



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

OAL DKT. NO. EDS 03694-22

AGENCY DKT.NO. 2022-34106

**J.T. & R.M. ON BEHALF OF N.M.,**

Petitioner,

v.

**WAYNE TOWNSHIP BOARD OF EDUCATION,**

Respondent.

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**J.T.**, pro se

**Margaret Miller**, Esq. for respondent (Weiner Law Group LLP, attorneys)

Record Closed: January 4, 2023

Decided: January 9, 2023

BEFORE **KIMBERLY A. MOSS**, ALJ:

**PROCEDURAL HISTORY**

This matter concerns a request for a due process hearing by J.T. and R.M. (hereinafter “petitioners”) on behalf of their minor child, N.M., who is eligible for special education and related services. Petitioners contends that the Wayne Township Board of Education (hereinafter “respondent” or “District”) failed to provide N.M. with a free

appropriate public education during the COVID-19 pandemic (between March 2020 and September 2021). As relief, petitioners seek compensatory education.

Respondent maintains that it provided N.M. with a free appropriate public education during the time in question. Respondent seeks denial of the relief requested by petitioners and dismissal of the due process petition.

On May 5, 2022, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL). The hearings were held on September 16, 2022, October 12, 2022 and January 4, 2023 on which date the record closed.

### **TESTIMONY**

#### **Deborah Patalita**

Deborah Patalita (Patalita) has been employed by the District as a Learning Disabilities Teacher Consultant (LDTC). For the past fifteen years, she works with preschool students. She case manages students and provides support to teachers and students. She tests and evaluates students.

Patalita was assigned N.M. in February 2020. She was the LDTC on his team. She met petitioners in September or October 2019 to discuss their concerns. At that time, no evaluation was done. N.M. was not attending in district school at that time.

On February 5, 2020, there was an initial evaluation plan. Petitioners were concerned with N.M.'s behavior challenges. He had been removed from three private preschools. Petitioners were not concerned about his cognitive abilities. Health, medical, social history occupational therapy (OT) and a Batel Developmental Inventory (BDI) evaluations were ordered with petitioner's consent. The OT evaluation could not be done due to Covid-19. Petitioner waived the OT evaluation.

N.M. met the eligibility requirements for special education. Patalita reviewed the social assessment and health assessment. She scheduled an eligibility meeting with petitioners on April 24, 2020. N.M. saw a developmental pediatrician who diagnosed him with ADHD combined type and defiance disorder. She looks for thirty three percent delay in one domain or twenty-five percent delay in two domains. N.M.' s personal social and cognitive scores were low. Petitioners agreed to the classification. There was an IEP meeting on the same day. The District has full day and a half day preschool program. The full day program uses ABA and discrete trials. The half day program is general education with a paraprofessional.

The half day general education with paraprofessional program was recommended for N.M. The main concern was social interaction with peers and modeling the peer's behavior. Petitioners did not object to the program. N.M. had a one-to-one aide and eventually counseling.

Patalita wrote the goals and objectives for the IEP. N.M started in the District in May 2020. The IEP goals and objectives were carried into the next school year. In the IEP meeting ESY was probably discussed but not offered. Petitioners agreed to the implementation of the IEP.

May 2020 and June 2020, the District had virtual instruction, it was very challenging. She does not know how the one-to-one aid for N.M. was working at that time. Patalita became N.M.'s case manager in September 2020.

In September 2020, instruction was done two days in person and three days virtual. On September 8, 2020, Patalita received an email that petitioners wanted an IEP meeting. The IEP meeting was scheduled for October 19, 2020. On September 15, 2020, she received an email from petitioners requesting that N.M. be allowed to attend school in person four days per week. Petitioners' request was granted. It was suggested that N.M. go to the Boys and Girls club in the morning and attend school in the afternoon.

On September 23, 2020, petitioners sent an email requesting a Functional Behavioral Assessment (FBA) be done on N.M. due to behaviors that were seen at his private pre-school. A behaviorist from the District observed N.M. and did not observe any behaviors. N.M.'s IEP was changed to add counseling. He had difficulty with self-regulation and transitions. He was provided occupational therapy (OT) for sensory concerns.

A new IEP was developed on October 19, 2020. Additional goals and objectives were added. Patalita was not the one who added the new goals and objectives. On October 23, 2020, petitioners rescinded their request for the FBA because N.M. was no longer exhibiting behavior issues. On November 2, 2020, the parties met and discussed progress N.M. was making with the present levels of academic achievement and functional performance (PLAAFP) and his strengths and weaknesses.

On December 12, 2020, a notice for re-evaluations was sent to petitioners. Educational and Psychological evaluations were done. Patalita did the educational assessment. She reviewed the psychological assessment. The WPPSI-VI test was given to N.M. The WPPSI -VI test show the IQ score. They were looking for discrepancies between the IQ and performance. N.M.'s IQ score was one hundred and ten which is a high average score. He did well in listening and made progress in all areas accessed. Patalita observed N.M. in class. She had no concerns but noticed that he had a difficult time socially with sharing material.

The eligibility and re-evaluation report determined that N.M. should remain classified. He was classified as other health impaired based on ADHD and defiant behavior. Petitioners consented to the classification.

The May 11, 2021, IEP did not propose any changes for the rest of 2021. It recommended step-up class, full day class in general education, counseling, OT, speech, and physical therapy if needed and a one-to-one aid. Petitioners agreed to the

IEP. ESY was discussed with petitioners, but N.M. was not eligible because he did not regress, he made progress.

