;
12. RBOE called an IEP meeting on October 25,2021 at which Petitioners attended in person;
13. The draft proposed IEP was different from the 10/4/21 IEP;
14. M.W.'s 10/4/21 IEP provides that "Student will self-monitor behaviors with chart";
15. M.W.'s 104/21 IEP has communication protocols between RBOE and Petitioners;
16. RBOE uses a "Realtime IEP System" to track current IEPs for students;

17. On November 4, 2021, Petitioners filed a Request for Mediation.[1]

There have been multiple disputes over the past years between the Petitioners and the Board pertaining to M.W.'s eligibility for Special Education and related services under the classification of "Other Health Impaired" and the creation and implementation of M.W.'s IEPs. The current issue in dispute is the Petitioners' position that the Board did not properly implement M.W.'s 10/4/21 IEP and thus, violated that IEP which was stipulated as the 'Stay Put' IEP.

As stated above, the parties agreed that the October 4, 2021 IEP was and remains the operative IEP. The IEP requires M.W. to be educated in a General Education Inclusion Classroom for ELA, Math, Science and Social Studies and M.W, is to be provided with a 1:1 aide in the classroom and on the bus. The IEP also states, "Per parent request, the paraprofessional will only service the student during in-person instruction and decline during virtual instruction." The IEP also provided for other modifications and accommodations. (P-51).

G.W. testified at the hearing before the undersigned that on October 4, 2021, after approximately Eighteen months of negotiations, Petitioners and the Board agreed to an IEP for M.W. as a settlement of a prior 2021 Due Process Petition in exchange for Petitioners withdrawing their Petition.[2] The Petitioners thus signed what is now the agreed upon 10/4/21 'Stay Put' IEP. The Petitioners argue that this IEP, which is dated 10/4/21 was not provided to them until 10/13/21. (P-13). This was confirmed by Janine Gribbin through her testimony. Gribbin is the Director of Special Education for the Ringwood Board of Education and testified on behalf of the Board. However, Gribbin stated that only the Petitioners' signature was necessary for full implementation of the 10/4/21 IEP and a copy signed by the Board was provided on 10/13/21 at the request of

[1] For clarification purposes, the November 4, 2021, Request for Mediation was made under OAL Dkt. No. EDS 00220-22.

[2] Counsel for Petitioners requested that G.W. be admitted as a software and technology expert. It was argued that due to G.W.'s employment history as a data/bata/CTO Scientist, he would have the expertise to testify as to the 'Real Time System' software used by the Board for compilation and posting of the student IEPs, in particular, M.W.s IEPs. This is despite the fact that G.W. does not have work experience using the 'Real Time System' software. This request was denied by the undersigned and G.W. testified as a fact witness only.

the Petitioners. (P-13). Gribbin explained that the Stay Put IEP has been implemented since 10/4/21 through the present day. Gribbin also testified that M.W.'s current average grade in all four classes is an "A".

G.W. testified as to an incident which occurred on or about October 7, 2021, wherein M.W. was pulled out of class for drawing a picture of a pixel gun and sent straight to the school Psychologist. A Psychological Assessment ensued. He alleged that the procedure implemented by the school did not comport with the procedure in the current IEP. M.W. should have been spoken to by one of the in-class teachers/aides to discuss the drawing and give M.W. a 'cooling off period' in order to deescalate the situation. G.W. testified that this caused emotional trauma and embarrassment to M.W. This incident then led to an incident which occurred on October 12, 2021. G.W. stated that the school attended by M.W. contacted the Ringwood Police Department who in turn conducted a welfare check on M.W. for not attending school that day. (P-54). The absence was deemed an unexcused absence. (R-7). According to G.W., the petitioners had contacted the school prior to October 12, 2021 to advise that M.W. would not be attending school on October 12, 2021 because M.W.s private Psychologist thought it would not be in M.W.'s best interest. G.W. believed that this was a retaliation tactic used by the Respondent for all the past disputes between the parties.

