State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 00983-10

AGENCY DKT. NO. 2010 15634

S.M. AND E.M. ON BEHALF OF B.M.,

Petitioners,

v.

GARDEN ACADEMY,

Respondent.

George M. Holland, Esq., for petitioners

David Rubin, Esq., for respondent

Record Closed: July 31, 2019 Decided: October 25, 2019

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners S.M. and E.M. are the parents of B.M., a student with autism eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA).[1] From 2007 to 2011 B.M. attended Garden Academy (Garden), a private school for students with disabilities (PSSD), pursuant to a series of individualized education programs (IEPs) agreed to by B.M.'s parents and the Marlboro School District (Marlboro).

[1] Although B.M. is now an adult, his parents were granted legal guardianship by the Superior Court of New Jersey in February 2017.

In November 2009, Garden sent petitioners and Marlboro a letter indicating its intent to terminate B.M.'s placement. Petitioners requested mediation and, after unsuccessful settlement attempts, filed a due-process petition challenging the termination and seeking compensatory education services for "home-based support services" that B.M. allegedly was denied in violation of his IEP.

The due-process matter was transmitted to the Office of Administrative Law (OAL) by the New Jersey Office of Special Education Programs (OSEP) for a hearing. An issue in the case was the definition of "home-programming" services and whether Garden violated the IEP by not providing these services in B.M.'s home. Administrative Law Judge (ALJ) Blake ruled in the emergent application that Garden had not withheld services to which petitioners were entitled and denied the application for emergent relief.

Petitioners then filed in the U.S. District Court of New Jersey (District Court) seeking a review of ALJ Blake's rulings. While cross-motions for summary judgment were pending, petitioners entered into a settlement with Marlboro withdrawing B.M. from Garden and placing him at another PSSD. Following that settlement, Garden and petitioners were ordered to resubmit motions to have the case decided summarily.

The District Court issued a Memorandum Opinion on May 31, 2013. In its opinion, the District Court dismissed petitioners' claims against Garden related to the termination as moot because of the settlement with Marlboro. However, the court found that there were additional issues concerning the claim for compensatory education. The court found that "at a minimum, there exists a material factual dispute with regard to the meaning of home-programming." Thus, the court remanded "so that the ALJ can examine the Parties' positions regarding the meaning of 'home-programming' as it relates to the Parties' agreements." Without this finding, the court determined that the record was incomplete.

The District Court found that the amount or availability of compensatory education is dependent on the meaning of home-programming, leaving the issue on remand the factual determination of the nature and extent of home-programming services to which B.M. was entitled. Upon remand the matter was assigned to the undersigned. After

motion practice and attempts at settlement, testimony was taken on September 7, 2016, November 29, 2016, May 16, 2017, July 10, 2017, January 8, 2018, January 31, 2018, and December 17, 2018.[2] After the submission of post-hearing memoranda the record closed on July 31, 2019.

FACTUAL DISCUSSION

B.M. had been classified by the child study team of Marlboro as eligible for special education and related services under a diagnosis of autism. B.M.'s parents and the District agreed to a series of IEPs beginning in 2007, placing him at Garden, a private school then located in Maplewood, New Jersey. On March 26, 2009, when B.M. was ten years old, the parents and Marlboro agreed to an IEP for the 2009–10 school year, and the District agreed to pay B.M.'s tuition for Garden that year. That IEP included the following language in the Developmental and Functional Performance section:

> Home parent training is included as part of B.M.'s program at Garden Academy and involves once weekly visits by either B.M.'s teacher or teacher's aide.
>
> [P-2.]

That IEP also discussed, in the Present Level of Education Performance (PLEB) section, B.M.'s difficulty with generalizing skills in the home, riding appropriately in a vehicle, and even keeping on his clothing, noting that "home programming and training" would continue in those areas. Additionally, some of his goals and objectives in that same IEP targeted behaviors that usually take place in the home such as laundry, dental care, and showering. Home visits were part of his prior year's IEP as well (P-19). That IEP provides, under the category of services, that home visits would occur "as per the Garden Academy program" once a week for approximately two hours. His 2008–09 IEP goals and objectives also included behaviors such as zipping and unzipping his clothing and tooth brushing.

[2] Other hearing dates were set during the above time period but were adjourned consensually at the request of one or both parties.

In August 2009, however, Garden unilaterally ceased the training in the home and notified petitioners that the home-programming component of the IEP would take place at Garden instead. Without calling an IEP meeting or notifying Marlboro, Garden presented petitioners with a September 1, 2009, letter for their signature. It set out seven terms and conditions to be complied with by petitioners as a condition of their "continued involvement in the school." They included a requirement that petitioners come to Garden for any training. From August 2009 through September 2011, when B.M. ceased attending Garden, home visits did not occur, with the exception of two instances where Garden staff went to the home to assist the family with his school transport issues. Additionally, in November 2009, Garden attempted to terminate B.M.'s placement, resulting in petitioners' request for mediation and resulting due-process filing. B.M. remained at Garden until September 2011 under stay-put.

In this matter, petitioners are requesting an award of compensatory education for the lost home-programming component of B.M.'s IEP for the period August 2009 through September 2011. The issue to be determined in this remand is what home programming B.M. was to receive under that IEP. Simply put, petitioners contend that home visits were an essential component of that programming, while Garden insists that such programming could occur at the school.

In support of its case Garden presented the testimony of its now former executive Director, David Sidener, Ph.D. (Sidener) and Lauren Sinning (Sinning), a behavior specialist/trainer at Garden. Petitioners then presented the expert testimony of Dr. Cecelia McCarton, M.D. (McCarton) and S.M., B.M.'s father. Both parties also entered documentary exhibits in evidence.