N.M.'s progress was discussed with the petitioners. He had challenges but worked to established good relationships with teachers and peers. There was no concern regarding N.M.'s academic progress.

During hybrid schooling the class size was small, five to six students. N.M. made progress and was excited to come to school. Patalita observed N.M. in class once a week. There were no concerns about N.M. making progress. Petitioners sent a letter to the District expressing their appreciation with how the District was helping N.M.

In March 2022, petitioners requested compensatory education for N.M. from May 2020 to September 2021. Patalita was surprised because N.M. had been making progress and petitioners were hopeful. At the May 23, 2022, IEP meeting compensatory education services were discussed. Patalita had not been aware of petitioners concern that N.M. was not making progress. N.M. had made progress.

Prior to the Covid-19 epidemic, pre-school was held for two hours and forty minutes. Virtual instruction was not the best for anyone, but it was all they had. Virtual counseling was attempted but not successful.

On May 20, 2021, an FBA was done on N.M. due to escalating behaviors. He became dysregulated during transitions or when doing something he did not want to do.

#### Gianna DiChristina

Gianna DiChristina (DiChristina) has been employed by the District for four years as a school social worker. She has a school social worker certificate. She provides counseling. She was part of N.M.'s Child Study Team (CST) in February 2020. She conducted the social history assessment. N.M. started daycare at fifteen months. He became aggressive at age two and was asked to leave daycare. Petitioner's main

social behavioral development concerns were aggression and impulsiveness. She was not at the eligibility meeting, which was done remotely.

The IEP of May 1, 2020 did not include counseling, which was added on September 25, 2020 once per week individually for thirty minutes. This was done because N.M. was becoming increasingly aggressive at his private pre-school. Aggression and defiant behaviors were not occurring in the District school. Di Christina was N.M.'s counselor.

In her first session, N.M. had homicidal ideation to hurt his sister, Di Christina reported this to petitioners. N.M. had a plan. She told them to contact perform care. In October and November 2020, she met with N.M. once per week for thirty minutes. He was a willing participant. She used zones of regulation, social steering, and the use of a timer. From November 30, 2020, to December 4, 2020, the District was virtual. She had a virtual session with N.M. which he had difficulty with. School remained virtual until February 2021. During that time, she offered to meet with N.M. virtually and went over strategies with petitioner to work with N.M. Petitioner stated that N.M. was going to private preschool full time during that time.

On December 4, 2020, N.M. became a candidate for the school's no place for hate program because he was smart and self-aware.

In February 2021, the District was on a hybrid schedule. N.M. resumed counseling. In March 2021 there was a situation that made N.M. angry, it escalated but DiChristina got him back on track.

DiChristina was not present for the May 2021 IEP meeting. She contributed drafts to the IEP and a summary of how he was progressing. In October 2020, N.M. was open to learning coping skills. From October 2020 to May 2021, N.M.'s progress was what she expected. He had problems with transitions. In Kindergarten N.M. would have group counseling twice per week for twenty minutes.

DiChristina drafted the counseling goals and objectives in the May 11, 2021 IEP. There is a big jump from preschool to kindergarten. It is a full day program with a new teacher and new peers. There is more structure and less play. She checked in on N.M. He did well, the class size was smaller, and he responded well to the services. She did not report on N.M.'s goals in the progress report.

N.M. could not attend class virtually. He could not sit in front of a laptop. While he was in school, he actively participated. He started to use words to express frustration. N.M. could have the same social emotional goals throughout his academic career. N.M. had a positive experience with her. There is no evidence that N.M. regressed.

Large group settings are difficult for N.M. He worked one to one with Ms. Andrea and worked well with her. When the other students came back for in person school, N.M.'s behavior incidents were not high.

An FBA was done for N.M. on May 10, 2021. He had seven behavioral incidents in District. Transitions and change of routine were difficult for N.M. The incidents were not a concern because they were able to get him back on track. N.M. could identify his emotions and advocate for himself. He made appropriate progress.

DiChristina had four in person sessions with N.M. She did not see him from November 2020 thru January 2021. When N.M. had a difficult day and did not want to come with her, he was advocating for himself without escalating his behavior.

On March 15, 2021, N.M. knocked down materials, kicked a cabinet and eloped to the bathroom. On March 19, 2021, N.M. threw an activity in the garbage and kicked and swatted at Ms. Andrea. This incident was de-escalated and lasted a shorter time than the previous incident. On May 5, 2021, N.M. threw some of his snack, swatted at the teacher and knocked over the garbage. After twenty minutes, he came back and

self-regulated. When more students returned in person, it was not surprising that behavioral incidents would occur.

DiChristina missed twelve sessions with N.M. She does not believe that he missed out because his mother worked with him.

### Andrea Gilman

Andrea Gilman (Gilman) is a preschool teacher in the District. She has a master's degree in special education. She is a certified teacher of students with disabilities. Gilman reviewed the April 2020 IEP of N.M. She communicated with the parents and made herself aware of N.M.'s strengths and weaknesses. She also reviewed N.M.'s evaluations.

The 2020-2021 school year had a hybrid schedule. Her class had a total of ten students. Half of the students were in Cohort A and the other half were in Cohort B. N.M. attended both Cohort A and B beginning in October 2020. Wednesdays were done virtually.

