



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

**FINAL DECISION**

OAL DKT. NO. EDS 01093-22

AGENCY DKT. NO. 2022-33804

**C.G. ON BEHALF OF N.H.,**

Petitioners,

v.

**NEW BRUNSWICK CITY  
BOARD OF EDUCATION,**

Respondent.

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**Lisa Quartarolo**, Esq., for petitioners (Law Offices of Lisa Quartarolo)

**George F. Hendricks**, Esq., for respondent (Hendricks & Hendricks,  
attorneys)

Record Closed: May 25, 2022

Decided: August 1, 2022

BEFORE **KIM C. BELIN**, ALJ:

**STATEMENT OF THE CASE**

This matter arises under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§1401-1484(a). Petitioner, C.G., (petitioner or C.G.) filed a petition for due process, on behalf of her daughter, a minor student, N.H., seeking an appropriate program and placement in the least restrictive environment, a functional behavior assessment, a behavioral intervention plan, a one-to-one aide, related services, and compensatory education.

The petitioner specifically contends that the respondent, the New Brunswick City Board of Education (respondent or Board): a.) failed to provide a comparable Individual Education Program (IEP) including extended school year services (ESY) when her daughter transferred from the Newark School District to the respondent; b.) unilaterally placed N.H. on home instruction for more than forty-five days without requesting an expedited hearing or manifestation determination; c.) failed to provide educational services for forty-three school days between November 17, 2021, and January 28, 2022; d.) failed to provide an appropriate IEP that included the educational supports and services N.H. needed to receive a free, appropriate education (FAPE); and e.) violated the terms of a Final Order Approving Settlement.<sup>1</sup>

The respondent admits that it failed to meet the timelines for developing an appropriate IEP but asserts that there were several factors involved. Namely, COVID-19 which mandated virtual instruction; a shortage of employees to provide services; the petitioner's refusal to agree to observation and evaluation scheduling, and her initial failure to accept a recommended out-of-district placement as an interim placement. The respondent also does not dispute that it must provide N.H. with compensatory education. However, the respondent calculates the amount of time owed is between September 23, 2021, through November 29, 2021, and January 3, 2022, through January 26, 2022.

### **PROCEDURAL HISTORY**

After not receiving educational services for more than forty-five days, the petitioner on behalf of her daughter, N.H., filed a petition of appeal dated January 21, 2022, alleging that the respondent failed to provide N.H. with a FAPE by not implementing the IEP dated May 13, 2021, from her previous school district that included ESY services when N.H. transferred into the New Brunswick School District. On February 14, 2022, the Commissioner of Education transmitted this matter as a contested case to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 to-15; N.J.S.A. 52:14F-1 to -13. Petitioner filed an amended petition on March 15, 2022, and the Board submitted an answer to the amended petition on March 30, 2022. Hearings were conducted on April

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<sup>1</sup> This claim was not raised in the initial or amended petitions and thus will not be addressed in this Initial Decision.

4, 2022, April 6, 2022, and May 2, 2022. After post-hearing briefs were submitted the record closed on May 25, 2022. The record was re-opened on July 8, 2022, to obtain additional information and clarification and closed on July 18, 2022.

### **FACTUAL DISCUSSION AND FINDINGS**

The following **FACTS** are undisputed and I, therefore **FIND**:

N.H. was a nine-year old student in the fourth grade for the 2021-2022 school year. She was classified as eligible to receive special education and related services under the category of Multiple Disabled by the respondent and was diagnosed with Down's Syndrome in utero. She was a student in the Newark Public Schools until she moved with her mother to New Brunswick in June of 2021. While a student in the Newark Public Schools, N.H. was eligible to receive special education and related services under the category of Other Health Impaired (OHI) and had an Individualized Education Plan (IEP) dated May 13, 2021. (P-2.) After moving to New Brunswick, C.G. sought to enroll her daughter in the New Brunswick school district but was told to call back in August.

On August 10, 2021, the secretary for respondent's Pupil Personnel Services, requested a copy of N.H.'s IEP so the IEP could be forwarded to the Child Study Team (CST). (P-4.) N.H.'s IEP along with petitioner's cell phone number were forwarded by the Pupil Personnel Services secretary on August 10, 2021. Id. Dr. Iris Ford, Acting Assistant Superintendent for Pupil Personnel Services, acknowledged receipt of the IEP on August 14, 2021. Id.

A student registration form was received by the respondent on or about August 18, 2021, acknowledging that the student, N.H., had an IEP. (P-1.) C.G. had a registration appointment on August 18, 2021, at 12 p.m. which was completed on that date. Id.

The IEP from the Newark School District, dated May 13, 2021, identified N.H.'s disability as OHI, and identified the following specially designed instruction and related services:

- District and Statewide testing accommodations
- ESY
- Specialized transportation
- Behavior Intervention Plan (BIP)
- Classroom modifications
- Supplementary aids and services
- One-to-one aide
- Occupational Therapy 1x/week for thirty minutes in a group
- Speech language 2x/week for thirty minutes in a group (P-2.)

A Student Placement Form was completed for N.H. on August 20, 2021, placing her in the fourth grade at Woodrow Wilson School under the classification of Multiple Disabled and providing small group occupational therapy once per week for thirty minutes and small group speech twice per week for thirty minutes. (P-5.)

N.H.'s case manager, Ms. Maiola, met N.H. for the first time on September 10, 2022. (T1:15:7-9)<sup>2</sup> Ms. Maiola had not read N.H.'s IEP prior to September 10, 2022. (T1:19:5;12-13.) N.H. was placed in a self-contained multiple disabled classroom. (P-28.)

N.H. was referred to the Board-Certified Behavior Analyst (BCBA) on September 14, 2021. (P-10.) With C.G.'s consent, the BCBA conducted an observation of N.H. on September 14, 2021, and on September 17, 2021, the BCBA sent an email to seven individuals, including Ms. Maiola, asking for assistance in scheduling a meeting with C.G. to review the BCBA's observations and recommended strategies for N.H. and to schedule training for staff. (Id.; P-11.) The BCBA's report recommended a structured program with low student teacher ratio and a one-to-one paraprofessional for N.H. (P-11.)

On September 20, 2021, the BCBA sent an email to district staff, including Ms. Maiola, again asking for assistance in scheduling a meeting with C.G. to review the BCBA's observations and to schedule training. (P-10.)

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<sup>2</sup> "T1" refers to Transcript dated April 4, 2022. "T2" refers to Transcript dated April 6, 2022. "T3" refers to Transcript dated May 2, 2022.

On September 14, 2021, Ms. Maiola recommended home instruction for N.H. because she posed a risk to her safety and the safety of others. (P-14.) The CST Supervisor responded stating she had spoken with C.G. who requested a meeting with the principal prior to placing N.H. on home instruction. Id.

Respondent met with C.G. on September 15, 2021, and told C.G. that the respondent could conduct a functional behavioral assessment (FBA). C.G. gave her verbal consent, but the BCBA did not agree that N.H. needed a FBA. (P-10.)

In a letter dated September 17, 2021, the respondent memorialized the meeting held on September 15, 2021, at which the parties agreed that there would be a paraprofessional assigned to N.H. daily, the BCBA would continue to observe and work with N.H., a FBA and possibly BIP would be developed, the classroom teacher would communicate daily with C.G. regarding N.H., a follow up meeting would be held on September 21, 2021, to discuss N.H.'s behavior and assess if the current placement was appropriate, and C.G. would support school personnel if there was an episode that compromised N.H.'s safety or the safety of others. (P-16.)

Home instruction began on September 20, 2021, at the direction of the school administrator. (P-47) (T1:25:2-7.) Twenty hours of home instruction was provided and completed on or about November 17, 2021. (P-47.)

A re-evaluation meeting was held on September 29, 2021, where the respondent determined that additional assessments were needed. Namely, educational, psychological, speech/language, and occupational therapy evaluations were recommended to determine if N.H. continued to have a disability that adversely affected her educational performance. (P-23.)

The psychological evaluation was completed on October 21, 2021. (P-25.) The occupational therapy and speech and language re-evaluations were completed on November 19, 2021. (P-28.)