Sidener was executive director of Garden during the relevant time period and holds a Ph.D. in psychology and is a board-certified behavior analyst (BCBA). Sidener testified that Garden used an Applied Behavior Analysis (ABA) therapy approach with its mostly autistic students. In its early years, Garden's sponsor site was Princeton Child Development Institute (PCDI) and it mirrored their approach and protocols in its programs. He described the home-programming services to be provided in B.M.'s IEP as "parent training." Throughout his testimony he differentiated it from home-based ABA therapy

services for B.M., which he said Garden did not provide. He stated that Garden's concept of parent training (R-10) was an adaptation of the "home-program" model from PCDI (R-11). He defined parent training as providing parents with skills to cope with B.M.'s behaviors and improve his performance in school and other venues. He cited PCDI's model for parent training and a scholarly article in explaining how Garden chose to perform its home programming. He noted that such training could occur at home, in school, or in the community.

Although Sidener had never formally evaluated B.M., he was familiar with him, and recalled that prior to August 2009, what he referred to as parent training occurred in the home, school, and community. He noted that staff had worked with B.M. and his mother on his transport issues, with his mother coming to the school so his teacher could ride with them to deal with his transport issues in riding to and from school.

Sidener further testified that B.M. was generally behaving in school, but he was not being cooperative with his parents. Admitting that Garden staff felt that the home visits were not enough to deal with B.M.'s increasingly alarming behaviors in mid-2009, he made a decision to move the training to a more structured environment at the school. During the summer of 2009, Garden had changed B.M.'s teacher and the home visits stopped. Sidener was uncertain when he made the decision to move the parent training exclusively to the school, but stated it was sometime in August or September. Sidener testified that the more structured school environment would provide more resources and allow the teacher to "fade out" as training progressed. He did recall that S.M. expressed concern over B.M.'s growing behavioral problems at home. Sidener then directed petitioners to attend a full week of parent training in August. The parents did not attend, and Sidener then issued his September 1 letter (R-12) setting forth his conditions for any further training as follows:

> Accordingly, in order to assure your continued involvement in the school, it will be necessary that you comply with the following terms and conditions:
>
> 1. You will come to school for training as requested by the Director.

> 2. You will participate in home programming sessions consistently on an ongoing basis.
>
> 3. You will implement strategies for behavior reduction or skill acquisition as directed by the Director, trainer, consultant or teacher.
>
> 4. You will collect ongoing data and send to school as directed.
>
> 5. You will inform us if strategies are not being implemented or could not be implemented as per your training.
>
> 6. You will inform us of all treatment efforts you intend to pursue and coordinate those efforts to the satisfaction of the Garden Academy staff.
>
> 7. You will comply with any parent participation policies implemented by the school.

After he set out the conditions of B.M.'s continued enrollment at Garden, Sidener's letter concluded with the following:

> Your signature on this letter indicates your understanding of the above information and your willingness to accept the above-stated terms of [B.M.'s] continued enrollment at Garden Academy.

The letter went on to include the signatures of B.M.'s parents under the following language:

> I hereby agree to enrollment of my child at Garden Academy. In signing this agreement, I acknowledge that I have received a copy of this form.

The training continued at the school until March 2010 but resumed in May 2010. Sidener recalled that petitioners informed him in November 2009 that they would be contracting with an outside firm to provide additional home programming to deal with B.M.'s behavioral difficulties. He also admitted that B.M.'s mother, E.M., had contacted Edward Fenske, of PCDI, in the fall, questioning whether home programming should include home visits.

In his testimony, Sidener justified Garden's cessation of the IEP-mandated home visits as within his discretion in implementing the parent-training model used by Garden. As training could take place in various venues, and he had determined that training in a more "structured" environment at the school would be more efficacious, Garden eliminated home visits in August 2009. Sidener discussed the new programming protocol devised for B.M. and his parents. He defended his requirement that petitioners sign the September letter setting out his conditions for the child's continuation in Garden's program as a way to clarify expectations and avoid misunderstandings. Despite the elimination of the weekly home visits specified in the March 2009 IEP, Garden did not effectuate the change through an IEP meeting, nor did it notify Marlboro of the change to the IEP.

Respondent also presented the testimony of Lauren Sinning, a behavior specialist/trainer employed by Garden who worked with B.M. Her work with B.M. began in late 2008 or early 2009. She was involved in the preparation of the March 2009 IEP and described "home programming" as an "umbrella" term. She also identified home-programming logs which she said were in use at Garden for the 2007–08 and 2009–10 years, which showed that the programming for B.M. occurred in various places, including his home during the 2007–08 year. Although the logs at R-58 are undated, she thought they were for the 2009–10 school year. Garden did not produce logs for the 2008–09 school year. Sinning corroborated Sidener's testimony that Garden had adopted the PCDI terminology and model for "home programming and training." She further testified that she had attended the September 2009 meeting with Sidener, B.M.'s new teacher, and B.M.'s parents, and that no one from Marlboro was present at that meeting. She testified that B.M.'s parents did not have input into the creation of the document. While asserting that his parents were not forced to sign the document, she admitted that their failure to do so may have resulted in their child being removed from the school, referencing the language in the letter. Sinning described the meeting as a way of getting petitioners to participate more in training since she had not been in contact with them much during the preceding summer months. She also stated that B.M.'s behavior was worse at home and in the community setting than in the structured school environment, where there was a one-to-one staff/student ratio.