Gilman was aware that N.M. had difficulty interacting with peers, following directions and transitions which resulted in frustration and behaviors. He did not exhibit behaviors in school. N.M. was where a typical preschooler would be, he could identify some letters and numbers. When N.M. was in class, Gilmore did not observe any of the behaviors that the petitioners were concerned about.

Gilman worked on the goals and objectives in class. She used positive behavior supports. She walked around with a notebook. She used data, charts, and informal and formal observation.

Gilman did the PLAAFP for the October 19, 2020 IEP meeting. Under personal responsibility she looks at how independent the child is. How he enters class, follows



routine hangs up coat and packs and unpacks his bag. N.M. was successful. Self-care included toileting, washing hands opening and closing his backpack. N.M. was successful. The personal social domain includes peer interactions, self-control, awareness, conflict resolution, taking turns, problem solving and coping strategies. This is the area that she worked most with N.M. The class size limited the peer interaction. The small class was beneficial for N.M. Initially N.M. and one other student attended in person and the other students attended virtually. Gradually more students began attending in person. Gilman could create situations where N.M. could use his skills. Self-concept and social roles can be addressed in reading and math with taking turns and helping friends.

N.M. would look for friends on zoom and recognize when other students would reach out for him. He engaged with personal learning. When his schedule changed, he adapted.

In the communication domain receptive language is looking at what he can comprehend and understand. N.M. was good in this area. He knew what was expected of him and he could follow directions. Expressive language is verbal. N.M. was very verbal. His problem was expressing how he was feeling.

N.M.'s motor skills were what you would expect for a child his age. His fine motor skills using his fingers and hands had initial resistance, but he could eventually write his name and pick up pegs. N.M. had a very good working memory.

Students with ADHD are highly impulsive and easily distracted.

In Pre-reading skills, N.M. made progress and could recognize numbers up to one hundred. His reading and literature goals were modified to meet N.M.'s goals and objectives to make them more attainable.

The November 2020 IEP did not have changes to the goals. It did not have a behavior intervention plan because N.M. was not exhibiting behaviors. She used positive behavioral support and reinforcement with N.M. He did not need a more structured program.

After Thanksgiving 2020, when the District went virtual, she provided activities for the students through seesaw on zoom. N.M. did not attend school when the District was virtual. When the District went back to in person learning, N.M. could practice skills such as turn taking with his peers. He was always happy in her class. He had anxiety when he was getting ready to leave school. Gilman did not fill out a preschool life skills questionnaire for N.M. because she did not see him exhibit behaviors in class.

He had six peer interaction when the District went back to in person. Bumping into each other is typical preschool behavior, which he did not have before the break in instruction.

Gilmore saw the FBA that was done on N.M. The behaviors that are noted in the FBA are not a sign of regression. They were of short duration.

In the May 2021 IEP N.M. made progress with self-care. If there was a conflict, he would use words to describe what was wrong. In the area of personal responsibility, N.M. made more than expected progress. He could complete actions with reinforcement. He made significant progress in the personal social domain. He would engage and use conflict resolution.

N.M prefers, and is most successful, working in small groups. He makes more progress in small learning environments. Modeling and scaffolding were used for N.M. His self-confidence increased during the year. His expressive communication skills increased. He was on target with his motor skills. By the end of the schoolyear, N.M. could attend activities to completion.

In reasoning and academic skills, N.M. could count to one hundred and do patterns and sorting. He was good in math.

The language arts goals were eliminated from the May 2021 IEP because N.M. was age appropriate in that area. The number of math goals were reduced but the goal of writing numbers was restarted. His numerical operation skills were above most preschool students, but the goals were increased in the IEP. The life skills goals were ongoing. The social emotional goals were continued. They were the same as in the previous IEP. The goal was based on N.M.'s strengths and weaknesses. It is not uncommon for a goal to be carried over from one IEP to the next. It is not likely that all the goals would be accomplished by the end of preschool. During the IEP, petitioners stated that they were happy with his progress. Petitioners did not raise any negative issues. ESY was not an issue at that time. He was meeting or exceeding all his goals.

Gilman did the progress report for N.M. When filing out the progress report she states if the matter was introduced, reintroduced, progressing or mastered. In language arts, N.M. mastered the first two goals, identify characters, major events, or settings in a familiar story with prompting and support and identify the role of the author and illustrator in the telling of a story with prompting and support. He was progressing in the goal of using a storybook to tell how adventures and experiences of the characters are similar and different. He did not master the goal to actively participate in reading aloud. He made limited progress. The progress would be measured on the seesaw program which was used when the school was virtual, and N.M. did not attend virtually. She does not believe that N.M. not attending virtual class when the District went virtual caused regression.

N.M did not master the social empowerment and support goals, but he made appropriate progress. Some of these goals were broad and could not be accomplished in the time frame.

Gilman was never told that petitioners were concerned that N.M. was not progressing. The preschool to kindergarten transition shows that N.M. was developing and making progress in the social emotional area. He progressed in taking turns and self-confidence and sharing. Social emotional is N.M.'s area of disability, with scaffolding and support he does well.

N.M. made tremendous progress. He made social emotional progress. She was very surprised by petitioners request for compensatory education.

N.M. did not master the social emotional goal of demonstration self-direction. The goal of identify and express feelings was reintroduced with different modifications and supports. He still did not master this goal. N.M. was progressing but did not master the goal of exhibiting positive interaction with other children and adults.

Channeling anger with minimal assistance was not acted on when the district was virtual, he progressed when he returned to in person instruction. It took students more than one attempt to engage in virtual learning. There was no paraprofessional during virtual learning. During in person learning Gilman oversaw the paraprofessional aide.