A re-evaluation meeting was held on December 3, 2021, where a draft IEP prepared by the respondent's CST was presented to the petitioner. (P-34.) This IEP listed N.H.'s classification as OHI and recommended placement in a multiple disability classroom for all subjects, individual occupation therapy twice a week for thirty minutes, individual speech/language therapy three times per week for forty minutes, door-to-door transportation, and waiver from state assessments for math and literacy. Id. C.G. signed a consent form to implement this IEP.<sup>3</sup> (R-1.) This IEP did not require behavioral interventions, ESY or a one-to-one aide. Id.

On January 7, 2022, Ms. Maiola sent an email to the CST Social Worker asking for additional out-of-district placement recommendations for petitioner's consideration. The Social Worker recommended New Roads School in Parlin. (P-38.)

On January 17, 2022, C.G. requested a copy of the IEP that the respondent had developed for N.H. and was sending to potential placements. Ms. Maiola provided the copy on January 18, 2022. (P-42.)

In an email dated January 25, 2022, Dr. Ford stated that C.G. had terminated home instruction services and would not allow the evaluators to complete the evaluations. The Center for Lifelong Learning (CLL), one of the schools considered, had accepted N.H. and was ready to enroll her starting Friday, January 28, 2022. (R-3.)

On January 28, 2022, N.H. was placed at the CLL for thirty days pursuant to a settlement agreement. (P-56.)

In an email dated March 2, 2022, the case manager at CLL forwarded to the petitioner and respondent the Behavioral Strategies developed for N.H. (P-59.)

C.G. considered the following schools: Academy Learning Center, CLL (who accepted N.H.), New Roads School (who accepted N.H.), Midland School, Rock Brook School (who did not accept N.H.) and The Deron School. (R-4.)

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<sup>3</sup> The date of December 3, 2021, was inserted by Ms. Maiola as evidenced by her initials.

A psychoeducational evaluation was completed on March 26, 2022. (P-62.)

In a letter dated March 28, 2022, C.G. accepted admission into the New Roads School in Parlin, New Jersey. (R-5.)

A revised IEP was developed on March 30, 2022, placing N.H at The New Roads School. (P-65.) This IEP contained similar supports to the December 3, 2021, IEP, but added ESY services from July 1, 2022, through August 12, 2022, and individual occupational and speech language therapy from September 1, 2022, through March 29, 2023. (P-64.)

On March 31, 2022, a revised version of the March 30, 2022, IEP was presented to C.G. This IEP included a one-to-one aide once daily for 345 minutes and 240 minutes during the ESY program; a behavioral summary, supplemental aides, and services, however, a BIP was deemed inappropriate. (P-65.)

### **TESTIMONY**

#### **For the petitioner:**

**Gianna Locascio, Psy.D.** (Dr. Locascio) is Board-certified in clinical neuropsychology, pediatric neuropsychology, and rehabilitation psychology and is a certified school psychologist in New Jersey. She has both master's and doctoral degrees in psychology from Rutgers University. She has worked in the field of neuropsychology since 2007. She currently works as the Director of Pediatric Neuropsychology at New York University Langone in the Brooklyn Division. She conducts neuropsychological evaluations of children, adolescents, and young adults. (T2:13:6-15.) Her patients typically have epilepsy, brain injuries, and congenital and genetic disorders. (T2:13:17-19.) Since 2007, she estimated that she had completed 1,000 evaluations including evaluations of children with Down Syndrome. (T2:14:10-17.) Her evaluations include evaluation of academic functioning, and her recommendations are frequently incorporated into components of a child's education. (T2:15:3-9.) She has a small private

practice in New Jersey where she conducts similar evaluations for private clients. Dr. Locascio was accepted as an expert in neuropsychology.

Dr. Locascio reviewed the Behavioral Observation and Recommendations (P-11) and found it to be a “fairly standard summary.” (T2:21:11-12.) Dr. Locascio agreed with the observer’s recommendation that N.H. needed a one-to-one paraprofessional given the number of elopements observed. (T2:24:17-24.) She also agreed that all staff working with students like N.H. need crisis prevention and restraint training. (T2:25:1-4.) Although there were many attempts by N.H. to elope, Dr. Locascio did not think N.H. had to be immediately removed from the classroom. Rather she stated that with the proper interventions, she has seen many cases like N.H. where the students have been maintained in the classroom. (T2:28:17-20.) A FBA, a BIP, and/or a one-to-one paraprofessional were examples of typical interventions Dr. Locascio recommended for the types of behaviors N.H. exhibited.

Dr. Locascio also reviewed the Collaborative Learning and Psychological Re-evaluation (P-25), but she found it problematic because C.G. was in the room during the assessment process. N.H.’s reliance on adult prompting from her mother resulted in the assessment being discontinued and the formalized assessment transitioned to a “functional assessment.” (T2:33:11-15.) A functional assessment helps determine the individual’s basic functional skills like matching colors, naming colors, or identifying different colors. (T2:34:14-25.)

Dr. Locascio reviewed the December 3, 2021, IEP (J-1) and stated she did not think the classification of OHI was appropriate for N.H.; she did not see a formal FBA or BIP, and the IEP indicated that behavior intervention was not needed. (T2:36:10-20.)

Dr. Locascio completed an assessment of N.H. on March 26, 2022, and found N.H. to be “inattentive” and “quite impulsive” attempting to avoid or escape the testing tasks presented to her. (P-62; T2:39:1-5.) Dr. Locascio stated that N.H.’s classification should be multiple disabilities or intellectual disabilities. (T2:40:17-25.) OHI, in her opinion, was more for attention deficit hyperactivity disorder (ADHD), epilepsy, or diabetes that impacts a child’s education functioning. (T2:55:9-16.) She found N.H. to be “enormously social,”



able to maintain eye contact, responded well to behavior reinforcement, and receptive to correction or redirection. (T2:41:7-19.) Dr. Locascio recommended changing N.H.'s classification to multiple disabilities, putting her into a very small class size with trained staff, performing a FBA and BIP, and an evaluation for an augmentative or assistive communication device to assist with her expressive language. (T2:42:1-14.)

Dr. Locascio reviewed the March 30, 2022, IEP completed in collaboration with CLL, and she noted that there was no request for a BIP even though data had been collected confirming behavioral disruption. (T2:46:11-15.) She did not see any reason for placing N.H. on home instruction. (T2:56:6-7.) She believed failure to conduct a FBA and create a BIP are interfering with N.H. receiving a FAPE. (T2:57:12-14.)

On cross-examination, Dr. Locascio stated that she thought the BIP should have been completed even with the home instruction and interim placement. She approved of a one-to-one paraprofessional for N.H., and she agreed that all the evaluations conducted by the respondent were needed to develop a comprehensive IEP. (T2:54:6-17.)

**C.G.** is N.H.'s mother. N.H. was born on November 15, 2011. C.G. knew when she was pregnant that N.H. would have Trisomy 21, which is also known as Down Syndrome. (T3:158:11-20.) N.H. started receiving special education services when she was three years old. N.H. is very social; she likes people, likes to play, sing, and be outside; she has a "sweet soul." (T3:160:11-25.) They lived in Newark for four years and moved to New Brunswick in June of 2021. (T3:161:3.) C.G. moved to New Brunswick so N.H. could get a better education. (T3:161:11-13.) They moved before the school year ended in Newark. N.H. usually attended the summer program in Newark but she did not for the summer of 2021 because of the move. (T3:162:11-14.)

C.G. called the respondent in June to find out the process to enroll N.H. and was told to call back in August when registration started. She called in August and was told to submit all relevant documents including N.H.'s IEP which she did. (T3:162:17-22.) The documents were sent via email on August 9, 2021. (P-2) C.G. approved of the IEP from Newark and thought it was appropriate for N.H. (T3:164:13-18.)

N.H. has had a one-to-one aide since she was three years old. N.H. did not attend the first day of school which was September 9, 2021, in New Brunswick because the school bus never came. When C.G. called the respondent, she was told there were transportation issues. (T3:167:17.) Accordingly, N.H.'s first day of school was September 10, 2021. On September 10, 2021, the school bus was late and when C.G. contacted the teacher to get an update on N.H.'s first day, the teacher asked if C.G. was coming to get N.H. When N.H. arrived home, her bookbag was ripped. (T3:168:10-19.) The teacher later explained that N.H. tried to elope from the classroom and the teacher grabbed her bookbag to prevent N.H. from eloping. (T3:168:20-25.) C.G. asked if N.H. had an aide and the teacher said no. C.G. did not speak to the case manager assigned to N.H. until the following Monday. (T3:169:2-15.)

