

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 04579-18

AGENCY DKT. 2018-27709

L.M. ON BEHALF OF R.M.,

Petitioners,

v.

BRICK TOWNSHIP BOARD OF EDUCATION,

Respondent.

AND

OAL DKT. NO. EDS 06220-18

AGENCY DKT. 2018 27767

BRICK TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

L.M. AND D.M. ON BEHALF OF R.M.,

Respondents.

(CONSOLIDATED)

L.M. and D.M., on behalf of R.M., pro se

Sebastian Ferrantell, Esq., for Brick Township Board of Education (Montenegro,
Thompson, Montenegro and Genz, attorneys)

Record Closed: November 30, 2018

Decided: December 21, 2018

BEFORE **CATHERINE A. TUOHY, ALJ:**

STATEMENT OF THE CASE

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415, L.M. has requested a due process hearing on behalf of his son, R.M., who is classified as eligible for special education and related services. The parent disputes the self-contained placement, assignment of a one to one paraprofessional and special transportation set forth in his son's proposed IEP. At issue is whether the Brick Township Board of Education provided R.M. with a Free and Appropriate Public Education (F.A.P.E.)

Also, in accordance with the provisions of the IDEA, 20 U.S.C. § 1415, the Brick Township Board of Education (the District) has requested a due process hearing to compel the parents of R.M. to permit the District, through its Child Study Team (CST), to conduct formal re-evaluations. The parents have withheld their consent for these evaluations.

PROCEDURAL HISTORY

Parent L.M. on behalf of his minor student, filed a due process petition with the Office of Special Education Policy and Procedure (OSEP) on March 23, 2018. The matter was transmitted to the Office of Administrative Law (OAL) on April 2, 2018 as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

The District filed a due process petition with OSEP on April 3, 2018 seeking consent to re-evaluate and a determination that the District provided FAPE. The matter was transmitted to the OAL on May 2, 2018 as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

An initial telephone prehearing was conducted on May 16, 2018, and adjourned on consent to allow the parents the opportunity to obtain counsel. On June 15, 2018 a follow-up telephone conference was conducted and again was adjourned on consent to allow the parents additional time to retain counsel. A further pre-hearing conference was

conducted on August 27, 2018 and counsel appeared on behalf of the parents. The matters were consolidated by order dated August 28, 2018.

The matter was scheduled for a hearing on November 19 and November 30, 2018. Thereafter, on September 17, 2018 parents' counsel moved to be relieved as counsel. Parents did not oppose the motion and consented to their substitution as attorney pro se.

An in-person status/settlement conference was conducted on October 23, 2018 and parents requested an adjournment of the November 19, 2018 hearing date to allow them the opportunity to retain new counsel. The November 19, 2018 hearing date was adjourned on consent to allow the parents the opportunity to retain new counsel, with the first day of hearing scheduled to begin November 30, 2018. On November 20, 2018 another telephone status conference was conducted at which time the parents advised they had not retained counsel. Also on November 20, 2018, the District filed an application for Emergent Relief seeking an order directing the parents to provide medical documentation to continue the home instruction; to compel the parents to bring R.M. to the home instruction; or in the alternative to have a third party guardian ad litem appointed for R.M. in light of his parents failure to consent to evaluations, provide medical authorizations and failure to bring R.M. to the home instruction. The parties presented oral argument on the emergent relief application on November 30, 2018. By order dated December 3, 2018, the District's request for emergent relief was denied.

A hearing was also conducted on the consolidated due process petitions on November 30, 2018.

The parents submitted additional documentation on December 3, 2018 including: a handwritten letter from D.M.; a note from Jersey Shore University Medical Center dated November 16, 2018 indicating that R.M. was hospitalized from November 7, 2018 through November 16, 2018 and indicating he could return to school on Monday, November 19, 2018; a note from the Emergency Department dated Wednesday, November 21, 2018 indicating R.M. would be able to return to school on November 23, 2018; and a copy of the refusal to consent to the proposed IEP form signed by L.M. and dated October 15, 2018 (R-4). Prior documentation submitted by the parents by fax on November 20, 2018

included a handwritten note enclosing: a September 13, 2018 authorization to return to school on September 14, 2018 indicating that R.M. was admitted to the pediatric unit at Jersey Shore University Medical Center from September 8, 2018 to September 13, 2018; notes from the Valerie Fund Children's Center for Pediatric Cancer and Blood Disorder excusing R.M. from school dated September 17, 2018 and October 17, 2018; and a note from Shore Children's Dental Care dated October 29, 2018 indicating R.M. appeared for a dental appointment (R-5). These documents are being included as part of the record since the parents are pro se and there was confusion at the hearing as to what documents had been submitted by the parents and received by the District concerning R.M.'s absences.