N.M. progressed with expressing needs verbal or nonverbal without aggression. In the beginning of the school year, N.M. did not exhibit non-compliant behaviors in the classroom. After Gilman evaluated N.M., she increased challenges to him to not become frustrated or engage in negative behavior. He did not master independent play and cooperation. Setting up play situations with another student was a goal that was reintroduced when students came back for in person learning.

If N.M. had been in a typical size class, his experience would not be the same. Gillman emailed petitioners on April 5, 2021, that N.M. had a rough day. He had a hard time transitioning back to school. He was upset and tired. He calmed down, ate lunch, and completed taking turns.

Gilman witnessed a March 9, 2021, incident with N.M. where he refused to sit on the bus. She knows that N.M. had seven brief incidents at school. This cluster of incidents was not representative of N.M.'s preschool experience.

In the May 2021 IEP the areas of concern for N.M. included when he is frustrated, he demonstrates aggressive tendencies. He will hit, kick and spit at adults. He is defiant when challenged. It is difficult to determine what will upset N.M. He is ineffective with using language to express his emotional needs. N.M. had modifications.

N.M. would not have mastered the social emotional goals in one year due to his ADHD and oppositional defiant issues. The goals and objectives were continued into the next IEP.

The fact that N.M. had four days of in person learning and did not participate in virtual learning could have impacted him making progress, but he showed progress.

#### April Kelly-Winston

April Kelly-Winston (Kelly-Winston) is a school social worker in Wayne. She has held that position for fourteen years. She has a master's degree in social work and educational leadership. She works with students from kindergarten to fifth grade.

Kelly-Winston was N.M.'s caseworker beginning in September 2021. She did not know N.M. prior to that time. She had a brief discussion in June 2021 regarding the students she would case manage during the school year. During the 2021-2022 school year N.M. was in an inclusion class with a teacher, paraprofessional for the class and an additional paraprofessional. He was not successful in this setting. It was recommended that he be placed in a more restrictive environment in a smaller setting.

Kelly-Winston received an email on March 8, 2022, from petitioners requesting an IEP meeting to discuss compensatory education for N.M. for the period when Covid-

19 restrictions were in place. They attached an assembly bill to the email. Prior to this when she spoke to petitioners, they stated that N.M. was successful in school. She scheduled a meeting for March 23, 2022, for an IEP meeting.

Kelly-Winston believes that when there is a request for compensatory education because of losses due to Covid -19 that an IEP meeting is set up to discuss the need for compensatory education to determine if the student has regressed due to the pandemic or if FAPE has been provided.

Petitioners were concerned that N.M. did not master many of his goals. He is still working on his goals in a more restrictive setting. She does not believe that N.M. did not master goals due to him not participating in virtual learning. She believes he made appropriate and meaningful progress. He had no regression at that time. Prior to September 2021, N.M. did not meet the criteria for Compensatory Education. Failure to master goals does not mean that N.M. did not make progress.

Petitioners did not provide any data regarding any of their concerns. Kelly Winston looked at Harbor Haven to determine if it was appropriate for N.M. She found that Harbor Haven was not appropriate for N.M. He required more support than the program provided.

N.M.'s 2020-2021 IEP was implemented as described. An IEP is one aspect of FAPE. At the March 23, 2022, meeting N.M.'s hours of schooling were discussed. His IEP was implemented to the extent possible. Services were offered to N.M. In the 2020-2021 school year, N.M. had seventy-six objectives. He mastered nine. He was making progress toward his goals. Goals are set for the deficits of the child. They are areas to be worked on. Goals should be attained based on information that was available at the time the goals were made.

He was not available for virtual instruction, but it was offered. She did not see N.M. having virtual instruction.

The administrator ensures that the related services are provided. She has never seen a pre-school to kindergarten transition form.

When Kelly-Winston receives a new student to case manage, she receives the evaluations and IEPs of the student. When she saw that N.M. had behavioral problems, she met with his prior behaviorist. Other than school closings, there are no reasons that services are not implemented. When she gets a new student to case manage, she gets the students special education file.

After hearing the testimony and reviewing the evidence I **FIND** the following additional **FACTS**.

N.M. resides in the District. On February 5, 2020, an initial evaluation was done for him. Petitioners were concerned with his behaviors. Health, Medical, Social History and BDI evaluations were done. A multi-disciplinary evaluation of N.M. was done. Patalita did the BDI along with the psychologist. Patalita did the adaptive and personal social domain. These were completed with the parents. She also did the motor and communication domain with N.M. The psychologist did the cognitive domains. The adaptive domain includes self-care and daily routines. N.M. who was four at the time, scored six years eleven months level in self-care which is a high level. In the personal responsibility area including simple chores, making phone calls, and following the rules of a game, N.M. scored two years eleven months level.

In personal interaction with adults including speaking and interacting with adults he scored at one year eleven months level. In his peer interaction friendships and working with peers his score was below the two-year level. He did poorly in these areas.

In communication N.M.'s receptive communication score was four years seven months level. He had the ability to understand language, follow instructions and complete two step instructions. In expressive communication his score was in the four-

year range. He could speak in complete sentences. N.M. had a difficult time with attention. He needed re-direction. He did not complete the cognitive portion of the evaluation. He met the eligibility requirements for special education. An IEP meeting was held on April 24, 2020.