C.G. spoke to Ms. Maiola on Monday who shared that she had not read N.H.'s IEP and therefore, N.H. did not have an aide. However, N.H. had an aide on Monday. C.G. also spoke with the principal on Monday, September 13, 2021, and the principal said that N.H. was having behavioral issues and he asked for consent for an observation. She consented to the observation. The school nurse also called to tell C.G. how many times N.H. fell throughout the day. The observation occurred on September 14, 2021, and the principal called her and said that a meeting had been held with all the teachers and it was decided that N.H. would be placed out of district. (T3:171:2-13). C.G. objected because she had not been consulted or invited to the meeting. The principal responded that there would be a meeting on September 15, 2021, to which she was invited. C.G. called pupil services and spoke with Ms. Caballero who said she would also attend the meeting. (T3:171:21-25.)

On September 15, 2021, she attended the meeting in person along with her boyfriend, Ms. Caballero, and the principal. Members of the CST attended virtually. C.G. was told about N.H. running out of the classroom, not sitting in the classroom, and being injured from falling, but there were no incident reports. (T3:173:14-25.) C.G. felt that the decision had already been made to remove her daughter from the district. However, the group agreed to allow N.H. to remain for another week and the respondent would gather data on her. If her behavior did not improve, there would be another meeting to discuss other options. (T3:175:5-9.) This agreement was memorialized in a letter dated

September 17, 2021, which C.G. received via email on September 21, 2021. (P-16; T3:178:1-6)

There was another meeting on September 21, 2021, in which C.G. was told the respondent was going to seek an out-of-district placement for N.H. or home instruction because of safety concerns. (T3:180:9-17.) Home instruction was to start immediately. (T3:180:21.) There was no discussion of N.H.'s IEP because this was not an IEP meeting.

A re-evaluation planning meeting was held on September 29, 2021. In this meeting, the various evaluations the respondent wanted to conduct were identified. There was no discussion about potential school placements, just testing. (T3:186:9-10.) Evaluations were scheduled for October 6, 2021, and October 7, 2021, but C.G. had to cancel because she had no transportation. She was a college student and had classes on Tuesdays. She told Ms. Maiola that she could not attend meetings or visit schools on Tuesdays but was available any other day of the week. (T3:187:13-17.) The speech and language evaluator cancelled the October 26, 2021, session.

After home instruction ended in November of 2021, the respondent did not contact her to continue it. N.H. did not get speech or occupational therapy during home instruction and she regressed. (T3:189:10-16.) C.G. called the respondent to try to get N.H. back into school. She requested a meeting which was held on December 3, 2021. The CST explained the various evaluations completed. C.G. became frustrated when she was told it would take another thirty days before N.H. could be placed in a school. C.G. got up to leave but Ms. Maiola and another CST member stopped her and told her to sign the consent form so it could be sent to potential schools. Accordingly, she signed the consent form but did not realize she was signing the IEP. (T3:191:2-25.) After she signed the consent form, she was given a copy of the IEP. Id. She thought only the consent forms were being sent out to the schools.

She never refused home instruction. However, she worked a seasonal job during Christmas and was unable to be home between 3:00 p.m. to 5:30 p.m. which were the times N.H. received home instruction. (T3:194:2-12.) C.G. initially liked CLL but later

noticed that many of the students were nonverbal and she feared that N.H., who is talkative, would lose her verbal skills. (T.195:13-25.)

On December 22, 2021, January 4, 2022, and January 6, 2022, C.G. emailed Ms. Maiola seeking information on getting N.H. into school. Ms. Maiola did not respond until January 7, 2022. (P-36; T3:196-198) An appointment was scheduled for C.G. to visit Academy Learning Center on December 23, 2021, but it was cancelled by the school due to an increase in COVID-19 cases. The appointment was rescheduled for February 8, 2022, but that visit did not occur either and C.G. was not told why. (P-36; T3:202:6-11.)

C.G. had meetings with staff at CLL on March 2, 2022, and March 30, 2022, and consented to allowing them to collect data on N.H. Although the staff promised to let her know of N.H.'s progression monthly, that has not happened. (T3:204:21-25.) However, C.G. did receive a behavioral summary of N.H.'s behavior from CLL for March 8, 2022, through March 18, 2022, with a promise of an update for March 21, 2022, through March 31, 2022 (P-60; T3:207:31-25). The behavioral summary identified that N.H. during the ten-day period eloped an average of 6.25 times per day, engaged in aggression an average of three times per day, and engaged in property destruction an average of 5.37 times per day. Id.

C.G. received a copy of the March 30, 2022, IEP twenty minutes before the meeting which was not enough time for her to review and understand it. (T3:212:13-20.) C.G. believed N.H. was assigned a one-to-one aide at CLL a few days after the March 30, 2022, IEP meeting. (T3:215:1-7.)

On cross-examination, C.G. stated that although she had attended other IEP meetings since N.H. was three years old, the IEP meeting held with the respondent on December 3, 2021, was a far different experience with some people attending in person and others attending virtually. There was confusion when she tried to leave and was told to sign the consent form so the respondent could look for different schools. (T3:217:14-25.) She relied upon Ms. Maiola's representation that the consent form would be sent to other schools, and she signed the form. C.G. was eager for her daughter to return to school. "She would have signed anything for [N.H.] to go back to school." (T3:218:2-6.)

C.G. did not believe she had a choice but to agree to the out-of-district placement. The respondent unilaterally removed N.H. and put her on home instruction and the only way she could return to school was if C.G. agreed to an out-of-district placement. (T3:218:13-20.) In addition, she agreed to hold off on completing the IEP until all the evaluations were completed because that is how the respondent advised her. (T3:222:8-12.)

The March 30, 2022, IEP had to be revised based upon recommendations from the CLL. C.G. refused to sign the IEP until the revisions were made. C.G. received the revised IEP on March 31, 2022. (T3:227:8-17.) C.G. wants her daughter to get the education she missed. The respondent was negligent in not reading Newark's IEP. She was denied a FAPE. She prefers New Roads over CLL because she believes New Roads is at a higher academic level and will be better for N.H. (T3:238:4-5.)

**For the respondent:**

**Yasbeth Maiola**, (Maiola), stated she was a certified social worker and case manager for two schools and had worked in this position for sixteen years. She testified that she had a case load of seventy-one students. She learned about N.H. on September 10, 2021, which was N.H.'s first day of school. Maiola did not work over the summer and thus, she did not see N.H.'s IEP before September 10, 2021. Maiola went to N.H.'s classroom on September 10, 2021, to meet her. N.H. was in a self-contained classroom for students with mild intellectual disabilities. Maiola spoke with N.H.'s teacher regarding concerns with N.H. trying to leave the classroom. (T1:16:12-13.) Maiola recalled that the IEP from Newark required a one-to-one aide for N.H. N.H. did not have a one-to-one aide when she entered the school. Accordingly, Maiola notified the principal that N.H. needed a one-to one aide and the principal assigned someone temporarily. (T1:17:11-15.) There was already an aide in the classroom who stepped in to help. A one-to-one aide was officially assigned on the next Monday. (T2:124:21.) However, that person did not last and so another aide was assigned. (T2:126:10-15.) N.H. ultimately had three different aides during her time at the Woodrow Wilson School. Id.

The following week, Maiola contacted Pupil Personnel Services about N.H. trying to leave the classroom and learned that the BCBA was available to do an observation. Accordingly, Maiola contacted the petitioner for verbal consent for the observation. (T1:19:16-25.)