In support of their case, petitioners presented the testimony of Dr. Cecelia McCarton, a developmental pediatrician who is the director of the McCarton Center for Developmental Pediatrics. A board-certified pediatrician, she had founded and administered schools for children on the autism spectrum and had experience in home services for that population, including parent training. She was qualified as an expert in the diagnosis and medical treatment of children with autism, their education, and the training of their parents, as well as the management and oversight of such training.

She testified as to her evaluation of B.M., autism education, and "home programming." According to McCarton there are various models within the education community for home programming, including those that take place in school, in the community, and at home. While the PCDI model was not one used by schools with which she was affiliated, she opined that it was a valid approach and accepted within the autism treatment and education field. Its focus was more on involving the parents and less on actual ABA therapy sessions for B.M. Yet, even given that focus, she opined that while training could commence at the school, it would of necessity move to the home and community for "hands on" work with the child in each environment.

Further, McCarton discussed her evaluation of B.M. in August 2009 at the request of his parents. While he was functioning in school, his behaviors at home were troubling. She described B.M. as having significant autism and in need of ABA therapy. McCarton asserted that it was important to work with his parents in implementing the ABA program he was receiving in school, in the home. Although Garden was providing parent training, his parents felt they needed more assistance. After the evaluation, McCarton recommended that B.M. receive additional ABA-therapy services in the home. She was not aware of the provisions of his IEP, but opined that a home program should focus on generalization of the child's skills and include working in the home with both the child and parents. McCarton testified that during school the child is under instructional control, and it is essential to generalize his or her behavior to other settings, including the home, and that most home programming does occur in the home. While parent training can begin in a school setting it should then move to the home and community for "hands-on"

implementation with the child. In her report she did recommend an expanded home program for B.M. and his parents.

The final witness presented in this matter was S.M., the father of B.M. He described B.M.'s early years and his diagnosis of autism at two years of age. He received home services under the IDEA from ages two to three and attended Marlboro programs. S.M. said he became aware of PCDI's program model and received a placement through Marlboro at Garden, a PCDI dissemination site, in 2007. He described a positive relationship with Sidener at first and he saw B.M. making progress with his behaviors and schooling. During B.M.'s first year at Garden, 2007–08, his teacher came out to the house once a week to work with B.M. to generalize his skills in areas such as toilet training and his lessons. During his second year, 2008–09, his teacher, Dana Lee, came out more often, sometimes as much as three times a week. S.M. saw his son making progress in toileting, brushing his teeth, tying his shoes, and eloping less in community settings. Lee's parent training included helping them to "redirect" B.M. when necessary and, overall, S.M. felt her efforts were positive and helpful.

S.M. recalled that in the 2007–08 year his wife went to the school more often, sometimes several times a week, but that in the 2008–09 school year she went less often, as the focus had changed to more home visits by B.M.'s teacher. S.M. testified that at the March 2009 IEP meeting, he requested more home programming, but that Sidener felt that the current Garden program could meet B.M.'s needs. S.M. said that while the home visits and programming by his then teacher were allowing his son to make progress, they still wanted more home visits added to the IEP. He recalled that at the March 2009 IEP meeting, the staff involved in that year's home visits discussed the home program and home visits with Sidener present.

Although he requested more home visits at the March 2009 IEP meeting, Garden was opposed, and the final IEP only contained a provision for home programming to include at least once-weekly visits. In June 2009, Garden changed B.M.'s teacher. S.M. recalled that she only made one or two visits in July of that summer and no visits were made to the home in August 2009. Although the visits stopped, he received no communication from Marlboro, nor was an IEP meeting scheduled. During that summer

he recalled that B.M.'s behaviors worsened, and they began "searching for answers." They contacted McCarton and brought B.M. for an evaluation. When they contacted Sidener to request that his teacher accompany B.M. to the evaluation, Sidener questioned him regarding the reason for the evaluation. S.M. said he told Sidener that his son's behaviors were a continuing problem, and, additionally, they wished to rule out any possible medical issues. He recalled that sometime in August, Sidener scheduled a week's training without consulting them prior. The summons put his wife into a panic, as it was the summer vacation period and it would be difficult for the family to attend and for S.M. to schedule with his work. As a result, they did not attend. According to S.M, relations with Sidener and staff began to cool from that point.

In September of that year, Sidener issued his letter setting out conditions for B.M.'s tenure at Garden. According to S.M. the letter and its conditions were presented as a *fait accompli* to them, with Sidener stating that the home programming would be conducted under the letter's terms or there would be no programming at all. No one from the District was invited to the meeting and Sidener did not seek their input. Although opposed to the letter's terms, petitioners nevertheless signed it, as the letter tied their signatures to their son's continued enrollment. They then attended the sessions at the school. S.M. recalled that the home visits had stopped, with the exception of one or two visits to help with getting B.M. into the vehicle to get him to school. S.M. stated that they were concerned over the cessation of home visits, and his wife even contacted Fenske from PCDI regarding the lack of home visits. When B.M.'s behaviors continued to regress that fall, they sought mediation and later filed for due process.

S.M. described how, once the home visits had ceased, they were forced to seek services from an agency, and presented an invoice from Rainbow Consulting (P-18) for the costs that they had incurred from October 2009 through December 2010 in the amount of $19,300. He estimated that during the school year prior to the cessation of home visits anywhere from fifty to seventy home visits had occurred, and that B.M.'s teacher spent anywhere from an hour to two and a half hours at the home during a session.

In this matter, a determination as to what home services or home programming had been agreed upon by the parties for the 2009–10 school year must begin with that

year's IEP. As set forth above, the last-agreed-upon IEP between the parties clearly set out that home visits were to occur "once weekly by B.M.'s teacher or teacher's aide" for "home parent training." The IEP then goes on to discuss B.M.'s need to generalize skills in the home environment, and states that "home programming and training" would continue. Neither home programming nor parent training is defined in the IEP and further details are not provided. The IEP does note that petitioners brought up B.M.'s behavioral issues and requested that "in home ABA behavioral therapy services" be provided by the District. The prior year's IEP also mandated once-weekly home visits, without further detail, but as per the Garden Academy Program.