A private developmental pediatrician diagnosed N.M. with ADHD combined type and defiance disorder. The IEP of April 24, 2020, included May 1, 2020 through June 30, 2020. N.M. would be in half day preschool in a general education class with supplements for 155 minutes with a one-to-one aide. This was to be done remotely because the schools are closed. N.M. was classified as a preschool child with disabilities. The goals and objectives of this IEP were carried over to the next IEP.

For the 2020-2021 school year, the District had hybrid learning. In September 2020, the District was divided into two groups Cohort A and Cohort B. Students in Cohort A, had in person instruction on Monday and Tuesday. They had virtual instruction on Wednesday, Thursday, and Friday. The students in Cohort B had in person instruction on Thursday and Friday and virtual instruction on Monday, Tuesday, and Wednesday. The class size was five to six students. This was for all general education programs.

On September 8, 2020, petitioners wanted an IEP meeting. By September 15, 2020, petitioners requested that N.M be allowed to attend in person four days per week. Petitioners request was granted. It was suggested that N.M. go to the Boys and Girls club in the morning and attend school in the afternoon. On September 23, 2020, petitioners requested an FBA be done on N.M. because of behaviors that were observed at the private preschool that he attended. He was observed by a behaviorist at that time who did not observe any behaviors.

The IEP meeting was scheduled for October 19, 2020. The IEP called for N.M to be in half-day preschool five days per, week 155 hours per day, in a general education class with supplements. It also required N.M. to have OT once a week for thirty minutes



in a small group, a one-to-one aide five times a week for 155 minutes, meet with a behaviorist once a week and counseling once a week for thirty minutes.

Gilman was N.M.'s preschool teacher. Gilman did the PLAAFP for the October 19, 2020, IEP meeting. Under personal responsibility she looks at how independent the child is. How he enters class, follows routine hangs up coat and packs and unpacks his bag. N.M. was successful. Self-care included toileting, washing hands opening and closing his backpack. N.M. was also successful. The personal social domain includes peer interactions, self-control, awareness, conflict resolution, taking turns, problem solving and coping strategies. He had difficulty interacting with peers, following directions and transitions which resulted in frustrations and behaviors. Initially he did not have behaviors in school. This is the area that she worked most with N.M. The class size limited the peer interaction. Gilman worked on the goals and objectives with N.M.

In December 2020, a notice of reevaluations was sent to petitioners. Educational and Psychological evaluations were done on N.M. The WPPSI-V test showed N.M.'s IQ was 110, which is a high average score. He did well in listening and made progress in all areas. DiChristina provided counseling for N.M. She used zones of regulation, social steering, and the use of a timer. He had difficulty expressing emotions. Large group settings are difficult for N.M. DiChristina had four in person sessions with N.M.

In November 2020 the district went back to virtual learning. The District remained virtual until March 2021.

N.M. could not attend class virtually. Petitioner believed that he could not sit still in front of a laptop. N.M. did not have counseling sessions from November 2020 to March 2021 because he did not attend virtually. N.M. attended private pre-school while the district was virtual.

N.M. returned to in person classes in the District in March 2021. From March 2021 to May 2021, N.M. exhibited behaviors on seven occasions. These behaviors included:

1. On March 9, 2021, N.M. refused to get on the school bus.
2. On March 15, 2021, he arrived and stated that he was hungry but would not eat. He knocked down materials, kicked a cabinet and eloped to the bathroom.
3. On March 19, 2021, N.M. threw an activity into the garbage, kicked, and swatted at Gilman and hit the garbage.
4. On April 5, 2021, N.M. threw and knocked down items.
5. On April 13, 2021, N.M. knocked down another student's name from the sign in board.
6. On April 15, 2021, N.M. sat in the corner by himself for ninety minutes at the Boys and Girls club and would not participate. He became aggressive when he returned to the boys and girls club.
7. On May 5, 2021, N.M. threw some of his snack on the floor, swatted at the teacher, threw work in the garbage, knocked the garbage over and sat in his cubby. After twenty minutes N.M. cleaned up and participated in activities but did not interact with classmates.

These incidents were brief.

In the 2020-2021 school year, N.M. had seventy-six objectives. He mastered nine. He was making progress toward most of his goals. N.M. did not participate in virtual learning. Certain goals were re-introduced when learning was in person. N.M. did not receive twelve counseling sessions from May 1, 2020 to September 9, 2021. He did not have a one-to-one aid from May 1, 2020 through March 2021.

N.M. mastered nine of the sixty-six objectives from his IEP. His progress report dated December 4, 2020, shows that all of the goals and objectives for May 1, 2020 to June 30, 2020 were not introduced. N.M. entered the preschool program on May 1, 2020, when the program was conducted remotely remainder of the school year. The

report also shows that the goals and objectives were introduced for the September 1, 2020 to April 30, 2021 and that N.M. was progressing.

N.M.'s skills, knowledge, and abilities for Spring 2020-2021 shows that N.M. was meeting or exceeding expectations in all areas.

N.M.'s progress report dated June 15, 2021, shows that in reading literature, he mastered two of the objectives. The objective of telling how adventures of characters are alike and how they are different was re-introduced to N.M. on February 28, 2021 because he did not participate in virtual learning. In June, he was progressing on this objective. He also progressed on his read aloud objective. On reading foundation skills, N.M. mastered three of the objectives and was progressing on the fourth.