Maiola observed N.H. trying to leave the classroom and other “aggressive behaviors” that raised concern about her safety. (T1:21:11-14.) A meeting was held with the petitioner, school administration, the CST, and pupil personnel administration on September 15, 2021, and the group decided to continue to support N.H. in the classroom to give her more time to adjust. (T1:21:17-25; T1:22:1.) Maiola contacted the case manager in Newark to get background information about N.H.’s behavior in the Newark School District. According to the Newark case manager, N.H.’s behaviors included inappropriate gesturing and foul language, short attention span but not elopement. (T1:23:13-24.)

Based upon N.H.’s behavior, the respondent recommended home instruction which began on September 23, 2021. (T1:25:2-12.) The CST scheduled a reevaluation planning meeting with C.G. on September 29, 2021. During this meeting, three evaluations - psychological, educational, and speech and language - were scheduled for October. (T1:26:5-9.) However, the petitioner did not attend the psychological and educational evaluations due to the lack of transportation and she cancelled the speech and language evaluation for the same reason. These evaluations were rescheduled and completed in November.

An eligibility meeting was held on December 3, 2021, where all the evaluations were reviewed, and an out-of-district placement was discussed. (T1:20:7-14.) The group decided to keep the classification from the previous district and three schools were proposed – Bright Beginnings, CLL, and Academy Learning Center. (T1:29:20-23.) The petitioner agreed to send N.H.’s school records to Academy Learning Center and the CLL. (T1:30:1-3.) A draft IEP was presented to C.G., but the group was unable to fully discuss it because C.G., left the meeting appearing frustrated at the length of time it might take for her daughter to be enrolled in an appropriate placement. However, the petitioner

did sign the IEP, and Maiola told her that she had fifteen days to consider it before it became effective. (T1:31:7-20.)

An in-person intake meeting was scheduled with CLL for December 10, 2021, but the day before it was cancelled due to COVID-19 precautions. (T1:32:1-15.) C.G. asked for additional school options and an appointment was made at New Roads School for February 9, 2022. C.G. visited New Roads and appeared to like it. (T1:33:12-20; 34:15-22.) New Roads accepted N.H. but C.G. wanted to visit three additional schools. (T1:35:12-16.) There were delays in making appointments with the Deron School, the Midland School and the Rock Brook School declined to accept N.H. (T1:36:6-14.)

As a result of a settlement agreement, N.H. was enrolled in CLL starting January 28, 2022. An IEP meeting was held on March 30, 2022, at CLL. (T1:28:10-24.) The IEP included assigning N.H. a one-to-one aide which was not part of the December 3, 2021, IEP. (T1:39:12-22.) New Roads still had space for N.H., but not an aide so the principal declined to accept N.H. until the principal could secure one. He anticipated the earliest date would be May. (T1:40:10-41:1.)

On cross-examination, Maiola stated that the first day of school for the students was September 9, 2021, however, N.H. was not in attendance due to transportation issues. (T1:42:16-22.) The student placement form dated August 24, 2021, identified that N.H. needed a one-to-one aide, door to door assistance, and elopement precautions. (P-5; T1:51:20-22.) Some of the aggressive behaviors Maiola witnessed on September 14, 2021, was hitting, spitting, stabbing the aide with a pencil, pulling someone's hair, throwing an iPad at a staff member, and repeated attempts to leave the classroom and school building. (T1:59:25-60:1-8.)

Maiola stated that after petitioner signed the draft IEP, Maiola changed it to add that the CST recommended placement at CLL and to include the petitioner's concerns about N.H. being on home instruction and petitioner's desire for an out-of-district placement. (P-51; T1:90:16-25 – 91:1-4.) In addition, she included the recommendations of the BCBA, and the annual measurable goals for motor skills, reading, math, speaking skills, classroom modifications, and accommodations. (T1:95:1-10.) The revised IEP

was not sent to the petitioner to review and sign. (T1:95:24-25.) This is the IEP that was sent to potential schools. (T1:113:1-2.)

Maiola stated that in March of 2022, the CLL implemented behavioral strategies because of N.H.'s behavior which consisted of aggression, elopement, and destruction of property. (T1:103:1-9.; P-59, 60.) In consultation with the CLL, a new IEP was drafted on March 30, 2022, which stated that N.H.'s behaviors were decreasing and thus a BIP was not needed. (T1:109:1-6.) The petitioner was given fifteen days to review this IEP. (T1:109:21-25.)

Maiola stated that the thirty-day IEP meeting did not occur because the petitioner stated that she did not want an IEP meeting but rather wanted a progress meeting. (T1:114:17-22.) This progress report meeting was held on March 2, 2022. (T1:129:19.)

**Dr. Cesar Cabrera** (Dr. Cabrera) has worked in the New Brunswick School District for ten years and currently served as the Director of Special Education. He worked as a general and special education teacher. He has a doctorate in school psychology from Fairleigh Dickinson University, and has worked as a business administrator, vice principal, principal, and supervisor of special education. (T2:64:5-10.)

Dr. Cabrera met N.H. on September 15, 2021, after a meeting with C.G. to address her concerns with her daughter's program. C.G. wanted to know what the school was planning to do in the face of N.H.'s behavioral challenges. (T2:66:6-13.) The plan was to give N.H. additional time to adjust and meet again the following week. The next few days, the behaviors continued to escalate wherein N.H. was running away and falling. The school had to place a security guard by the door to ensure she did not elope outside the building in addition to the support of a paraprofessional and classroom teacher. (T2:67:19-25.) Everyone, including C.G., was concerned about N.H.'s safety.

N.H. was in a self-contained classroom for students with cognitive impairments. There was a special education teacher and at least two paraprofessionals for the classroom and an individual paraprofessional for one other student. (T2:68:14-20.)



Home instruction pending completion of the evaluations was deemed appropriate to keep N.H. safe. (T2:69:18-22.) Evaluations were needed to determine the best placement for N.H. Dr. Cabrera stated that a psychological evaluation and behavior assessment were needed. There were difficulties aligning C.G.'s schedule to visit potential schools and difficulties in getting staff to perform all the assessments because of the pandemic. (T2:71:5-14.) He thought it was appropriate for N.H. to be on home instruction for five weeks because of the concerns for her safety. (T2:75:17-25.) In addition, it took some time to complete the evaluations.

On cross-examination, Dr. Cabrera testified that registration for N.H. was completed on August 19, 2021. (T2:78:18-21.) He stated when a child enrolled with an IEP, a CST member reviewed the IEP, and recommended that a comparable program was implemented until the CST could do a full review of the IEP once school started. (T2:80:17-25.) Dr. Cabrera stated a one-to-one aide was assigned to N.H. when she started school. (T2:81:21-22.) The respondent had information on N.H.'s behaviors prior to the start of school. (T2:83:3-7.)

The enrollment process required that the transportation and placement forms (P-5 and P-6) and a parent notification letter was sent to the assigned school to notify the assigned school that the student was enrolling in the program identified on the placement form. A district social worker who worked during the summer reviewed N.H.'s IEP and established her placement. (P-5.) In this case, N.H. was placed in the cognitive impaired program at the Woodrow Wilson school which was not her neighborhood school. The relevant enrollment forms stated N.H. would need a one-to-one aide, transportation, and elopement precautions. (T2:81:9-19.) The documents were normally copied to the building principal, the CST, and other administrators in the building. (T2:84:3-6.) None of the people who received the N.H.'s enrollment documents made any preparation for N.H. to address her elopement and other behavior issues prior to her first day of school because they did not work in the summer. (T2:85:16-19.)

On September 14, 2021, staff recommended that N.H. be placed in an out-of-district placement. (T2:91:22-25.) Bright Beginnings, and CLL were being considered. The administration, and the CST made the decision to place N.H. in home instruction.

(T2:96:18-23.) Dr. Cabrera signed the form authorizing home instruction on September 22, 2021. Home instruction was to last until November 29, 2021. (T2:94:2-5.) A school district has sixty days to complete a re-evaluation. (T2:98:18-21.) He stated it was possible for N.H. to have been placed in an interim out-of-district placement while the evaluations were being completed, however, he did not know if the respondent considered this option. (T2:100:16-21.)

Dr. Cabrera was aware that the BCBA did a behavioral assessment and made recommendations. Although a BIP was not completed, behavioral strategies were included in the IEP in the BIP section. (T2:112:21-25.)