One of the arguments raised by the Petitioners was that the Board called an IEP meeting on October 25, 2021, at which the Petitioners attended in person but claim that the draft IEP was not provided to them until November 3, 2021. They further allege that the draft contained unilateral changes that were not discussed with petitioners at the meeting. Thus, they were denied meaningful participation in the creation of the IEP. It should be noted that 10/25/21 IEP was only a "draft" (Emphasis added). Most concerning, according to the testimony presented by the petitioners, G.W. and K.W. was that there was a placement change and a "Teacher Checklist" which was not agreed to by the parties. The Petitioners were against such a list because they allege it is not relevant to M.W.'s education. They claim it is merely used to aggravate the discourse and long history of M.W. being mistreated by his peers and their parents and the Board's attempts to segregate him from his peers. G.W was unable to identify any specific incident where the "Teacher Checklist" was utilized by the Board since the implementation of the 10/4/21

'Stay Put' IEP. Here, G.W. merely stated that on occasion M.W. told him that the teachers were utilizing the "Teacher Checklist" and were asking him to fill out this checklist on how many times he interacted with his peers. It is undisputed that what was being implemented in accordance with 10/4/21 IEP was a self-monitoring behavior chart. This has not been argued by petitioners to be in violation of the 10/4/21 IEP. (R-11). G.W. testified that these charts were helpful but were not being implemented with regularity. G.W. was unable to evidence the irregularity.

Another argument by the Petitioners is that the Board violated the 10/4/21 IEP by allowing M.W.'s 10/4/21 IEP to be posted on the Realtime System portal for anyone to view. One of the provisions agreed to by the parties and included in the 10/4/21 IEP was that M.W.'s IEP was not to be viewable on the Realtime system portal by anyone other than the Case Manager. If a teacher needed to view the IEP in order to comply with the accommodations, modifications, and services they would need to go to the office of the Case Manager and have it pulled up to be viewed. K.W. testified as to the Realtime System Portal and her capability to view one of M.W.'s IEPs through the portal from her personal account. It is not disputed by the parties that the Realtime System, throughout the entire State, crashed and went offline for a few days. The Realtime System was restored on November 1, 2021. (R-3). On November 2, 2021, K.W. alleges that she went into to M.W.'s portal account and was able to view an older draft of an IEP from 2020. K.W. took a picture of her computer screen, depicting what appeared to be an older IEP. (P-64). Other than K.W.'s testimony, there is no way to identify when this photograph was taken, who's computer screen the document was on, or even the date of the IEP which could be viewed. It is apparent that it was not the 10/4/21 IEP, and it is not disputed that it was an older IEP; not the 10/4/21 IEP. K.W. further testified that she is a High School Teacher in another District and uses the same Realtime System and was fully aware that it was a Statewide shutdown and not an intentional act by the Respondent. This glitch was immediately fixed. K.W stated that others were able to view this IEP, but she was unable to identify by way of testimony or evidence who these individuals were. She also testified that M.W. was harmed by the posting but could not specifically identify what harm M.W. suffered.

G.W. also testified as to the inadvertent posting of the older IEP on the Realtime

System portal. He stated this was a human error not a computer error. He based this belief on his work experience. However, he stated that he did not have any first-hand knowledge that it was a human error but stated "in theory" it was not a computer error. (Emphasis added). No further explanation was given.

Jamie Fritts testified on behalf of the Board. She is M.W.'s Special Education Inclusion Teacher for math and science. She does not nor has she ever accessed M.W.'s IEPs on the Realtime system. She only viewed M.W.'s 10/4/21 IEP when she went to the Case Manager's Office and had her pull it up on the Realtime System. (P-51). She has seen a hard copy. Fritts testified that she is ware of all modifications and accommodations associated with the IEP and implemented same. The HRW and IXL programs used in her classroom and utilized by M.W. for math are not modifiable. She further testified that this did not affect M.W.'s grade. (R-15). M.W. has a 1:1 aide in math and science and the aides are used to assist M.W. with redirection. There are daily sheets which go home with M.W., (R-11) identifying the work M.W. is doing in class as well as how M.W. is doing on homework assignments. Fritts signs off on these daily sheets. Fritts testified M.W. is given extra time and breaks when taking tests as part of his accommodations. This was also the case when they tried to give M.W. the Standard State Testing. Fritts further testified that M.W.'s current grade in both math and science class is an "A". As to modifications for online work, she checks in with M.W. and has M.W. ask her questions when he does not understand something. Further, modifications are use of a study guide, and she grades the individual paper tests. Classwork and homework are modified. (R-12 and R-15). She testified that she did not give formal progress reports, however she does send weekly progress emails updating M.W.'s parents. G.W. testified that the HRW and IXL nonmodifiable programs did in fact affect M.W.'s grade and these programs were being counted in M.W.'s grades. (P-14-P-18).