FACTUAL DISCUSSIONS

Janet Maciel testified on behalf of the District. She is employed as a case manager and LDTTC with the Brick Township Public Schools since September 2002. She has a master's degree from Walden University and has two certificates above her masters in learning disabilities and supervisory from Stockton University. She became his case manager in 2016 when R.M. entered sixth grade. A case manager is part of the IEP team and monitors the IEP to make sure that what is written in IEP is appropriate for the child. She has never met R.M. personally, but she has information from his parents and home instructors. He is currently classified as multiply disabled which means he has one or more disabilities which significantly impacts his learning and requires a specialized educational program to assist and accommodate his needs. Special needs students generally can attend school in the actual school building, but if they cannot, there is a provision for home instruction that can be provided. R.M. was no longer able to attend class in mid-fifth grade year due to his diagnosis of pancreatitis and episodes of chronic pain. The program was based on his current IEP at the time. The home instruction is provided at the Brick library at the request of the parents. Initially she was not the case manager in fifth grade, but she became R.M.'s caseworker in sixth grade. The first home instructor was Nancy Sansone but she chose not to continue the home instruction after a couple of months and then it became Joanne Clymore. Mrs. Clymore had limited days in which she saw R.M. There were several times R.M. was hospitalized or was not brought to the home instruction by his parents without notification to the instructor. Christine Vie

Brock was the next home instructor during R.M.'s seventh grade year. There was a lot of home instruction going on that year and Ms. Vie Brock notified Ms. Maciel when home instruction could not take place when R.M. was in the hospital. There were other times that they did not show-up and Ms. Maciel was aware that there was some difficulty initially in getting in touch with the parents to initiate the home instruction in the beginning of the seventh-grade school year. R.M. has issues of recoupment of skills and any time lost would be difficult to make-up. The parents have provided some notes regarding R.M. not being able to attend home instruction. The last time R.M. was brought to home instruction was October 16, 2018. He has received no home instruction from October 16, 2018 up to November 30, 2018. Ms. Maciel stated that she had not been provided with any doctors' notes excusing these absences. On March 28, 2018, the District sent the parents a letter advising that the home instruction documents on file needed updating by April 12, 2018 in order to extend the home instruction (P-5). A Physicians' Request for Home Instruction form was enclosed (P-6). The parents did not respond to this request initially. On June 14, 2018, Ms. Maciel sent the parents a "Re-evaluation Planning – Additional Assessment Warranted" notice advising the parents to contact the case manager for purposes of updating R.M.'s IEP. The parents' response was handwritten on the document (P-7). Ms. Maciel also had a conversation with the mother voicing her concerns regarding the documents she received. By letter dated June 15, 2018, the child study team forwarded a copy of the IEP developed on June 14, 2018 (P-8). The June 14, 2018 IEP was prepared by the child study team (P-9). The IEP outlines the proposed services program and related services, provides his eligibility information, the students demographics, information from the home instructor and how his disability effects his involvement in the curriculum; and provides goals and modifications that should be provided to R.M. The services are provided based on R.M.'s needs. She believes the IEP was appropriate. The parents responded in writing on the IEP itself. They did not come to the IEP meeting. They have not been to an IEP meeting since she has been the case manager, which is three years since R.M. was in sixth grade. She has only been recently presented with medical documentation regarding R.M. missing home instruction.

R.M. is scheduled to begin high school in September 2019. In order to provide an appropriate high school IEP for R.M., the District needs an updated psychological and updated educational evaluation of R.M. The last educational evaluation that was done was when R.M. was first evaluated by the team and determined eligible for special

education services in 2013 (P-15). The last psychological evaluation done was in 2015 when R.M. was in fifth grade (P-14). R.M. had a previous psychological evaluation done in 2013 (P-13). R.M. is currently fourteen years old. Although the District has invited the parents to participate in updating the evaluations, the parents have not brought R.M. to be evaluated. The parents have advised Ms. Maciel that they do not agree with the evaluations and they do not consent to the evaluations. However, the evaluations are necessary to provide an appropriate IEP for R.M. In her professional opinion, the parents have hindered the Districts' ability to provide R.M. with a free and appropriate public education.