While Garden asserts that the home programming or services to be provided under the IEP consisted of "parent training" under its home-programming model, B.M.'s IEPs also use the terminology "home programming and training." There is also language in the PLEB section of his 2009–10 IEP that cites the need for continued work with B.M. in the home environment. The record supports the conclusion that Garden's parent-training model was adapted to meet B.M.'s needs by specifying that the home programming would occur at least once a week in the home to allow for generalization of skills and to aid him in achieving the goals and objectives in his IEP related to the home environment.

While both Sidener and McCarton agreed that home programming and parent training in an ABA-focused program for an autistic child could occur in several physical venues—including school, the home, or community settings—Sidener insisted that it was within his discretion to remove the home-visit component from B.M.'s program, referencing the PCDI and Garden models. His emphasis was on parent training per se, and he downplayed the need to work within the home to generalize B.M.'s skills while also working with his parents. In contrast, McCarton credibly described a more logical trajectory to home programming and parent training. She allowed that home programming and parent training can begin in a school setting, but that in order to effectively generalize skills work must continue in the home, with the teacher or other professional working "hands on" with family members and the child. Her analysis aligned with the language in the IEP that required home visits and referenced the need for generalization of skills as part of the "home programming and training." The rationale for home visits was further buttressed by the goals and objectives in B.M.'s IEP, which dealt

with skills such as showering and dental care and which were part of B.M.'s home environment.

In addition to the terms of the IEP itself the rationale for specifying home visits as part of the home programming and parent training was supported by the credible testimony of S.M. When the home visits increased in frequency during 2008–09 to two or three times a week, his son's behaviors improved, and when they ceased during the summer of 2009 during the extended school year (ESY) period, his behaviors regressed. Even Sidener admitted in his testimony that B.M.'s behaviors were problematic at that point. His solution, however, was the cessation of the IEP-mandated home visits and to require the parents to attend training sessions at the school under a set protocol developed outside of the IEP process. In essence, he chose to unilaterally eliminate the "home" component of the home programming and parent training, thereby changing the IEP.

While according to Sidener the Garden model for such home programming and parent training emphasized parent training over ABA-therapy sessions for B.M., that model nevertheless had included home visits and working with B.M. and his family on his generalization of skills in the home during the 2007–08 and 2008–09 school years. Interestingly, testimony was presented regarding articles in which Sidener discussed Garden's program and how his staff worked with families in their homes. His elimination of home visits was not only at odds with the terms of the IEP, it was at odds with the manner in which his own model had been implemented in B.M.'s prior school years, as well as the need to generalize B.M.'s skills outside of the school environment.

It is clear that the parties disagreed on the nature and extent of the home programming necessary for B.M. His parents sought more extensive services, while Garden felt that his needs could be met within the narrower focus of its parent-training model. The March 2009 IEP was a compromise between the parties. It continued Garden's approach, but specifically required that the services be provided at least once a week in the home. When Sidener determined in the summer of 2009 to require that those services take place at the school, he unilaterally eliminated the IEP-agreed-upon home visits. Without seeking input from Marlboro or B.M.'s parents, and without calling

for an IEP meeting, he presented petitioners with both the elimination of home visits and a set of requirements they had to meet, or their son's enrollment was in jeopardy. By doing so he evaded the collaboration and procedural safeguards attendant to the IEP amendment process.

The record shows that the last-agreed-upon IEP from March 2009 mandated at least once-weekly home visits for home programming and parent training. I **FIND** that those home visits ceased in August 2009, and Sidener implemented a new parent-training protocol under the terms of his September 1, 2009, letter eliminating the IEP-required home visits. I further **FIND** that the changes were effectuated outside of the IEP process and Marlboro was not a party to the changes. S.M. presented credible testimony that he and his wife were not part of the process that developed those changes and that they were asked to agree to the changes as the price of having their son continue at Garden Academy. I **FIND** that although B.M.'s parents signed their acknowledgment of the September 1, 2009, letter's terms, they did not agree with the elimination of the home visits. As the changes to the IEP occurred outside of the IEP process, and were developed unilaterally by Garden and presented to petitioners as a condition of their son remaining at Garden, I **FIND** that the terms of the IEP requiring once-weekly home visits were not changed.

I further **FIND** that under the terms of the IEP and stay-put, petitioners did not receive home visits on the required weekly basis from August 2009 through September 2011, a period of twenty-six months, or 113 weeks at 4.3 weeks per month, including the ESY. As S.M. presented credible testimony that the home visits that did occur were from an hour to two and a half hours, I **FIND** that on average two hours per weekly session is appropriate, and that 226 hours of home services were not provided to B.M. during the subject period.

LEGAL DISCUSSION

An initial issue raised by the parties in this matter was the scope of the remand. In a motion for summary decision Garden argued that petitioners' claim for compensatory education should be dismissed, as it is not an available remedy against a private school

for students with disabilities. Under N.J.A.C. 1:1-12.5(b), a "motion for summary decision shall be served with briefs and with or without supporting affidavits." A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid.

While Garden raised a colorable issue as to whether an award of compensatory education can be made under the IDEA against a PSSD, that issue is not before me on this remand. The remand from ALJ Blake's original decision is a directive from federal court to determine a specific set of facts, i.e., the nature and extent of the home-programming services to which B.M. was entitled under his IEP.