In math the goal of demonstrate and understanding of number and counting N.M. mastered two objectives and was progressing on the third. On the goal of understanding numerical operations, he progressed on one objective, and another had to be reintroduced in February 2021 because he did not participate in virtual learning. In June 2021 he was progressing in this objective. In the goal of conceptualizing measurable attributes of objects N.M. mastered all three objectives.

In social empowerment and support, the goal of demonstrating self-direction N.M. was progressing on the objective. On the goal of identifying and expressing feeling, both objectives were re-introduced due to N.M. not participating in virtual learning. He was progressing in June in each of the objectives. In the goal of exhibit positive interaction with other children and adults, N.M. was progressing on all the objectives. On the goal of exhibiting pro social behavior, he was progressing on one of the objectives and the objective of enter play when a group of children are already involved in play was introduced, then reintroduced then introduced again.

In OT the goal of improve the ability to use sensory information for interaction with people and objects, N.M. was progressing on the objectives. The goal of increase

body awareness and improve motor planning skills, N.M was progressing in the goal of improve sensory processing, N.M. was progressing. All the OT goals were introduced on December 4, 2020.

On March 8, 2022, petitioners requested an IEP meeting to discuss compensatory education for N.M. during the period that Covid-19 restrictions were in place. The IEP meeting was held on March 23, 2022. At the IEP meeting, petitioner's concerns including N.M. had too much time in a one-to-one environment which was not appropriate. Petitioner believed that N.M. had regressed. N.M. made progress toward his goals at that time. The CST discussed N.M.'s progress at the meeting. Petitioners wanted compensatory education for lost skills and regression in the areas of behavior, social, emotional, and reading skills. Regression was not noted by the District until September 2021. Petitioner wanted N.M. to go to Harbor Haven for the summer of 2022 to recoup his skills. Petitioners were concerned that the hours of services he received did not match up with the number of hours provided on the IEP. N.M. did not attend school remotely.

At the March 2022 IEP meeting N.M.'s progress notes were reviewed as well as the PLAAFP's. N.M.'s teachers and related service providers were present at the IEP meeting. The CST determined that N.M. made excellent progress until September 2021 and that he was provided with FAPE and made progress on most of his goals.

N.M. did not participate in virtual learning. Certain goals were re-introduced when learning was in person.

N.M.'s self-confidence increased during the school year. His expressive skills increased. He was age appropriate in Language Arts.

### **LEGAL ANALYSIS AND CONCLUSION**

The IDEA provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S.

176, 179, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 695 (1982). One of purposes 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 and prepare them for further education, employment, and independent living.” 20 U.S.C.A. §1400(d)(1)(A). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C.A. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rest with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1(d). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

The United States Supreme Court has construed the FAPE mandate to require the provision of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Rowley*, supra, 458 U.S. at 203, 102 S. Ct. at 3049, 73 L. Ed. 2d at 710. New Jersey follows the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” *Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist.*, 116 N.J. 30, 47 (1989) (citing *Rowley*, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). The IDEA does not require that a school district “maximize the potential” of the student, *Rowley*, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708, but requires a school district to provide a basic floor of opportunity. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533–34 (3d Cir. 1995). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the IEP provides for “significant learning” and confers “meaningful benefit” to the child. *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999); *Polk v. Cent. Susquehanna Intermediate Unit* 16, 853 F.2d 171, 180, 182 84 (3d Cir. 1988), cert. den. sub. nom. *Cent. Columbia Sch. Dist. v. Polk*, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). In other words, the school district must show that the IEP will provide the

student with “a meaningful educational benefit.” S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). This determination must be assessed in light of the individual potential and educational needs of the student. T.R., supra, 205 F.3d at 578; Ridgewood, supra, 172 F.3d at 247 48. The appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the district. S.H., supra, 336 F.3d at 271. Rather, the pertinent inquiry is whether the IEP offered a FAPE and the opportunity for significant learning and meaningful educational benefit within the least restrictive environment.

Toward this end, an IEP must be in effect at the beginning of each school year and be reviewed at least annually. 20 U.S.C.A. § 1414 (d)(2) and (4); N.J.A.C. 6A:14-3.7. A complete IEP must contain a detailed statement of annual goals and objectives. N.J.A.C. 6A:14-3.7(e)(2). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general education curriculum and “be measurable” so both parents and educational personnel can be apprised of “the expected level of achievement attendant to each goal.” Ibid. Further, such “measurable annual goals shall include benchmarks or short-term objectives” related to meeting the student’s needs. N.J.A.C. 6A:14-3.7(e)(3). The New Jersey Supreme Court has recognized that “[w]ithout an adequately drafted IEP, it would be difficult, if not impossible, to measure a child’s progress, a measurement that is necessary to determine changes to be made in the next IEP.” Lascari, supra, 116 N.J. at 48.

In this matter, N.M.’s mastered nine of his goals and he was progressing in most of his goals and objectives. The classes were smaller due to Covid-19, but N.M. did well in the smaller classes. N.M.’s self-confidence increased during the school year. His expressive skills also increased. He was age appropriate in Language Arts. Although he did not master the social emotional goals, he made progress. He was involved in seven incidents from March to May 2021, but they were short in duration.

I **CONCLUDE** N.M. was provided with a Free and Appropriate Education.