On cross-examination, L.M. brought up the fact that they have provided the District with the doctors' notes and that the doctor filled out form P-6. That request was for last school year, made March 28, 2018 which the District did not receive. L.M. questioned how the District provided home instruction if they did not have the form. The District did receive the "Physicians Request for Home Instruction Form" form for September 2018, the current school year, which L.M. provided (R-2). L.M. inquired what was the reason the IEP included a one on one aide and transportation. Ms. Maciel explained the one to one paraprofessional was included based on information provided throughout the course of his seventh-grade instruction with Mrs. Vie Brock that R.M. needed a lot of assistance with refocusing, reading materials and being able to keep up with what was going on in the academic classes. The special transportation was to allow R.M. extra time when coming into the building to prepare for his day. Mrs. Vie Brock had indicated that R.M. has concerns and issues with organization so this would allow him an opportunity to come in a few minutes before the other students and get organized. He has not been in the building, but it was never said that the aide was to help him navigate the building which was a parental concern. L.M. said they did not want the aide or special transport included in the IEP and advised Mrs. Vie Brock of same, yet it was still included in the IEP. Ms. Maciel said it was all discussed at an IEP meeting and this is what the team decided. L.M. said the parents were not at the meeting and did not consent. Ms. Maciel indicated that they were invited to attend and did not. The special transportation was not regarding R.M.'s mobility but was to provide him with more time to get organized. L.M. also wanted to know why the District was sending them the home packets of work for R.M.'s tutoring sessions and why the tutor did not bring it directly to the home instruction sessions. Ms.

Maciel explained that the District decided that the instruction would be provided by Monmouth Ocean Educational Services Commission (MOESC) and that they required the parents bring the work to the session and return it to the school. Ms. Maciel explained that she mailed it to the home to make it easier on the parents rather than having them come to the school to pick it up. L.M. inquired whether the tutor should establish a relationship with the Brick Township teachers and review the work R.M. was being assigned. Also, L.M. took issue with the content of the materials and believed R.M. should be getting eighth grade work to prepare for high school. Ms. Maciel explained that all of R.M.'s work assignments she receives from his teachers, including his pull-out resource replacement teachers. Ms. Maciel was shown the August 29, 2018 letter from Marcos Alfie, M.D. (R-1), which requested R.M. be excused from CST testing because it would cause him to be anxious which could cause him to have pain. Ms. Maciel had not seen that document before. L.M. also inquired how R.M. received grades for the first marking period when his tutoring did not commence until November 28, 2017 of his seventh-grade year. Ms. Maciel indicated that initially R.M. received incompletes on his report card which were later changed when tutoring began.

On re-direct examination, Ms. Maciel indicated that the parents never presented them with alternative dates that they could come in for an IEP meeting aside from proposing times outside the normal school hours. The parents disagreed with the IEP and have not brought R.M. for home instruction since October 16th. Ms. Maciel has not been presented with any medical documentation excusing R.M.'s attendance at home instruction.

Kristen Hanson testified on behalf of the District. She is employed by the Brick Township Public Schools as the Director of Special Services since July 30, 2018. She holds two masters' degrees plus thirty credits from Georgian Court University. She has been working with special education students and their parents for more than twenty-five years. She is familiar with R.M. He is classified as multiply disabled in that he has two or more conditions for which specialized programming is required that suits both of those conditions. R.M. has a learning disability/cognitive impairment and a health-related concern. His IQ is 55. She believes R.M.'s classification is appropriate at this time. She has not been able to hold an IEP meeting with R.M.'s parents because the parents are

contesting the last IEP from the Spring 2018. R.M. is not receiving home instruction at this time, but he was receiving home instruction. The District requires medical documentation from the treating physician to authorize home instruction. Thereafter, every sixty days the District must obtain additional information from the doctor indicating that home instruction is still required. The District can only provide home instruction for sixty days without that medical authorization.

The parents have generally been difficult to work with. When the District requests information, they are generally met with a lot of resistance on the part of the parents. The last time R.M. was brought to home instruction was October 16, 2018. R.M. is fourteen and does not drive, so someone has to bring him to the library where the parents have requested that the home instruction take place because they did not want the home instructor in their home. She has not received any medical documentation indicating why R.M. has not been at the home instruction since the middle of October. However, the school doctor did speak with R.M.'s doctor who indicated that R.M. was hospitalized November 7, 2018. However there has been no indication how long he was there or is he able to continue with home instruction at the present time. What the District has been looking for is communication between the District and the doctor as to when R.M. is not well and cannot attend home instruction and when he is well and can attend. There have been a number of breaks in services because of this lack of communication. The parents had a problem with one of the last instructors, so the District contracted out with MOESC to obtain an instructor. The parents did not want someone from MOESC and refused to bring R.M. to the home instruction. R.M.'s last tutor was Ms. Stevenson who the parents had an issue with. She was a qualified instructor capable of providing instruction to R.M. After the parents received R.M.'s most recent IEP in the mail, they wrote on the document all the things they did not agree with (P-9). That should have occurred during the parent participation in an IEP meeting, which can occur in a number of ways. The District has patched parents in by telephone on their lunch hour when they want to attend an IEP meeting in person but have to work. They have speaker systems to allow parents' participation by telephone. R.M.'s parents wanted to have an IEP meeting after 5:00 p.m. which contractually the teachers could not stay beyond the school day. Ms. Hanson explained that they can attempt to accommodate the parents, but they cannot compel the entire CST staff to stay after 5:00 p.m.