As such, the matter here is limited to the issue on remand from the District Court. "Where a reviewing court remands a cause with specific instructions, they must be followed exactly." Aguilar v. Safeway Ins. Co., 221 Ill. App. 3d 1095, 1099 (Ill. App. Ct. 1st Dist. 1991); 5 Am Jur 2d Appellate Review § 687. "If specific instructions are not given, the trial court is required to examine the Court's opinion and determine therefrom what further proceedings would be proper and consistent with the opinion." Ibid. This must be done "to ensure that the lower court's decision is in accord with that of the appellate court." 5 Am Jur 2d Appellate Review § 687.

"A remand phrased in language which limits the issues for determination will preclude consideration of new matters affecting the cause." Palm Bay v. State, DOT, 588 So. 2d 624, 627 (Fla. Dist. Ct. App. 1st Dist. 1991). When a case is remanded for a specific act, "[t]he entire case is not reopened, but rather the lower tribunal is only authorized to carry out the appellate court's mandate . . . ." 5 Am Jur 2d Appellate Review § 687 (citing Warren v. Dep't of Admin., 590 So. 2d 514, 515 (Fla. Dist. Ct. App. 5th Dist. 1991)). "Thus, the order of the appellate court as stated in the remittitur is decisive of the character of the judgment to which the appellant is entitled; the lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void." 5 Am Jur 2d Appellate Review § 687 (citing In re Francisco W., 139 Cal. App. 4th 695, 705 (4th Dist. 2006)). "Moreover, a defendant may be precluded from raising defenses at a new trial

that are outside the scope of the appellate court's remand order." 5 Am Jur 2d Appellate Review § 687 (citing Schrader v. Carney, 198 A.D.2d 779 (N.Y. App. Div. 4th Dep't 1993)).

Here, the District Court remanded this matter for an ALJ to make a factual determination about the meaning of home programming as it relates to the parties' agreements. It is inappropriate for this tribunal to do other than follow the directions of the District Court on remand and determine the material factual dispute over the meaning of home programming. Summary decision therefore was denied.[3]

---

[3] Even though this issue is not before the OAL because it is outside of the scope of the remand, it is likely that compensatory education is an available remedy against a PSSD under the IDEA.

New Jersey's special-education regulations "shall apply to all public and private education agencies providing publicly funded educational programs and services to students with disabilities." N.J.A.C. 6A:14-1.1(c). A private school approved by the State to provide special-education services to students with disabilities must submit an affidavit that its programs and services are nonsectarian and comply with the IDEA. N.J.A.C. 6A:14-7.2(a)(3)(i). In addition, children placed in private schools by their local school districts shall receive all of the same rights and protections as they would if educated in the local district. 20 U.S.C. § 1412(a)(10)(B)(ii).

In New Jersey violations of the IDEA may be enforced against a PSSD. P.N. v. Greco, 282 F. Supp. 2d 221 (D.N.J. 2003). In Greco, the court held that the ALJ erred when she concluded that she did not have jurisdiction over the parents' claims against a private school, The Windsor School, in a due-process petition. Id. at 236. In particular, the court held:

> Windsor, its status as a private school notwithstanding, is subject to IDEA and the regulations promulgated to implement it. It would be anomalous for Windsor not to be subject to the administrative procedures provided to ensure that IDEA requirements are fulfilled; and there are in fact instances in which private schools have been treated as within the jurisdiction of the OAL. Windsor concedes that it is subject to the jurisdiction of the OAL for the limited purpose of the stay-put provision, but contends that it is nevertheless beyond OAL jurisdiction in other respects. But as Plaintiffs observe, it is improbable that a private school could be subject to OAL jurisdiction for the purposes of the stay-put provision but not with respect to other aspects of the administrative proceedings.
>
> [Ibid. (citation omitted).]

The court stated that "[a]s a private school accepting placements of students protected by the IDEA, [the private school] is subject to IDEA regulations, and it can therefore be held liable under the IDEA for its failure to comply with IDEA rules in connection with the termination of [the child's] placement." Id. at 237. The court found that N.J.A.C. 6A:14-1.1(c) made the IDEA applicable to private entities providing publicly funded educational programs and services to students with disabilities. Ibid.

The court distinguished this decision from the Second Circuit, St. Johnsbury Academy v. D.H., 240 F.3d 163 (2d Cir. 2001), which held that the IDEA applies only to the state and other public agencies, not to private schools in which public agencies may place children. Ibid. First, the court found that Vermont law contained no reference to a provision such as N.J.A.C. 6A:14-1.1(c) expressly rendering IDEA regulations applicable to private entities taking placement of disabled students. Id. at 238. Next, the court disagreed with the reasoning in St. Johnsbury, which may have inferred too much from the proposition that "responsibility for compliance with IDEA remains with the public agency." Ibid. (citing St. Johnsbury, 240 F.3d at 171.) Instead, the court stated that this proposition "does not imply that no responsibility falls upon the private school: it is not by any means illogical for both the public authority (which has the initial and ultimate obligation to educate the child) and the private school (which is actually entrusted with the task and given the requisite funds) to be subject to IDEA rules." Ibid.