Diane Kaplan testified on behalf of Respondent and is M.W.'s Special Education Teacher for language arts. Kaplan stated that she viewed M.W.'s 10/4/21 IEP in the beginning of October 2021 when she went to the Case Manager's Office to view it and then viewed it again in December, 2021. She was fully aware of the 10/4/21 IEP and

was implementing the modifications and accommodations. M.W. was receiving General Education in class support. (P-51). She further testified as to (R-14) which is variety of emails on how grading occurred, updates on study guides and supported (modified versions) and unsupported assessments. She sends progress report emails to the parents weekly. She may skip a week here or there. These emails notify the parents of what is happening with M.W.; if work is missing, what books they are reading, etc. A modification tool Kaplan uses for M.W. is to put sticky notes on his work which provides instruction and redirection. There is a 1:1 aide in classroom. Kaplan testified that there is a daily reflection log used whereby M.W. fills in the information and/or a para will write in the information. Kaplan always reviews what information is put on the daily logs. (R-11). She stated that there is no tracking of M.W.'s interaction with peers. She further testified that M.W.'s current grade in the class was a 93.

Eva Martin testified on behalf of the Respondent and is M.W.'s Special Education Teacher for 8th grade social studies. She is aware M.W. has an IEP. (P-51) and M.W. is in a General Education In-Class Resource Room. Accommodations and modifications pursuant to the 10/4/21 IEP are being implemented. She testified as to (R-13) which are emails sent to M.W.'s parents throughout the school year and is a demonstration of the modified and unmodified work. There is a 1:1 aide in the classroom for M.W. and he is provided an extra set of books for home. The 1:1 aide redirects M.W. and makes sure he is on task. She testified as to the daily reflection logs; the comments portion and homework portion only are filled out by the teachers and M.W. fills out rest. (R-11). These are done on regular basis. Martin testified that M.W. has a grade for this class in the 90s. She stated that she "thinks" she viewed M.W.'s IEP (P-51) for the first time in the beginning of the school year "maybe" end of August beginning of September, 2021. (Emphasis added). She viewed whichever IEP was available at that time. Martin further testified that she saw the IEP on the Realtime System, "probably" in her classroom. (Emphasis added). She went back to look at it sometime in October, 2021 because she "may" have wanted to see something but "not certain" if it was in her classroom. (Emphasis added). She also "cannot be certain" of any changes to the IEP when she viewed it in October, 2021. (Emphasis added). Part of the classroom curriculum was on google classroom and she would go into the specific

work and modify as needed, as it pertained to the individual student. She made the modifications In-person and Online; depending on situation. (R-13). She explained that a modified version has 2-3 questions and unmodified version has 5-10 questions.

G.W testified that he believed there was no Special Education or 1:1 aide being utilized during virtual instruction and that the 1:1 aide was not always being utilized in the classroom. It should be noted that the Petitioners requested that no 1:1 aide be utilized during virtual instruction. (P-51). And G.W. could not be certain if and when 1:1 aides were not being utilized in the classroom on a regular basis because he is not physically there to observe same. Yet, all three of M.W.s' teachers, Fritts, Kaplan and Martin testified that a 1:1 aide was being utilized in the classroom and the correct placement of M.W. had been implemented.