**Dr. Iris Ford** is the Assistant Superintendent for Pupil Personnel Services. She is a certified elementary teacher with a specialization in English as a Second Language (ESL) bilingual special education. She has both administrative and supervisory certifications and a bachelor's degree in educational technology and assistive technology. In her current role, she oversees students with disabilities, school nurses, and the CST members. Dr. Ford testified that N.H. was enrolled in the CLL with a one-to-one paraprofessional and was doing well. (T3:9:15-20.) The CLL had implemented behavioral strategies and was seeing an improvement in N.H.'s behavior. However, the related services, such as physical therapy, speech therapy, etc., had not yet begun pending C.G.'s authorization. (T3:10:1-8.) New Road School was interviewing to hire a one-to-one paraprofessional for N.H. (T3:10:18-22.)

Dr. Ford stated that she did not believe that C.G. signed the March 30, 2022, draft IEP. (T3:12:2-9.) After Thanksgiving, C.G. stopped home instruction because she was working. Thus, N.H. had no instruction from December of 2021 through January of 2022 when she filed for emergent relief. (T3:18:15-25.) The respondent wanted to place N.H. in the least restrictive environment which was CLL while the respondent and petitioner continued to look for other schools. This was achieved through a settlement agreement developed at the emergent relief hearing on January 26, 2022. (T3:14:1-20.)

Dr. Ford was aware that N.H. did not have a one-to-one aide as required by her prior school district's IEP until the afternoon of the second day of school. (T3:15:21-25.)

Dr. Ford stated that the IEP meeting was delayed because C.G. wanted all the evaluations to be completed first. (T3:18:4-8.) N.H. was on home instruction from September 24, 2021, until November 29, 2021. (T3:37:6-7.) The respondent and CLL were planning to provide compensatory education services to N.H. (T3:45:10-25.)

Although the settlement agreement called for a one-to-one aide for N.H. upon enrollment at CLL, an aide was not provided because by law, CLL had thirty days to hold an IEP meeting and in the interim, CLL implemented the December 3, 2021, IEP which did not include a one-to-one aide. (T3:55:18-21.) Dr. Ford did not know if Maiola contacted CLL to inform them that the settlement agreement required a revision to the IEP to include the one-to-one aide. (T3:58:9-16.) Dr. Ford stated that Maiola was familiar with the terms of the settlement agreement. (T3:65:17-25.)

The respondent required parents to sign the draft IEP and then the final IEP was published. Changes made to a draft IEP after the parent has signed it are amendments and the amended IEP must be reviewed with the parent. (T3:85:13:25.) Dr. Ford did not know if Maiola followed this process when she changed the December 3, 2021, draft IEP after C.G. signed it. (T3:86:3-5.) It was not correct if Maiola did not give the amended IEP back to C.G. for review. (T3:85:13-17.)

Dr. Ford stated that respondent could not put N.H. in an interim placement temporarily while the evaluations were being completed. (T3:102:7-8, 17-22.) When C.G. stopped the home instruction, Dr. Ford was not aware if the respondent filed truancy charges or filed for emergent relief to compel C.G. to return N.H. to school. (T3:124:6-20.)

The behaviors witnessed by Maiola (hitting, spitting, stabbing a staff with a pencil, throwing an iPad) were not disciplinary issues but were safety issues. (T3:91:5:9.) N.H. did not commit any discipline infractions against the district or the school. (T3:91:17-19.) There was no manifestation determination because none of the behaviors exhibited by N.H. were related with discipline. (T3:92:10-13.)

Dr. Ford asked Maiola to ask CLL if the respondent could send over one of its paraprofessionals until CLL could acquire one, but CLL would not allow such an arrangement. (T3:135:10-17.) The CLL would provide its own paraprofessional once the IEP was revised at an IEP meeting. Id.

### **Additional Findings**

In order to assess credibility, the witness' interest in the outcome, motive, or bias should be considered. Furthermore, a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony, or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In determining credibility, I am not unaware that the District employees would want to support the program they developed for the child and would believe that the District's program would provide the child with a FAPE. I am also aware that the petitioner would want the best program for her child.

Accordingly, having considered the testimonial and documentary evidence offered by the parties, the testimony of Dr. Gianna Locascio appeared on its face to be the most credible. She was an unbiased witness who reviewed all the relevant assessments produced by the respondent and conducted her own assessment of N.H. out of the presence of her mother and thus was able to get conduct a formalized assessment. In addition, she was able to identify and use specific strategies that were effective in supporting N.H. to complete the required testing tasks despite her attempts to avoid them. Dr. Locascio has worked with children with Down Syndrome since 2007. She saw no reason for N.H. to be removed from the classroom and placed on home instruction. She provided specific recommendations to help N.H. be successful in the classroom environment.

Having considered the testimonial and documentary evidence presented I **FIND** the following additional **FACTS**:

1. Ms. Maiola did not see N.H. on the first day of school which was September 9, 2021, and did not review her IEP prior to N.H.'s first day of school which was September 10, 2021. (T1:42-16)
2. The respondent had N.H.'s enrollment documents including her prior school district's IEP as early as August 18, 2021. (T1:44:5-21)
3. The respondent knew as early as August 24, 2021, that N.H. needed a one-to-one paraprofessional, transportation, and elopement precautions. (P-5)
4. The respondent failed to respond to the BCBA's repeated requests to meet with C.G. to discuss the BCBA's observations and to train staff on strategies to help N.H. (P-10 and P-11.)
5. The administration, and not the CST, made the unilateral decision to put N.H. on home instruction, the most restrictive environment. (T1:61:16-17.)
6. The December 3, 2021, IEP developed by the respondent did not include a one-to-one aide. (J-1; T1:39:20-22) N.H. has had a one-to-one aide since the age of three. In addition, it did not provide for a BIP, ESY, or identify supplementary aids and services. (J-1; T1:80:13-14) This IEP also failed to require behavioral interventions despite data supporting the need for interventions. (P-34; T1:84:21-25)
7. The delays in scheduling the speech and language evaluation were due to the evaluator's unavailability. (T1:75:9-19)
8. Ms. Maiola modified the December 3, 2021, IEP after C.G. signed it but did not submit the modified IEP to C.G. for review.
9. As of December 3, 2021, Ms. Maiola was unsure if home instruction was still being provided. (P-47)
10. Home instruction was scheduled from September 24, 2021, through November 29, 2021, but the last entry on the home instruction log was dated November 17, 2021. (P-47)
11. The respondent sent the December 3, 2021, IEP which failed to include a one-to-one aide, BIP, or identify supplementary aids and services to potential out-of-district placements despite knowing that this IEP had not been fully discussed with C.G. (T3:81:19-21; P-34)

12. After home instruction stopped, there was no evidence presented that the respondent took steps to ensure that N.H. received a FAPE.
13. N.H. received no educational services from November 17, 2021, to January 28, 2022.
14. C.G. stopped home instruction after it ended on November 17, 2021, because she acquired a seasonal job which prevented her from being home in time for the home instruction sessions. (T3:194:2-12) She was employed from November 19, 2021, to December 26, 2021.
15. As of March 22, 2022, N.H. did not have a one-to-one aide at CLL. (P-60)
16. C.G. attempted to contact Ms. Maiola on numerous occasions to discuss getting N.H. back into school. (P-36)
17. The respondent was closed for winter break from December 23, 2021, through January 3, 2022.
18. While on home instruction, N.H. did not receive speech-language or occupational therapy services.

## **LEGAL ANALYSIS AND CONCLUSIONS**

### **IEP and FAPE**

This case arises under the IDEA, 20 U.S.C. §§ 1400 to 1482. One purpose of the IDEA, among others, is to ensure that all children with disabilities have available to them a “free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). This “free, appropriate public education” is known as FAPE. In short, the IDEA defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C. § 1401(9). A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A FAPE means special education and related services that: a) have been provided at public expense, under public supervision and direction, and without charge; b) meet the standards of the State educational agency; c) include an appropriate preschool, elementary, or secondary

school education in the State involved; and d) are provided in conformity with the IEP required under §614(d). 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d).