The court did not cite any minimum amount of public funds received or a minimum number of IDEA-protected special-education students enrolled before a private school would be subject to the requirements of the IDEA. The only

In this matter, the parties are in agreement that Garden used an ABA-therapy model in its program. Applied Behavior Analysis is a commonly used instructional method for children with autism spectrum disorder. New Jersey Department of Education, "Autism Programs Quality Indicators," 18 (2004) https://www.nj.gov/education/specialed/info/autism.pdf. ABA uses a variety of techniques to increase positive behaviors while extinguishing negative behaviors. Ibid. "During initial phases of ABA, educators and therapists rely upon Discrete Trial Training (DTT), which provides a systematic and rapid reward-based training for each step of the skills being taught." Michael J. v. Derry Twp. Sch. Dist., 2006 U.S. Dist. LEXIS 5093, *6–7 (M.D. Pa. 2006). DTT helps assure the maintenance and generalization of skills across multiple settings and situations, which is promoted in quality ABA programs. Ibid.; "Autism Programs" at *5, 19; "In order to achieve the goal of generalization, an ABA program requires implementation by a trained staff, supervision by experienced ABA consultants, and delivery in a variety of settings." Michael J., 2006 U.S. Dist. LEXIS 5093 at *7. This should include a home component including observations, behavioral consultations, and trainings. "Autism Programs" at 6–7.[4]

The meaning of "home programming," sometimes referred to as "home services," "home-based services," "at-home services," and "home-bound services," is not defined in state or federal regulations. However, a review of case law and administrative decisions

requirements identified by the court for the school to be bound by the IDEA were that the private school (1) accepted placement of students protected by the IDEA, and (2) accepted public funding. Id. at 237.

[4] While generalization is encouraged in ABA programs for autistic children, it is not necessarily a component of a free, appropriate public education (FAPE). L.K. v. N.Y. City Dep't of Educ., 2016 U.S. Dist. LEXIS 25930, *27 (S.D.N.Y. 2016). The IDEA is focused on the educational benefit *in the classroom*; therefore, generalization of skills is only required to the extent necessary to ensure that child receives a FAPE. See ibid. (citing Devine v. Indian River Cty. Sch. Bd., 249 F.3d 1289, 1293 (11th Cir. 2001) (opining that "[i]f 'meaningful gains' across settings means more than making measurable and adequate gains in the classroom, [such gains] are not required by [the IDEA]."); see also M.W. v. Clarke Cty. Sch. Dist., 2008 U.S. Dist. LEXIS 75278, *68–69 (M.D. Ga. 2008) (holding that the District was not obligated to provide at-home services because the student's behavior issues did not impede his education). However, "if a student's difficulty in generalizing skills prevents him from making the progress required under the IDEA . . . then a school district would have to offer services that seek to improve generalization in order to provide a FAPE." Id. at *28. As the First Circuit noted, "clear lines can rarely be drawn between the student's educational needs and his social problems at home"; therefore, where a student's disability is severe, a school district may have some responsibilities to address the home component as well. Gonzalez v. P.R. Dep't of Educ., 254 F.3d 350, 353 (1st Cir. 2001) (holding that the while residential placement was not appropriate, the District Court did not err in ordering the district to provide home programming to help the parents of an autistic child manage his behaviors at home). For example, where a student's aggressive behaviors at home also affected his ability to learn at school, the court determined that his IEP was inadequate because the "complementary nature" of a home-based program was necessary for him to receive a meaningful educational benefit. New Milford Bd. of Educ. v. C.R., No. 10-3189, 2011 U.S. App. Lexis 12244, *160 (3rd Cir. 2011) (quoting New Milford Bd. of Educ. v. C.R., 2010 U.S. Dist. LEXIS 61895, *6 (D.N.J. 2010).

suggests that while ABA home programming can include parent training outside the home, appropriate home programming, as its name implies, also includes an *in-home* component.[5]

Garden's model for home programming and the attendant generalization of skills followed the model of PCDI and emphasized training for parents and caregivers. Even McCarton, in her testimony, allowed that it was an accepted model within the educational community. Yet, even Garden's approach provided for training within the home and the community, as a means to generalize skills using ABA therapy techniques. As discussed earlier, the need for such generalization was recognized in B.M.'s IEPs, both in his goals and objectives and in his assessments. Also recognized in those IEPs, including the last-

[5] In W. Windsor-Plainsboro Regional School District Board of Education v. M.F., 2011 U.S. Dist. LEXIS 21827 (D.N.J 2011), the District Court affirmed a decision to award reimbursement to parents who provided a supplemental home-based ABA program for their son, at their own expense, when the district's proposed home-based program was inadequate to meet his needs. The court found that the student's IEP lacked sufficient home support, as it only offered one hour a month home visits with an additional home training assessment. Id. at *13–14, *34. Conversely, the home program provided by the parents provided an additional twelve to fifteen hours of in-home therapy sessions, which were necessary for the student to make meaningful progress. Id. at *40.

Similarly, in J.N. & T.N. ex rel. E.N. v. Lawrence Township Board of Education, EDS 13212-10, Final Decision (December 27, 2011), https://njlaw.rutgers.edu/collections/oal/, the ALJ awarded reimbursement for a unilateral parental placement when the district's IEP failed to provide a FAPE to an autistic preschool student largely because it lacked sufficient home-programming services. The district's home programming consisted of a six-hour parent workshop and a home component after the completion of parent training. The ALJ found that the student's proposed IEP did not have measurable goals and objectives, as it was missing important information regarding the terms, conditions, and number of hours of the home programming and related parent training, which were critical to the student's progress. The ALJ agreed with the multiple experts who testified at the hearing that an intensive ABA-based program was warranted, including a substantive home-based component, overseen by an experienced behaviorist, which at minimum should have consisted of three hours a week of home-based services.

Likewise, in C.R. & T.R. ex rel. T.R. v. New Milford Board of Education, EDS 11434-07, Final Decision (October 28, 2008), https://njlaw.rutgers.edu/collections/oal/, reimbursement was awarded to parents for private home services because the home services offered by the district, which consisted only of weekly to biweekly activity-based parent training, were inadequate to provide the student with a FAPE. By contrast, the home services provided by the parent were appropriate because they provided an additional home-programming component, delivered by a therapist in the home, to help the student with language and social skills.