Petitioners argues that certain assignments contained more than three questions per individual page which is not in conformance with the 10/4/21 IEP. The testimony of M.W.'s teachers did not dispute that on occasion this was the case. However, his teachers testified that M.W. never has an issue with completing the number of questions, and that they were available to guide him. As to the required Progress Reports which were required to be sent out three times per year as per the 10/4/21 IEP, the commencement of this requirement was not until 10/4/21 and the first day of hearing in this matter was January 31, 2022. Full compliance would have been an impossibility. Only the First Quarterly Progress Report could have been provided. The Board does not dispute that this was not done, but Gribbon explained through testimony that the teachers were unable to utilize the Progress Reporting System because the Petitioners had demanded that the IEP not be available on the Realtime System, thus they were not readily accessible to the teachers. While this does not alleviate the Respondent's responsibility from reporting the progress, I **FIND** that it was a minor deviation from the overall requirements of the IEP. Further, all the teachers who testified at hearing, demonstrated that they communicated with the parents as to the progress of M.W., either through notes being sent home with M.W. in his backpack, through emails directly to the petitioners or self-monitoring behavior charts.

I further **FIND** that there were modification deviations being implemented by the staff/teachers of M.W. Specifically, at times there were more than three questions on assignment pages, there was no Quarterly Progress Reports and certain online programs were not modifiable. However, these were minor deviations from the accommodations and modifications provided for in the 10/4/21 IEP. I also **FIND** that the Statewide shut-down of the Realtime System was inadvertent and not caused by the Respondent. This was clearly an event that was out of the control of the Respondent. Because of the shut-sown a glitch occurred which caused an older version of M.W.'s IEP to be viewable on the portal on November 2, 2021. This is not a violation by the Respondent of the IEP.

I further **FIND** that the Teacher Checklists were not utilized by the Board since the implementation of the 10/421 IEP. As to the incident with the pixel gun drawing, I **FIND** that the Board was warranted in taking the steps it took under the severity of the situation, even if it can be viewed that the steps were not in conformance with the IEP.

## DISCUSSION

It is within an Administrative Law Judge's "province to determine the credibility, weight, and probative value of the expert testimony." State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied. 127 N.J. 321 (1990). The weight to be given to an expert's testimony depends upon "[sic] candor, intelligence, knowledge, and especially upon the facts and reasoning which are offered as foundation of [their] [sic] opinion." County of Ocean v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975). Further, "the weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated." Johnson v. Salem Corp., 97 N.J. 78, 91 (1984).

A trier of fact may reject testimony as "inherently incredible," and may also reject testimony when "it is inconsistent with other testimony or with common experience" or it is "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "[t]he interests, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose

province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

In the case at hand, I found all of the witnesses to be credible and found that they all testified openly and honestly. However, I feel it necessary to expand on the credibility of one witness in particular; Martin. As stated earlier, Martin is one of M.W.'s teachers. Throughout her entire testimony, she did not seem certain as to many of the answers she provided. For example, many of her answers to the questions asked regarding when and how she viewed M.W.'s 10/4/21 IEP were either predicated or followed by terms such as, "I think so", "maybe", "probably" and "not certain". In light of same, the undersigned cannot rely on Martin's testimony as it pertains to when and where she viewed the 10/4/21 IEP, or any other IEP for that matter.

## LEGAL ARGUMENT

New Jersey as a recipient of Federal funds under the Individual with Disabilities Education Act (IDEA) 20 U.S.C. §1400 et seq. must have a policy that assures all children with disabilities the right to a free appropriate public education (FAPE)., 20 U.S.C. §1412. IDEA defines FAPE as Special Education and Related Services that are provided at public expense, under public supervision and direction, without charge; that meet the standards of the state educational agency that include an appropriate preschool, elementary school or secondary school education in the State involved; and that it is provided in conformity with an IEP 34 C.F.R. § 300.17; 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq.

In a due process hearing in which the question is whether the District has fulfilled its statutory responsibility to provide a FAPE, the District bears the burden of proving, by a preponderance of the evidence, that it has met its legal obligation. Lascari v. Bd. of Ed. of the Ramapo-Indian Hills Regional School District, 116 N.J. 30, 45 (1989). In providing a student with a FAPE, a school district must provide such related services and supports that are necessary to enable the disabled child to benefit from the

education. Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 188-89, 102 S. Ct. 3034 (1982). In fulfilling its FAPE obligation, the District must develop an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Endrew v. Douglas County School District RE–1, 137 S. Ct. 988 (2017).