Compensatory education is a remedy not specifically provided for in the IDEA. However, the courts have recognized that "Congress expressly contemplated that the courts would fashion remedies not specifically enumerated in IDEA." W.B. v. Matula, 67 F.3d 484, 494-95 (3d Cir. 1995). Thus, a student deprived of a FAPE may be entitled to an award of compensatory education, which is an available remedy even after the student has reached age twenty-one. Ridgewood, supra, 172 F.3d. at 249; M.C. v. Central Reg. Sch. Dist., 81 F.3d 389, 395 (3d Cir. 1996); Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 536 (3d Cir. 1995); Lester H. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990), cert. denied, 499 U.S. 923, 111 S. Ct. 1317, 113 L. Ed.2d 250 (1991).

The legal standard for the granting of such relief is summarized by the Third Circuit as follows:

[A] school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation but excluding the time reasonable required for the school district to rectify the problem.

[M.C., supra, 81 F. 3d at 397.]

Awards of compensatory education have included an additional two and one-half years of special education where the school district had been lax in its efforts to provide a proper placement, Lester H., supra, 916 F. 2d at 873, and payment of college tuition where the disabled student would apply credits obtained toward acquisition of a high school diploma. Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F.Supp.2d 138, 145-146 (W.D.N.Y. 1999).

On March 3, 2021, the New Jersey Department of Education issued guidelines regarding compensatory education for students with disabilities because of Covid 19. This provides that compensatory services should be provided for missed services during the Covid -19 pandemic when the failure to provide those services has denied that student the right to FAPE. It is the role of the IEP team to determine if

compensatory education is necessary, and if so, determine the need, type, and duration of the services.

An IEP meeting will be held to discuss the impact of the missed services on the student's progress on meeting the IEP goals and objectives and to determine if there is a need for compensatory education.

In this matter, it is not disputed that N.M. did not participate in virtual learning, did not have a one-to-one aide, and missed twelve counseling sessions. The IEP meeting was held in this matter. Although N.M. did not master most of his goals and objectives, he was progressing. In addition, the smaller classes which he was in during September 2020 to March 2021 was beneficial for him. There was no evidence that he regressed due to the pandemic.

Accordingly, I **CONCLUDE** that Wayne Board of Education provided a free and appropriate education to N.M. I further **CONCLUDE** N.M. is not entitled to compensatory education.

### **ORDER**

It is **ORDERED** that petitioners' request for compensatory education be and is hereby **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 Policy and Dispute Resolution.

January 9, 2023



\_\_\_\_\_  
DATE

\_\_\_\_\_  
**KIMBERLY A. MOSS, ALJ**

Date Received at Agency

January 9, 2023

Date Mailed to Parties:  
ljb

January 9, 2023

**WITNESSES**

**For Petitioner**

None

**For Respondent**

Deborah Patalita  
Gianna DiChristina  
Andrea Gilman  
April Kelly-Winston

**EXHIBITS**

**Joint**

- J-1 IEP Dated April 24, 2020
- J-2 IEP Dated October 19, 2020
- J-3 IEP Dated November 2, 2020
- J-4 IEP Dated May 11, 2021
- J-5 IEP Dated March 23, 2022
- J-6 IEP Dated July 21, 2023
- J-7 Multi-Disciplinary Report Dated February 25, 2020\
- J-8 Social Assessment Evaluation Dated February 25, 2020
- J-9 Multi-Disciplinary Report Dated
- J-10 Occupational Therapy Educational Evaluation Dated October 2, 2020
- J-11 Functional Behavioral Assessment Dated May 10, 2021
- J-12 Initial Meeting Notice dated September 25, 2019
- J-13 Initial Meeting Notice Dated January 1, 2020
- J-14 Initial Eligibility/IEP Meeting Notice Dated February 5, 2020
- J-15 Notification of CST Meeting Dated February 5, 2020
- J-16 Eligibility Conference Report-Initial Dated April 24, 2020

- J-17 Notice to J.T. from Patalita RE: N.M. Dated September 25, 2020
- J-18 Reevaluation Plan Dated October 19, 2020
- J-19 Letter to J.T. from Patalita Re: additional Information required Dated November 10, 2020
- J-20 Meeting Notice Dated February 12, 2021
- J-21 Letter to parents scheduling a review of the IEP Dated March 19, 2022
- J-22 April Kelly-Winston's Notes from March 23, 2022 IEP Meeting
- J-23 Initial Evaluation Plan Dated February 5, 2020
- J-24 Wayne Township Public Schools/Health History Dated February 25, 2020
- J-25 Preakness Early Childhood Center IEP Goals and Objectives Progress Reporting Dated December 4, 2020
- J-26 Preschool Life Skills Questionnaire Dated April 21, 2021
- J-27 Eligibility Conference Report Re-Evaluation Dated May 11, 2021
- J-28 Preakness Early Childhood Center Knowledge, Skills and Abilities Report Spring2020/2021 School Year
- J-29 Preschool to Kindergarten Transition Form Dated June 4, 2021
- J-30 Preakness Early Childhood Center IEP Goals and Objectives Progress reporting Dated June 15, 2021
- J-31 Attendance Detail Report for 2020-2021 School Year
- J-32 Email from J.T. to Cynthia Carey Re: N.M. Update Dated March 3, 2020
- J-33 Email from Cynthia Carey to J.T. and R.M. regarding Rescind Consent for O.T. Dated April 13, 2020
- J-34 Email from Cynthia Carey to J.T. and R.M.re: Report Cover and Report Dated April 13, 2020
- J-35 Email from J.T. to Cynthia Carey re Rescind Request for OT for N.M. Dated April 13, 2020
- J-36 Email from R.M. to Cynthia Carey re N.M. Dated August 17, 2020
- J-37 Email from Christine Romanick re Welcome Dated April 29, 2020
- J-38 Email chain from R.M., Jennifer Varano and J.T. Dated August 19, 2020
- J-39 Email from R.M. to Patalita re IEP Meeting request Dated September 8, 2020