In K.S. & C.S. ex rel. J.S. v. Hopewell Valley Regional Board of Education, EDS15329-12, Final Decision (December 21, 2015), https://njlaw.rutgers.edu/collections/oal/, the executive director of the child's private placement, who qualified at the hearing as an expert in autism and ABA methodologies, explained that home programming or home support is critical for students with autism. The ALJ determined that the eight hours a year of home programming provided by the district was insufficient. The student made meaningful progress at the private placement, in which home support consisted of fourteen visits at the school and seventeen home visits, ranging from 50–180 minutes per visit.

Further, the decision in J.S. & K.S. ex rel. K.S. v. Millburn Township Board of Education, EDS 11029-10, Final Decision (December 7, 2012), https://njlaw.rutgers.edu/collections/oal/, found a school district's ABA program inadequate for an autistic child with severe maladaptive behaviors, where the program was not intensive and did not provide the child with all the necessary instructional methodologies, including home-programming. Providing parent training once every three weeks and only as part of team meetings was insufficient considering the severity of the student's disability.

agreed-upon IEP, was the need for Garden staff to provide such services in the home during their required weekly visits.

As discussed earlier however, Garden changed the terms of B.M.'s 2009–10 IEP by eliminating the mandated once-weekly home visits. It did so without input from Marlboro and without attention to the requirements for amending a child's IEP as set forth in New Jersey regulations governing special education. N.J.A.C. 6A:14-7.5(b)(1)(i) provides that "the IEP of a student placed in a receiving school shall only be amended by the IEP team of the district board of education."[6] When the district proposes a change it must provide written notice to the parents at least fifteen calendar days prior to the implementation of the proposed action and the district shall take action to insure that the parents are given the opportunity to participate in meetings regarding the proposed action. N.J.A.C. 6A:14-2.3. While an IEP may be amended by the district with the consent of the parents and without a formal IEP meeting, N.J.A.C. 6A:14-3.7 sets forth the manner in which such amendment may occur:

> (d) The IEP may be amended without a meeting of the IEP team as follows:
>
> 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 15 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 15 days of receipt of parental consent by the school district; and

[6] N.J.A.C. 6A:14-7.1(a) includes approved private schools for students with disabilities in its definition of receiving schools.

> 4. If an IEP is amended pursuant to this subsection, such amendment shall not affect the requirement in (i) below that the IEP team review the IEP at a meeting annually, or more often if necessary.

In the within matter, Marlboro was not involved in the attempted change to the home-services section of the IEP by Garden. Nor can consent by the parents be assumed here, as the letter purporting to change the home services to parent training at the school was issued outside of the IEP process set forth above and its changes were never incorporated into the child's IEP. Rather, it was presented to the parents as a change they had to accept to keep their child enrolled in Garden. The circumvention of Marlboro, the school district, and the IEP process, along with the failure to validly obtain the consent of the parents, results in the conclusion that the IEP was not changed and the requirement in the last-agreed-upon IEP that weekly home visits must occur remained in place during the 2009–10 school year and the period of stay-put.

As the IEP-required home visits were not provided, the issue of compensatory education arises. The IDEA provides a comprehensive remedial scheme for children who have been deprived of a free, appropriate public education. A.W. v. Jersey City Pub. Schs., 486 F.3d 791, 803 (3d. Cir. 2007). Compensatory education, a judicially created remedy, "is crucial to achieve that goal, and the courts, in the exercise of their broad discretion, may award it to whatever extent necessary to make up for the child's loss of progress and to restore the child to the educational path he or she would have traveled but for the deprivation." G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015); D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 496 (3d Cir. 2012). "A disabled student's right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education." D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d. Cir. 2012) (citing P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d. Cir. 2009)). A child who has been deprived of a FAPE is "entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem." Ibid.

A court may award compensatory education when a school district fails to provide home programming where it amounts to a denial of a FAPE, and compensatory education

also may be awarded when a school district fails to provide home programming pursuant to the stay-put provisions. For example, the court in Student X v. New York City Department of Education, 2008 U.S. Dist. LEXIS 88163, *80 (E.D.N.Y. 2008), ordered a school district to pay compensatory education because it discontinued home services during a pendency placement. As compensatory relief the student received ten hours of at-home ABA services for fifty-seven weeks, i.e., what the school should have provided during the pendency of the proceeding. Where ABA home-programming or home-based services are necessary to provide a student with a FAPE, an in-home component is warranted for the generalization of skills, and where a school district has failed to provide the required home-based services, compensatory education is warranted.

Further, compensatory education is available even after the right to a FAPE has terminated. Hence, while a school district's obligation to provide a FAPE extends only to disabled students under the age of twenty-one, students over that age, and those who have already graduated high school, remain eligible to receive compensatory education. Brooks v. Dist. of Columbia, 841 F. Supp. 2d 253, 258 (D.D.C. 2012) (emphasizing that "every Circuit court that has addressed the question has held that a former student retains the right to compensatory education despite the fact that the IDEA no longer guarantees the student FAPE because he or she has graduated high school or has turned 22"); see Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 718 (3rd Cir. 2010) (holding that the court had equitable power to grant compensatory education to a twenty-four-year-old autistic woman who had been denied a FAPE); Stapleton v. Penns Valley Area Sch. Dist., 2016 U.S. Dist. Lexis 71121, *22–23 (M.D. Pa. 2016) (holding that it is within the court's equitable discretion to use an award of compensatory education to fund post-secondary or college-level expenses); Student X, 2008 U.S. Dist. LEXIS 88163, at *74 (holding that the student's age does not bar an award for compensatory education).