The Supreme Court noted in Rowley that judges have no expertise in the area of Special Education, and as such they must rely upon the determinations of Special Education experts. Rowley, 458 U.S. at 208. Of course, judges have expertise in resolving disputed questions of fact according to the preponderance of the evidence presented. Id. at 206-207. The Court should review such testimony and other relevant evidence and determine, according to the preponderance of the evidence standard, the appropriate placement for the child in light of the statutory indication in favor of "mainstreaming" and after appropriate consideration of the conclusion of those involved in the child's placement.

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An 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." Sch. Comm. Of Burlington v. Dept. of Education of Mass., 471 U.S. 359, 368, 105 S.Ct. 1996, 2002, 85 L.Ed. 2d 385, 394 (1985). The educational opportunities provided by a public school system will differ from student to student, based upon the "myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom." Rowley, 458 U.S. at 198. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry.

In assessing whether the District offered a FAPE, the focus is on the IEP, which the Supreme Court has referred to as the "modus operandi of the Act." Burlington Sch. Committee v. Dep't of Education, 471 U.S. 359, 368 (1985). Again, in Honig v Doe, 484 U.S. 305 (1988), the Supreme Court stated that "[t]he IEP is the primary vehicle for delivering the appropriate educational services to each disabled child" and further

described the IEP as the "centerpiece of the statute's education delivery system for disabled children." 484 U.S. at 311.

In the case at hand, the Petitioners argue that the Board failed to meet its burden of proof that it properly implemented the 10/4/21 IEP. They rely on Munir v. Pottsville Area School Dist., 723 F. 3d 423, 426 (3rd Cir. 2013), which states that "Once a school district has identified a child as eligible for IDEA services, it must create and implement an Individualized Educational Plan based on the student's needs and areas of disability." Further, the district must ensure that the IEP is "enabel[ing] the child to receive meaningful educational benefits in light of the student's intellectual potential." Id.

The Respondent's argue that the implementation of an IEP is not required to be strict, in fact the law allows for flexibility, recognizing the need to adjust instruction for students within the learning environment. The third Circuit has held that a failure to implement can only be found if substantial or significant provisions of the IEP were not implemented. See Melissa S. v. Sch. Dist. Of Pittsburgh, 183 F. App'x 184, 187 (3d Cir. 2006). The Court in Melissa considered failures to provide a 1:1 aide each day, give homework, and assign work at the appropriate skill level. 183 F. App'x at 187-88. On days an aide could not be provided, the parent alleged the student's math instruction was above her skill level, and that contrary to the IEP, the student was given work to complete at home. Ibid. The Third Circuit found, even assuming the allegations were true. "such de minimis failures to implement an IEP do not constitute violations of the IDEA. Ibid. (citing Houston Indep. Sch. Dist. V. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000).

Here each of M.W.'s teachers testified they were providing the accommodations and modifications required by the IEP. Moreover, the District demonstrated the modifications were being provided through documentary evidence. There were only minor deviations from the modifications and accommodations provided for in the 10/4/21 IEP. For example, providing M.W. with more than three questions on certain assignments. However, his teachers testified that he had no issues with completing the number of questions and that they were always available to guide him. With respect to the failure to send the first quarterly Progress Reports, the testimony explained this was because

Petitioners had demanded that the IEP not be available in the Realtime system. As such, the teachers could not utilize the Progress Reporting System. While this does not alleviate the District's responsibility from reporting the progress, it was a minor deviation from the overall requirements of the IEP. Moreover, the teachers communicated daily with the parents, and the parents were certainly kept abreast of M.W.'s progress on a regular basis.