After the last home instructor, the parents were not happy with, the parents met with the Superintendent and the director of curriculum at the Board offices and they requested a new home instructor. The District reached out to the teachers at the middle school and no one wanted to do it, so they contacted the Monmouth Ocean Educational Services Commission (MOESC) to obtain a home instructor. They are a public-school commission that provides services to all public schools in Ocean and Monmouth County. They provide child study team members, occupational and speech therapists, home instructors and they also have commission schools that provide services for students with special needs. Ms. Hanson had contact with Eileen Gallagher from MOESC who sent her a letter of intent regarding R.M. receiving home instruction and what their requirements were (P-10). Ms. Gallagher also provided the credentials for the proposed instructor who was qualified to provide the home instruction to R.M. (P-11). As of November 15, 2018, R.M. could have resumed his home instruction with the MOESC teacher, but that did not occur. The teacher had difficulty making contact with the parents and then was told that they were not going to bring R.M. to the home instruction because she was not an employee of the middle school. The parents stated that they were taxpayers and they wanted a teacher from the Brick Township middle school. It costs Brick Township \$30 per hour more to contract with MOESC than to provide one of their own teachers. Parents cannot pick and choose who the home instructors are. The last Brick Township instructor R.M. had was Ms. Stevenson who the parents claimed said their son was in the retarded class and they allegedly had a tape of her saying that. The Superintendent, Mr. Dent listened to the tape and believed the teacher said R.M. was in the resource pull out class, however he was not going to argue with the parents and it was agreed that the District would find another instructor. So, there was instruction time lost after the parents refused Ms. Stevenson's services and the time it took for the District to engage MOESC to provide an instructor. The District was willing to make-up all the time lost and do whatever it took with the new instructor, but the parents refused this instruction also. Ms. Hanson received an email from Ms. Gallagher on November 27, 2018 indicating that the parents did not want an outside agency and wanted a Brick instructor and refused the services of MOESC (P-16).

A psychological evaluation of R.M. was conducted by the Brick Township public schools on September 10, 2013 (P-13). Another psychological evaluation was conducted by the District in 2015 over the course of several days (P-14). Ms. Hanson is a school psychologist and there are a number of subtests which can be broken up if there are issues of stamina or attention with a student that would reflect a student's most accurate score if they were allowed to take it over the course of several days. This is an example of an accommodation that they could make for R.M. in the testing as they have done before. The educational evaluation of R.M. was done on September 10, 2013 (R-15). No other evaluations of R.M. have taken place. R.M. is due for re-evaluations which typically are done every three years to plan for programming. Any evaluations of R.M. could be done over a series of days. No re-evaluations of R.M. have occurred because his parents are refusing to present R.M. for evaluations. R.M. has been inconsistently attending home instruction so the District has inconsistent functional information on R.M. and the evaluations are three years old. L.M. is disputing the programming in the IEP but the District cannot get a handle on what R.M.'s current levels are without new evaluations. Therefore, the District is using the limited data they have to plan R.M.'s programming and are not afforded all of the information necessary to develop an IEP.

The only medical information the District has is that R.M. was hospitalized on November 7, 2018 for his pancreatitis. The District is aware that R.M. has intermittent flare ups from the pancreatitis that can impact him sometimes and that is why the District needs ongoing communication with the doctor. The District does understand that R.M. is ill and that they are compassionate and sympathetic to the situation, but they need to understand when R.M. is available to the District and when he is not available to the District without having to rely on the parents say so. The District requires medical documentation. The parents have hindered the District's ability to provide R.M. with FAPE because they are refusing to produce him for home instruction without a valid reason.

On cross-examination L.M. inquired how could the District not have all of the information he has faxed to Ms. Maciel regarding R.M.'s hospital stays. Ms. Hanson stated aside from what she had learned from the school district's doctor's conversation with R.M.'s doctor, she has no medical documentation regarding R.M.'s hospitalization or

that he is not able to participate in home instruction. The only information she has is that the parents refused to bring R.M. for home instruction because the instructor was not an employee of the Brick Township schools.