According to the First Circuit, "common sense" dictates that students should not be precluded from receiving compensatory education simply because they are no longer entitled to services under the IDEA. Brooks, 841 F. Supp. 2d at 258 (citing Pihl v. Mass. Dep't of Educ., 9 F.3d 184, 189 (1st Cir. 1993)). For example, the court in Pihl opined:

> "In order to give meaning to a disabled student's right to an education between the ages of three and twenty-one, compensatory education must be available beyond a student's twenty-first birthday. Otherwise, school districts simply could stop providing required services to older teenagers, relying on the Act's time-consuming review process to protect them from further obligations."
>
> [Ibid. (citing Pihl, 9 F. 3d at 189–90).]

The Third Circuit addressed this issue in Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In Lester, the school district knew that it could not provide an appropriate program for a child with severe cognitive impairment and recommended residential placement. However, the district unnecessarily prolonged the application process to the out-of-district placements and took years to secure an appropriate placement. To compensate for a denial of a FAPE, the District Court awarded two and a half years of compensatory education beyond the student's twenty-first birthday. The school district cited Honig v. Doe, 484 U.S. 305 (1988), for the proposition that the court could not grant equitable relief to persons over the age of twenty-one because they were no longer entitled to the protections of the IDEA. Unlike the Honig case, where the parents were asking the district to comply with the Act in the future, the parents in Lester sought a remedy for a past deprivation. In affirming the District Court's award of compensatory education, the Third Circuit clarified that while a disabled student's right to a FAPE ends at age twenty-one, the right to a remedy for past IDEA violations is not precluded.

The same logic in Lester applies to students with disabilities who have graduated from high school. See generally Brooks, 841 F. Supp. at 258 (holding that a student who has received a high-school diploma may still be entitled to compensatory education); see also U.S. Dep't of Educ., Office of Special Educ. and Rehab. Servs., Opinion Letter to Dr. Gordon Riffel (Aug. 22, 2000) (receiving a high-school diploma does not alter the student's right to compensatory education as a remedy).

Compensatory education therefore is available as a remedy even after the right to a FAPE has terminated. Hence, an award of compensatory education may be made to individuals who are over twenty-one or who have already graduated high school. As B.M. was deprived of the weekly visits to his home by Garden staff that were set forth in his

IEP, an award of compensatory education is appropriate for the services denied from August 2009 through the end of stay-put in September 2011.

ORDER

Based on the foregoing and the record as a whole, it is **ORDERED** that petitioner B.M. be awarded 223.6 hours of therapy services as compensatory education.

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

October 25, 2019
DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency: October 25, 2019 (emailed)

Date Mailed to Parties:

PMK/mel

APPENDIX

WITNESSES

For Petitioners:

Dr. Cecilia McCarton
S.M.

For Respondent:

David Sidener
Lauren Sinning

EXHIBITS

For Petitioners:

P-1 Mandated Tuition Contract dated July 1, 2009
P-2 Individualized Education Program (IEP) dated March 26, 2009
P-3 Letter from David Sidener, Ph.D., dated September 1, 2009
P-4 Letter from Dr. Sidener with fax cover sheet dated November 30, 2009
P-5 Certification of Dr. Sidener dated May 19, 2010
P-6 Certification in Support of Motion for Emergency Relief for Stay-Put Protection dated April 23, 2010
P-7 Supplemental Certification in Support of Motion for Emergency Relief for Stay-Put Protection dated May 26, 2010
P-8 Certification in Opposition to Motion for Summary Judgment and in Support [of] Cross-Motion for Partial Summary Judgment dated June 15, 2010
P-9 Certification of Robert Klein, Director of Special Services, dated May 26, 2010
P-10 Request for Mediation with Attached Cover Letter dated Stamped by the New Jersey Department of Education

P-11 Petitioner for Due Process dated-stamped by the New Jersey Department of Education

P-12 Report from Cecelia McCarton, M.D., dated September 1, 2009

P-13 C.V. from Dr. McCarton

P-14 Memorandum Opinion from the Honorable Michael A. Shipp, U.S.D.J., dated May 31, 2013

P-15 Order from Judge Shipp dated May 31, 2013

P-16 Autism Program Quality Indicators (without appendix)

P-17 Policy Memorandum from the New Jersey Department of Education

P-18 Statement from Rainbow Consulting, LLC

P-19 Individualized Education Program dated April 7, 2008

For Respondent:

R-1 Request for Mediation dated December 8, 2009

R-2 Petition for Due Process dated March 3, 2010

R-3 Certification of S.M. in Support of Motion for Emergency Relief, etc., dated April 23, 2010

R-4 Certification of D. Sidener dated May 19, 2010

R-5 Order of ALJ Dennis Blake Denying Emergent Relief dated June 3, 2010

R-6 Certification of S.M. in Opposition to Summary Judgment dated June 15, 2010

R-7 Order of ALJ Dennis Blake dated August 11, 2010

R-8 Memorandum Opinion of Michael Shipp, U.S.D.J., in S.M., et al. v. Marlboro Township Board of Education, et al., Civ. Action No. 10-4490 dated May 31, 2013

R-9 McClannahan, et al., “Parents as Therapists for Autistic Children” (1982)

R-10 Garden Academy Home-Programming Model

R-11 Princeton Child Development Institute Home-Programming Model

R-12 Letter from D. Sidener to M/M S.M., dated September 1, 2009

R-13 Tuition Contract dated July 1, 2009

R-57 Home-Programming Logs 2007–2008

R-58 Home-Programming Logs 2009–2010