Furthermore, courts have consistently held that IEPs are not strict contracts where the District has no flexibility in implementation. See Id. at 187 ("flexibility to implement an IEP is maintained, yet the school district is accountable for 'confer[ring] some educational benefit upon the handicapped child,' as required by the IDEA) (quoting Kingwood Twp Bd. of Educ., 205 3d 372, 577 (3d Cir. 2000)). As in Melissa S., here the District staff testified they were implementing the accommodations and modifications, there were some deviations from the prescribed methods, but well within the allowable "flexibility." Ibid. Where, as here, a party challenging 'implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." Fisher v. Stafford Twp Bd. of Educ., 289 F. App'x 520, 524 (3d Cir. 2008) (quoting Houston Indep. Sch. Dist. 200 F. 3d at 349. "This approach affords local agencies some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit." Houston Indep. Sch. Dist., 200 F. 3d at 349. The evidence supports a finding that the District implemented M.W.'s IEP, even with some minor deviations to allow for flexibility.

In J.D. o/b/o J.H. Your Honor noted, "[a] New Jersey District Court determined that the East Orange of Education did not deprive a student of a FAPE despite the fact that the student 'was without an IEP for approximately one year, between May 18, 2004 and May 25, 2005." N.P. ex rel. J.P. v. E. Orange Bd. of Educ. Civ. No. 06-5130 (DRD), 2011 U.S. Dist. LEXIS 11171, *23 (D.N.J. Feb. 3, 2011). In the present case, M.W. has been provided with an IEP that was substantially complied with. He has not been denied a meaningful educational benefit. J.D. o/b/o J.H., Petition, No. 2017, 2018 WL 3361213, at *10 (EFPS June 13, 2018).

To prevail on a claim that a school district failed to implement an IEP, courts have consistently held that evidence must show the school failed to implement substantial or significant provisions of the IEP, as opposed to mere *de minimis* failure, such that the disabled child was *denied a meaningful educational benefit*, Housten Indep. Sch. Dist., 200 F.3d at 349. (Emphasis added). After the recent Supreme Court case, Endrew F. Douglas Cnty. Sch. Dist. RE1, 137 S. Ct. 988 (2017), this principal can be restated as, failure to implement an IEP is only a denial of FAPE if the child was denied an educational program that was reasonably calculated to enable a child to make progress.

When this standard is applied to the case at hand, even if there was evidence of more than a *di minimis* deviation from the 10/4/21 IEP, and therefore a failure to implement, the evidence and testimony prove that M.W. has made appropriate progress in light of the circumstances. Fritts, Martin and Kaplan all testified that M.W.'s current grade in their class was either an A or in the 90s. I **CONCLUDE** that the documentary evidence proves that M.W. was progressing in the General Education curriculum, with the modifications and accommodations being provided and implemented by the 10/4/21 IEP. There is no evidence to suggest that M.W. was not making meaningful progress. I further **CONCLUDE** that even though there was evidence and testimony that while certain staff/teachers were implementing the accommodations and modifications of the 10/4/21 IEP, there were some deviations from the prescribed methods, but the deviations were well within the allowable flexibility. There was a *de minimis* failure to implement all elements of the IEP. The petitioners who are the party challenging the implementation of an IEP must show more than a di minimis failure to implement all elements of the 10/4/21 IEP and must demonstrate that the Respondent failed to implement substantial or significant provisions of the IEP. The Petitioners failed to do so. Therefore, there is no violation of the Stay Put 10/4/21 IEP that rises to the level of a denial of FAPE. Further, M.W. has not been derailed from making meaningful educational progress in his current educational placement. Any further discussion pertaining to Petitioners' claim that they were not provided with meaningful parental participation as to the 10/25/21 IEP meeting and draft IEP are unnecessary, because it does not bear on the limited issue that the undersigned must render a final decision on.

I further **CONCLUDE** that the inadvertent posting of what appeared to be an old draft of an IEP on the Realtime System, was not an unauthorized access violating the 10/4/21 IEP as the Petitioners would have one believe. The evidence and testimony clearly indicate that there was a Statewide shut down of the Realtime System which in turn caused glitches to the system and the material contained within the program. It was not a human error, but rather a computer error. Further the agreement between the parties was that the 10/4/21 IEP and any personal and medical information not be posted on the Realtime System or accessible by anyone other than the Case Manager. The only thing made available for viewing due to the shut-down, was an older draft of an IEP of M.W. This glitch was immediately rectified. Further, neither K.W. or G.W. were able to identify with specificity any incident where the older draft IEP or any medical or sensitive information were made accessible to any other individuals other than themselves, nor were they able to evidence that harm was caused to M.W. I **CONCLUDE** that there was no unauthorized access of M.W.'s IEP on the Realtime System Portal and no violation of HIPAA/Privacy postings of any IEP on the Realtime System Portal, thus, there is not a Denial of FAPE.