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. Dep’t of Educ. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985). An IEP should be developed with the participation of parents and members of a district board of education’s CST who have participated in the evaluation of the child’s eligibility for special education and related services. N.J.A.C. 6A:14-3.7(b). The IEP team should consider the strengths of the student and the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluations of the student; the student’s language and communications needs; and the student’s need for assistive technology devices and services. The IEP establishes the rationale for the pupil’s educational placement, serves as the basis for program implementation, and complies with the mandates set forth in N.J.A.C. 6A:14-1.1 to -10.2.

Here, it is not factually disputed that N.H. had an IEP developed by her former school district which she brought with her upon transferring to New Brunswick. The evidence adduced at the hearing confirms that the respondent had N.H.’s IEP and other enrollment documents as early as August 18, 2021. N.J.A.C. 6A:14-4.1(g) addresses the process when a student with an IEP transfers to another school district and mandates:

When a student with a disability transfers from one New Jersey school district to another . . . the child study team of the district into which the student has transferred shall conduct an immediate review of the evaluation information and the IEP and, without delay, in consultation with the student’s parents, provide a program comparable to that set forth in the student’s current IEP until a new IEP is implemented . . . .

This regulation further states that the IEP must be implemented *as written* if the parents and new school district agree. N.J.A.C. 6A:14-4.1(g)1 (emphasis supplied). If the new school district does not agree to implement the previous school district's IEP, the new school district must "conduct all necessary assessments and, within thirty days of the date the student enrolls in the school district, develop and implement a new IEP for the student." *Id.* The respondent herein did not present any evidence to suggest that it did not agree with N.H.'s current IEP from her previous school district and thus, that IEP should have been implemented as written. However, it is undisputed that the respondent failed to do so. Under the Newark IEP, N.H. had a one-to-one aide and a BIP. (P-2.) However, Ms. Maiola testified that on the second day of school, N.H. did not have an aide until Ms. Maiola notified the principal and one was temporary assigned. (T1:17:6-8.) While, a temporary aide was provided later in the day, this support was not available for N.H. on her first day of school. N.H. did not attend the official first day of school due to transportation issues but if she had, there would not have been a one-to-one aide because Ms. Maiola was unprepared.

Ms. Maiola was unprepared because she stated that she did not work during the summer, so she did not see N.H.'s IEP until September 10, 2022. (T1:14:22-25 – 15:1-15.) Indeed, none of the people responsible to address N.H.'s educational or behavioral issues, which included the principal, Ms. Maiola, and the CST, were prepared on the first day of school because they had not previewed or ensured that relevant staff previewed N.H.'s IEP. Accordingly, I **CONCLUDE** the respondent failed to provide a program comparable to that set forth in the Newark IEP as required by the law. Moreover, I **CONCLUDE**, the respondent's failure to implement the IEP as written or develop a new IEP within thirty days if the respondent disagreed with implementing the current IEP constitutes a denial of a FAPE.

C.G. stated that she signed the consent form associated with the December 3, 2021, IEP at the urging of Ms. Maiola. Ms. Maiola amended that IEP after the IEP meeting ended but did not send the revised draft to C.G. for review and approval. Dr. Ford denounced this process stating that any changes made to an IEP after the parent has signed the IEP must be reviewed by the parent. Indeed, N.J.A.C. 6A:14-3.7(d) outlines



the specific requirements to amend an IEP without a meeting. This regulation provides in relevant part:

1. The IEP may be amended if the parent makes a written request to the district board of education for a specific amendment to a provision or provisions of the IEP and the district agrees.
2. The school district provides the parent a written proposal to amend a provision or provisions of the IEP and, within fifteen days from the date the written proposal is provided to the parent, the parent consents in writing to the proposed amendment;
3. All amendments pursuant to (d)1 and 2 above shall be incorporated in an amended IEP or an addendum to the IEP, and a copy of the amended IEP or addendum shall be provided to the parent within fifteen days of receipt of parental consent by the school district[.]  
[N.J.A.C. 6A:14-3.7(d)1-3.]

There is no factual dispute that C.G. did not request an amendment, and Ms. Maiola did not provide C.G. with written notice of the amendments or give her fifteen days to consider and approve the amendments. Ms. Maiola testified that she made the revisions and sent the IEP to the identified out-of-district placements without allowing C.G. to see the amendments. Even if the amendments were valid, Ms. Maiola failed to allow C.G. to see the final IEP before it was sent out to other schools. Therefore, I **CONCLUDE** that Ms. Maiola improperly amended the December 3, 2021, IEP.

The IEP must be reasonably calculated to confer some educational benefit. Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 192, 73 L.Ed. 2d 690, 703, 102 S.Ct. 3034 (1982) (Rowley).

The Third Circuit Court of Appeals has clarified the meaning of this “educational benefit.” It must be “more than trivial and must be significant” and “meaningful.” Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989) (Polk); Ridgewood Board of Education v. N.E., 172 F.3d 238, 247-48 (3rd Cir. 1999) (Ridgewood). In evaluating whether a FAPE was furnished, an individual inquiry into the student’s potential and educational needs must be made. Ridgewood, 172 F.3d at 247. In providing a student with a FAPE, a school district must

provide such related services and support as are necessary to enable the disabled child to benefit from the education. Rowley, 458 U.S. at 188-89.

Parents who are dissatisfied with an IEP may seek an administrative due process hearing. 20 U.S.C. § 1415(f). The burden of proof is placed on the school district. N.J.S.A. 18A:46-1.1. The Board will satisfy the requirement that a child with disabilities receive a FAPE by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982). To meet its obligation to deliver a FAPE, a school district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. (2017); 137 S.Ct. 988; 197 L. Ed 2d 335. In Andrew, the District Court for the District of Colorado initially upheld the school denial of a reimbursement for an out-of-district placement. However, the Supreme Court reversed the finding that an IEP should be appropriately ambitious in light of the child's circumstances, and "tailored to the unique needs of a particular child."

C.G. contends that the December 3, 2021, IEP was not reasonably calculated to enable N.H. to make progress appropriate in light of her circumstances. The December 3, 2021, IEP presented to C.G. lacked the one-to-one aide, a FBA or BIP, indicated that behavior intervention was not needed and did not contain any supplementary aids and services. (P-34.)<sup>4</sup> Dr. Locascio identified such supports as necessary for N.H.'s success and these supports were provided in the May 13, 2021, IEP. In addition, after observing N.H., the respondent's BCBA recommended a "one-to-one paraprofessional, the use of visual schedule, visual cues, warning before transitions, token economy with menu of reinforcers to choose from, functional communication training, behavior skills training to address social skills and replacement skills, use gestural and visual prompting when appropriate instead of repeating yourself, tell the student what you need her to do instead of telling her 'no' or 'don't do that,' and provide choices." (P-11.) Accordingly, I **CONCLUDE** that the respondent has not met its burden to prove that the December 3,

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<sup>4</sup> The December 3, 2021, IEP was later improperly amended by Ms. Maiola to include supplemental aids and supports. See P-42.

2021, IEP presented to C.G. contained the necessary supplemental aids and services required for N.H. to make progress appropriate in light of her circumstances and thus has not met its obligation to provide N.H. with a FAPE.

### **Home Instruction Placement**

Under the IDEA, the respondent is responsible to provide a student with a disability a FAPE in the “least restrictive environment.” Specifically, 20 U.S.C. §1412(a)(5) provides:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

N.J.A.C. 6A:14-4.2(a) mirrors the IDEA and mandates that students with disabilities shall be educated in the least restrictive environment (LRE). This means “to the maximum extent appropriate, a student with a disability is educated with children who are not disabled.” N.J.A.C. 6A:14-4.2(a)1. The respondent maintains that home instruction (HI) was considered the LRE and best placement for the safety of N.H. and others. (Respondent’s letter brief, May 13, 2022, at 2.) Ms. Maiola testified that the principal made the decision to place N.H. on HI. An email affirms that Ms. Maiola made the recommendation. (P-14.)

In determining whether a student with a disability is removed from the classroom, consideration must be given to the “potentially beneficial or harmful effect which a placement may have on the student with disabilities or the other students in the class.” N.J.A.C. 6A:14-4.2(a)8iii. If the respondent believed continuing to keep N.H. in the district was substantially likely to result in injury to herself or to others, the respondent’s proper

course of action was to request an expedited hearing. N.J.A.C. 6A:14-2.7(c) specifically provides:

To remove a student with a disability when district board of education personnel maintain that it is dangerous for the student to be in the current placement and the parent and district board of education cannot agree to an appropriate placement, the district board of education shall request an expedited hearing.