- J-40 Email from R.M. to Patalita Re Accommodation for N.M. Dated September 15, 2020
- J-41 Email from Gilman to J.T. and R.M. re Great Day Dated September 21, 2020
- J-42 Email from J.T. to Patalita re: Accommodation for N.M. Dated September 22, 2020
- J-43 Email from R.M. to Patalita Dated September 23, 2020
- J-44 Email from Gilmore re: afternoon Sessions Dated September 29, 2020
- J-45 Email Chain from Michele Trentacosta, J.T. and Patalita re: N.M. Dated September 30, 2020
- J-46 Email from Gianna Savitteri to R.M and J.T. re: Follow-Up Phone Call Dated October 2, 2020 Counseling Follow-Up Dated October 5, 2020
- J-47 Email from Gianna Savitteri to R.M and J.T. re: Counseling Follow-Up Dated October 5, 2020
- J-48 Email from Patalita to J.T. and R.M. re: N.M. Dated October 15, 2020
- J-49 Email from Gilman to J.T. and R.M. re; Update Dated October 15, 2020
- J-50 Email from Gilman to J.T. and R.M. re Great Day Dated October 16, 2020
- J-51 Email Chain from Patalita to R.M. and J.T. re: Release Dated October 22, 2020
- J-52 Email Chain from J.T. to Gianna Savittieri re; Suspension Dated October 23, 2020
- J-53 Email Chain from Patalita to J.T. re N.M. Dated October 23, 2020
- J-54 Email from J.T. to Patalita re: N.M. Dated October 23, 2020
- J-55 Email Chain from J.T. to Gianna Savittieri re: Counseling Dated October 27, 2020
- J 56 Email from Patalita to J.T. re; Incident Today Dated November 4, 2020
- J-57 Email Chain from Gilman re: N.M. Dated November 9, 2020
- J-58 Email Chain from Savittieri to J.T. re: Counseling Dated November 25, 2020
- J-59 Email Chain from Savittieri to J.T. and R.M. re: Child's Nomination Dated December 4, 2020
- J-60 Email from J.T. to Savittieri re; Zones of Regulation Resources and Exercises Dated December 4, 2020

- J-61 Email Chain from J.T. to Savittieri re: Child's Nomination Dated December 10, 2020
- J-62 Email Chain from J.T. to Savittieri re; Check in Dated January 22, 2021
- J-63 Email Chain J.T. to Savittieri re: N.M. Dated February 16, 2021
- J-64 Email from R.M. to Patalita re: N.M. dated March 10, 2021
- J-65 Email from Michelle Trentacosta, Kevin Ragas and Patalita re: N.M. Dated March 11, 2021
- J-66 Email from Michele Trentacosta to Kevin Ragas re: N.M. Dated March 11, 2021
- J-67 Email from Savittieri to J.T. re: N.M. Dated March 12, 2021
- J-68 Email from Gilman to J.T. and R. M. Dated March 19, 2021
- J-69 Email Chain from Gilman to J.T. and R.M. re: Return from Spring Break Dated April 5, 2021
- J-70 Email from Gilman to J.T. Dated April 9, 2021
- J-71 Email Chain from J.T. and R.M. to Gilman re: Yesterday Dated April 13, 2021
- J-72 Email from J.T. to Kevin Ragas re: Suspension Dated April 15, 2021
- J-73 Email from Gilman to J.T. and R.M. re: N.M. Dated April 19, 2021
- J-74 Email from J.T. to Patalita re: IEP Eligibility Dated May 11, 2021
- J-75 Email from R.M. to Dana Sir re: Thank-you Dated May 18, 2021
- J-76 Email from Gianna Dicristina to Savittieri re: Peer Interaction Dated June 16, 2021
- J-77 Email from Gilman to J.T. and R.M. re: Excellent Day Dated June 17, 2021
- J-78 Email from Gilman to J.T. and R.M. re; Summer Suggestions Dated June 20, 2021
- J-79 Email Chain from Gilman to J.T. and R.M. re: summer Suggestions, Dated June 21, 2021
- J-80 Crisis Intervention Letter Dated September 23, 2021
- J-81 Email Chain from Jennifer Varano re: Letter Dated September 27, 2021
- J-82 Suspension Letter Dated September 27, 2021
- J-83 Email from R.M. to April Kelly-Winston re: Compensatory Education and Services Request S905 Bill Dated March 18, 2022

- J-84 Email Chain from April Kelly-Winston to R.M. re: Compensatory Education and Services Request S905 Bill Dated March 18, 2022
- J-85 Email from Gianna Dicristina to April Kelly-Winston re: Counseling Timeline Dated March 21, 2022
- J-86 Email Chain from R.M. to April Kelly-Winston re: Compensatory Education and Services Follow Up Dated March 30, 2022
- J-87 Email Chain from R.M. to April Kelly-Winston re: Compensatory Education and Services Follow Up Dated March 31, 2022
- J-88 Email Chain from April Kelly-Winston to R.M. re: IEP from N.M. Dated April 5, 2022
- J-89 Re-Evaluation Meeting- Written Notice of Re-Evaluation Plan Dated February 21, 2022