## ORDER

For the reasons set forth above and the Board having satisfied its burden of proof, I **CONCLUDE** that the Respondent did not fail to implement the 10/4/21 IEP and M.W. was not denied FAPE in the least restrictive environment, thus it is **ORDERED** that Petitioners petition be **DENIED.**

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

February 24, 2022

DATE

**ELISSA MIZZONE TESTA**, ALJ

Date Received at Agency February 24, 2022

Date Mailed to Parties: February 24, 2022

sej

# APPENDIX

## WITNESSES

For Petitioners

G.W.

K.W.

For Respondent

Janine Gribbin

Jamie Fritts

Diane Kaplan

Eva Martin

| EXHIBITS | | I.D. | EVID. |
|---|---|---|---|
| Joint | | | |
| R-2 | September 16, 2021 email from K.W. to J. Kleen Asking to keep the dates on the IEP the same and just add the word amendment | x | x |
| R-6 | 2021-2022 schedule for M.W. | x | x |
| R-9 | District Calendar | x | x |
| R-12 | Science Documents | x | x |
| R-13 | Social Studies documents | x | x |
| R-14 | ELA documents | x | x |
| R-15 | Math documents | x | x |
| R-17 | Certification and Resume-Janine Gribbin | x | x |
| R-18 | Resume-Paul J. Schurr | x | x |
| R-19 | Resume-Krista Maher | x | x |
| R-20 | Certification and Resume-Jacqueline Borowski | x | x |
| R-21 | Certification and Resume-Jaime Fritts | x | x |
| R-22 | Certification and Resume-Michael Zubia | x | x |
| R-23 | Certification and Resume-Eva Martin | x | x |
| R-24 | Certification and Resume-Jennifer Zaccardi | x | x |

| | | | |
|---|---|---|---|
| R-25 | Certification and Resume-Susan Curran | x | x |
| R-26 | Certification and Resume-Katy Fritzky | x | x |
| R-27 | Certification and Resume-Diane Kaplan | x | x |
| R-28 | Certification and Resume-Joseph Calabria | x | x |
| R-29 | Certification and Resume-Leon Smith | x | x |
| P-13 | Emails to and from Janine Gribbin and K.W. Discussing the signing of the 10/4/21 IEP | x | x |
| P-14 | Email dated 12/1/2, with attachments to Alexia Luna regarding missing work of K.W. | x | x |
| P-15 | Follow-up email dated 12/5/21 regarding P-14 | x | x |
| P-16 | Follow-up email dated 12/6/21 regarding P-14 and P-15 | x | x |
| P-17 | Email dated 12/6/21 from G.W. to Janine Gribbin | x | x |
| P-18 | Email from G.W. to Janine Gribbin and Nicholas Bernice with attachments dated 126/21 regrading Math and Realtime | x | x |
| P-19 | Email dated 1/11/22 from G.W. to Eric Erler Regarding Chromebook | x | x |
| P-51 | Full version of the 10/4/21 IEP | x | x |
| P-53 | Covid test result dated 12 2/21 | x | x |
| P-63 | Math work of M.W. dated 11/30/21 | x | x |

<u>For Petitioner</u>

| | | | |
|---|---|---|---|
| P-54 | Welfare Check Operation Report dated 10/12/21 | x | x |
| P-64 | Photograph of a computer screen depicting a portion of an undated IEP | x | x |

<u>For Respondent</u>

| | | | |
|---|---|---|---|
| R-3 | Email enclosing 10/25/21 IEP | x | x |
| R-5 | 11/4/21 email exchange between J. Kleen and J. Rue re mediation only filing and stay put | x | x |
| R-7 | M.W. attendance record | x | x |
| R-11 | Weekly sheets | x | x |