The respondent failed to avail itself of this opportunity but instead removed N.H. to an environment where she was isolated from her disabled and non-disabled peers and not receiving the supplemental aides and supports contained in her IEP such as speech-language services and occupational therapy. Accordingly, I **CONCLUDE** that the respondent failed to provide a FAPE in the least restrictive environment.

C.G. contends that the decision to remove N.H. from the district and place her in HI was made unilaterally by the principal. C.G. testified credibly that the principal told her on September 14, 2021, that a meeting had been held with N.H.'s teachers and the decision was made that N.H. should be placed out of the district. C.G. was not invited to that meeting or was given written notice of the meeting. N.J.A.C. 6A:14-2.3(j) states:

A district board of education shall take steps to ensure that the parent is given the opportunity to participate in meetings regarding the identification, evaluation, classification, educational placement of, or the provision of a free, appropriate public education to the student.

In addition, N.J.A.C. 6A:14-2.3(k)3 required the respondent to provide C.G. with written notice of any meeting early enough to ensure that she had the opportunity to attend. Accordingly, I **CONCLUDE** that the respondent failed to adhere to the legal requirements to ensure that C.G. was given an opportunity to participate in a meeting concerning N.H.'s educational placement.

Moreover, N.J.A.C. 6A:14:2.3(h)2 mandates that parents are given fifteen calendar days to review a proposed action. Under the December 3, 2021, IEP, academic services

were to start on December 6, 2021, which was insufficient time for C.G. to consider the IEP. (R-1 and P-42.) “In matters, alleging a procedural violation, an administrative law judge may decide that a child did not receive a FAPE only if the procedural inadequacies: . . . 2. Significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE to the child.” N.J.A.C. 6A:14-2.7(k). Based upon the respondent’s failure to provide C.G. with notice of a meeting related to N.H.’s educational placement, and failure to allow C.G. fifteen days to consider the IEP, I **CONCLUDE** N.H. did not receive a FAPE due to these procedural inadequacies.

N.J.A.C. 6A:14-4.2(a)5 states that placement of a student with disabilities is based on the student’s IEP. Here, the May 13, 2021, IEP placed N.H. in a special education classroom with a one-to-one aide. However, the respondent’s principal unilaterally determined to put N.H. on HI allegedly for her safety and the safety of others. It is undeniable that the safety of all students and staff is a legitimate concern for school administration, however, the respondent presented no evidence such as medical records or incident reports to determine if the severity of the injuries or damages caused by N.H.’s conduct during the six or so days she attended school was adequate to justify the respondent’s position that N.H. required an out-of-district placement. The testimony provided by Ms. Maiola was that N.H. engaged in elopement, hitting, spitting, stabbing an aide with a pencil, pulling someone’s hair, and throwing property. However, the respondent presented no incident reports. There was no allegation that this behavior violated the student code of conduct. Indeed, Dr. Ford testified that these incidents were not considered disciplinary but were behavioral. In addition, Dr. Locascio testified that she did not see any reason to place N.H. on home instruction based upon these behaviors. The respondent also ignored the BCBA’s repeated requests to meet with C.G. to discuss potential strategies and to train staff.

Accordingly, I **CONCLUDE** that the respondent erred in unilaterally placing N.H. on HI before evaluating the efficacy of supplementary aids and services and in so doing denied her a FAPE.

Respondent contends that there was shortage of teaching staff members available to provide the supplemental services required such as speech/language and occupational

therapy due to COVID-19, and this impacted its ability to provide N.H. with a FAPE. There is no dispute that the pandemic has been especially challenging for teachers and students who are involved with delivering and receiving special education and related services, impacting thousands of students and families of students like N.H. who are eligible to receive these services.

Recognizing the need to address the situation, the U.S. Department of Education (USDOE) issued a document advising local education agencies (LEAs) on how to comply with IDEA regulations during the COVID-19 public health emergency. The document was not intended to impose additional requirements on LEAs, nor act as legally binding rules, but rather to provide informal guidance of the USDOE's interpretation of the IDEA and its implementing regulations in the specific context of the COVID-19 health crisis. U.S. Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, (Mar. 2020), <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>. The USDOE stated that during this time schools were required to ensure that "to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP." Ibid.

Based upon the above directive, services needed to be provided to special education students during these unprecedented times. In the present matter, it is unclear what efforts the respondent took to provide the speech-language and occupational therapy services and why the services were not provided. The speech-language and occupational therapy evaluations were completed, thus implying that staff were available to provide those services. However, the respondent failed to present evidence explaining its efforts to provide those services and any roadblocks encountered. I therefore **CONCLUDE** that the respondent has not met its burden of proving by a preponderance of the evidence that N.H. received a FAPE.

### **Compensatory Education**

Finally, petitioners seek compensatory education. Our courts recognize compensatory education as a remedy under the IDEA, which should be awarded "for the

time period during which the school district knew or should have known of the inappropriateness of the IEP, allowing a reasonable time for the district to rectify the problem.” M.C. ex rel. J.D.C. v. Cent. Reg’l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996). Compensatory education requires school districts to “belatedly pay expenses that [they] should have paid all along.” Id. at 395.

My task is “to weigh the interests on both sides and determine the equitable outcome. This is not an easy task, [and I must] balance the interests of finality, efficiency, and use of the School District’s resources with the compelling needs [of the student].” Ferren C. v. Sch. Dist. of Phila., 595 F. Supp. 2d 566, 577 (E.D. Pa. 2009), *aff’d* 612 F. 3d 712 (3rd Cir. 2010). Some courts award by rote a block of compensatory education equal to time lost by a denial of FAPE, referred to as a “cookie cutter approach.” See: Cent. Sch. Dist. v. K.C., 2013 U.S. Dist. LEXIS 94065, \*32 (E.D. Pa. 2013), citing Reid v. D.C., 401 F. 3d 516, 523 (D.C. Cir. 2005). The award “should aim to place disabled children in the same position they would have occupied but for the school district’s violations” by “replacing educational services the child should have received in the first place.” Reid v. D.C., 401 F.3d 516, 518, 365 U.S. App. D.C. 234 (D.C. Cir. 2005) (cited with approval by Ferren C., 612 F.3d at 717-18). An hour-for-hour replacement for the period of deprivation, however, is not the only appropriate method of calculating a compensatory education award. Reid, 401 F.3d at 523 (finding that “this cookie-cutter approach runs counter to both the ‘broad discretion’ afforded by the IDEA’s remedial provision and the substantive FAPE standard that provision is meant to enforce.”)

With this analysis in mind, in this case, C.G. contends that N.H. is owed compensatory education for the entire 2021-2022 school year. The respondent does not dispute that it owes the petitioner compensatory education but asserts that the time is limited to September 23, 2021, through November 29, 2021, and January 3, 2022, through January 26, 2022. I agree but modify the time to include the official first day of school, September 9, 2021, and the period N.H. was enrolled in the CLL receiving services based upon the December 3, 2021, IEP which failed to include the one-to-one aide, FBA, and BIP which is from January 23, 2022, through March 30, 2022. Thus, the relevant time periods are:

- September 9, 2021

- September 23 – November 17, 2021
- January 3, 2022 – March 30, 2022

The period during which C.G. made the decision to work in a job that conflicted with the providing HI cannot be accounted to the respondent. N.J.A.C. 6A:14-2.3 specifically states:

[I]f a parent refuses special education and related services on behalf of a student, the district board of education shall not be determined to have denied the student a free, appropriate public education because the student failed to receive necessary special education and related services . . .

C.G.'s contention that she did not "refuse" special education services is untenable. While it is true that the HI log shows that services stopped on November 17, 2021, and there is no evidence that the respondent made any efforts to reinstate HI, N.H. was not available to receive the HI services because C.G.'s new work schedule conflicted with the HI schedule starting on November 19, 2021. And C.G. expressly told the respondent that she was unavailable to receive the HI services. That is tantamount to a refusal of services and the respondent cannot be held accountable for services it was willing and able to provide but could not at the request of the petitioner. C.G. further contends that the respondent failed to reinstate HI services after November 17, 2021, and thus she cannot be said to have refused special education services. However, Dr. Ford testified that C.G. notified Ms. Maiola on November 29, 2021, that C.G. was working and thus N.H. would not be available for HI. (T3:20:17-20.) Moreover, C.G. testified that she worked from 6:00 a.m. to 5:30 p.m. daily and HI was typically scheduled from 3:00 p.m. to 5:30 p.m. and thus there was "no way I would have been home for those times." (T3:194:2-8.) Accordingly, I **CONCLUDE** that the respondent is not responsible for compensatory education for the period of C.G.'s employment from November 19, 2021, through December 26, 2021.

Based upon the 2021-2022 calendar for the respondent, N.H. is owed 100 days of compensatory education consisting of fifteen half days and eighty-five full days calculated as follows:



2021	2022
September = 5 full days; 2 half days	January = 15 full days; 5 half days
October = 18 full days; 3 half days	February = 17 full days; 1 half day
November = 11 full days	March = 19 full days; 4 half days
December = 0 days	

Based upon the New Jersey Department of Education's NJ School Performance Report, the length of respondent's full time daily instructional time is five hours and forty-five minutes.<sup>5</sup> Thus, the total amount of full day hours owed to N.H. is four hundred and eighty-eight hours and seventy-five minutes (85 days x 5.75 hours) and forty-three hours and thirteen minutes for half days (15 days x 2.875). Petitioner has requested that the compensatory hours owed be converted to money and a trust fund established where such funds can be used for N.H.'s reasonable educational, behavioral, emotional, social, and/or therapeutic needs. To convert the hours into currency, petitioner recommends using the per diem member rate at the CLL. However, that seems imbalanced since the petitioner does not want N.H. to remain at the CLL.

The respondent provided a certification by the Superintendent of the Educational Services Commission on New Jersey (ESCNJ) stating that the ESCNJ has a past practice of making up lost instructional time through end of the school day instruction, Saturday instruction time, instruction at the end of the ESY day. (R-6.) Accordingly, the respondent must provide a written schedule specifically outlining how it proposes to provide the missed instructional time to N.H.

### **CONCLUSION**

Based upon the evidence and testimony presented, I **CONCLUDE** that upon enrollment the respondent failed to provide N.H. with a comparable program as outlined in her May 13, 2021, IEP. I further **CONCLUDE** that the respondent failed to develop an appropriate IEP within thirty days of N.H.'s enrollment. I further **CONCLUDE** the respondent's December 3, 2021, IEP as presented to the petitioner did not provide N.H.

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<sup>5</sup> <https://rc.doe.state.nj.us/2020-2021/school/detail/23/3530/140/climate?lang=EN>

with a FAPE. I further **CONCLUDE** that this IEP was not reasonably calculated to deliver a measure of progress deemed reasonable and beneficial given the special needs and specific requires of N.H. Further I **CONCLUDE** that the respondent improperly amended the IEP by not submitting the revised IEP to the petitioner for review and approval. Further I **CONCLUDE** that the respondent failed to provide a FAPE in the LRE. I **CONCLUDE** the respondent committed procedural violations resulting in the denial of a FAPE. I further **CONCLUDE** the respondent erred in unilaterally placing N.H. on home instruction without considering other available options offered by the respondent's BCBA and others.

Therefore, I **CONCLUDE** the petitioner has met the standard in showing that the respondent's December 3, 2021, IEP failed to provide a FAPE and compensatory education of eighty-five full days and fifteen half days, or five hundred thirty-one hours and eighty-eight minutes is warranted.

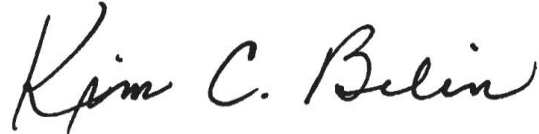
### **ORDER**

I hereby **ORDER** an award of compensatory education to N.H., consistent with the above, for New Brunswick's failure to provide N.H. with a FAPE. New Brunswick is directed to submit to the petitioner and this tribunal a specific proposed schedule to provide the missed instructional time within fifteen (15) days of this decision.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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 (2022). 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.

August 1, 2022

DATE



**KIM C. BELIN, ALJ**

Date Received at Agency:

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

KCB/sm

**APPENDIX**

**WITNESSES**

**For Petitioner:**

Gianna Locascio  
C.G.

**For Respondent:**

Yasbeth Maiola  
Cesar Cabrera  
Iris Forde

**EXHIBITS**

**Joint Exhibits:**

- J-1 Individualized Education Program dated December 3, 2021
- J-2 Individualized Education Plan dated March 30, 2022

**For petitioner:**

- P-1 Student registration
- P-2 Newark IEP dated May 13, 2021
- P-3 Not admitted
- P-4 Emails dated August 10, 2021, through August 19, 2021
- P-5 Email dated August 24, 2021, and Student Placement Form
- P-6 Email dated August 20, 2021, and Transportation Form
- P-7 Not admitted
- P-8 Not admitted
- P-9 Not admitted

- P-10 Emails dated September 13, 2021, through September 22, 2021, and Referral for BCBA Consultation (blank)
- P-11 Behavioral Observation and Recommendation dated September 15, 2021
- P-12 Not admitted
- P-13 Not admitted
- P-14 Emails dated September 14, 2021; Document Discovery Request dated September 14, 2021; and Least Restrictive Environment Review Prior to Out of District Placement
- P-15 Not admitted
- P-16 September 17, 2021, letter to C.G.
- P-17 Not admitted
- P-18 Not admitted
- P-19 September 21, 2021, letter to C.G.
- P-20 through P-22 Not admitted
- P-23 Reevaluation Planning – Proposed Action dated September 29, 2021
- P-24 Not admitted
- P-25 Collaborative Learning/Psychological Re-Evaluation dated October 25, 2021
- P-26 Emails dated November 9, 2021, through November 10, 2021
- P-27 Emails dated November 11, 2021
- P-28 Occupational Therapy Re-Evaluation dated November 19, 2021
- P-29 Not admitted
- P-30 Not admitted
- P-31 Email dated December 1, 2021, and Invitation for Reevaluation Eligibility Determination and IEP Development dated December 1, 2021
- P-32 Not admitted
- P-33 Not admitted
- P-34 Draft IEP dated December 3, 2021
- P-35 Not admitted
- P-36 Emails dated December 22, 2021, through January 24, 2022, regarding N.H.'s placement
- P-37 Not admitted
- P-38 Emails dated January 7, 2022
- P-39 Not admitted
- P-40 Not admitted

- P-41 Not admitted
- P-42 Emails dated January 17, 2022, through January 18, 2022, and IEP dated December 3, 2021
- P-43 through P-46 Not admitted
- P-47 Emails dated December 3, 2021, through January 25, 2022; Request for Home Instruction dated September 14, 2021, and Home Instruction Program Report
- P-48 Not admitted
- P-49 Not admitted
- P-50 Email dated January 18, 2022, and February 3, 2022; Consent to Implement Initial IEP dated December 3, 2021
- P-51 Emails dated February 7, 2022, and February 8, 2022
- P-52 Not admitted
- P-53 Not admitted
- P-54 Emails dated February 11, 2022, through February 22, 2022
- P-55 Not admitted
- P-56 Final Decision Approving Settlement dated February 1, 2022
- P-57 Not admitted
- P-58 Not admitted
- P-59 Email dated March 2, 2022, and Behavioral Strategies
- P-60 Email dated March 3, 2022, to C.G.
- P-61 District Policy 5600
- P-62 Psychoeducational evaluation dated March 30, 2022
- P-63 Curriculum Vitae of Gianna Locascio, Psy.D., ABPP-CN
- P-64 Draft IEP dated March 30, 2022

**For respondent:**

- R-1 Individualized Education Program for N.H. dated December 3, 2021
- R-2 Respondent's timeline of events dated January 18, 2022
- R-3 Not admitted
- R-4 Not admitted
- R-5 Not admitted
- R-6 Certification of Mark J. Finkelstein