In Ms. Hanson's opinion, R.M. is truant if he does not attend home instruction without a medical excuse. She also reiterated that the District can accommodate R.M. in the re-evaluation process and conduct the reassessments over the course of several days and that the re-evaluations can be done at the library where R.M.'s home instruction takes place. Ms. Hanson also indicated if R.M. becomes well enough, they can arrange for him to attend school on an abbreviated school day.

The last note received authorizing home instruction was the doctors report and script dated September 2018 and was for eight weeks, so the District should be provided with an update continuing the request for home instruction (R-2).

The last three tutors were all from the Brick middle school. Ms. Hanson tried to get a tutor from Veterans Middle School since that was what was requested by L.M. L.M. asked why Ms. Hanson did not post the position to the grammar school and the high school. Ms. Hanson candidly admitted that at this point in time she is not going to post the position because the teachers are unwilling to work with their family because they have been so difficult. Since the family has accused Ms. Stevenson of saying R.M. is in the retard class when she did not say such a thing, none of their teachers want to be placed in such a vulnerable situation. Ms. Hanson also stated that L.M. will continually telephone school personnel, sometimes twenty times within an hour, which is practically harassment.

L.M. testified on behalf of the parents. His opinion that his son is not cognitively impaired. R.M. does not need a special bus to pick him up in front of the house when he is capable of walking to the bus stop like other children. L.M. also does not believe R.M. needs an aide to follow him around all day at school and that L.M. is capable of getting around the school on his own.

R.M. has good days and bad days but he pushes himself to go to tutoring. L.M. was under the impression R.M. was getting eighth grade work but he was not. Ms. Stevenson was R.M.'s tutor from September 2018 to October 16, 2018. She was doing assessments of R.M. Although he is not an educator, she was using sixth grade work books when R.M. should have been receiving eighth grade instruction to prepare him for high school. L.M. did not understand how the District did not get all the faxes he sent to the District regarding dentist visits and doctor visits. As parents, he explained they would not fail to give the medical documents to the school and he cannot understand how the school does not have the information he provided. He believed the District personnel were lying in stating they did not receive their faxes.

Ms. Stevenson was R.M.'s home instruction teacher this year until October. L.M. claims that she said R.M. was in the retarded class and that they recorded this on his son's telephone. The District then contracted with the Monmouth Ocean Educational Services Commission (MOESC) to provide a home instructor. L.M. refused this teacher's services because he insisted as a taxpayer he should have a teacher employed by Brick Township. In addition, L.M. objected to the fact that that Ms. Maciel from the District mailed home the work that the MOESC teacher was to work with R.M. on and felt that the contracted teacher should go to the school and pick-up the work and bring it to the tutoring session. He believed the contracted tutor should establish a relationship with the teachers at the Veterans' Memorial school. L.M. did not believe that the parents should be the intermediary between the school and the tutor and they were not happy about that.

R.M.'s disease prevents him from getting up in the morning and going to school. His condition has worsened as he had another MRCP test and R.M.'s pancreas has gotten worse than it was two years ago. R.M. may need major surgery in Minnesota which would require the family to move there for two months. It has been a difficult time for the family. R.M. has good days and wants to attend the home instruction when he can. R.M. pushes himself to attend. L.M. is of the opinion that since the tutor is providing one on one instruction, they should be able to cover more ground than in a classroom setting and R.M. should be able to catch up to eighth grade work and be prepared for high school.

He claims he and his wife, D.M. want R.M. to receive the home instruction at the library and bring him whenever R.M. is well enough to attend. L.M. indicated that the home environment is too distracting with the other family members present and that is why they agreed to the library as the setting for the home instruction. As far as testing was concerned, L.M. produced a letter dated August 29, 2018 from Dr. Alfie which indicated that if possible, R.M. should be excused from CST testing because the stress of the test could possibly cause R.M. to be anxious, which could cause R.M. to have pain (R-1). L.M. did admit that he understood that R.M. would have to be evaluated to determine an appropriate program for him, but L.M. was concerned that R.M. would not do well since he has missed so much school due to his illness.

L.M. supplied a copy of the Physician's Request for Home Instruction that was completed by Dr. Marcos Alfie dated September 14, 2018 indicating that R.M. was unable to attend school for a period of eight weeks (R-2). L.M. also produced a prescription from Dr. Alfie dated September 12, 2018 recommending R.M. have home schooling for eight weeks due to "chronic spink 1 mutation pancreatitis and gastro paresis" (R-3). L.M. also indicated that R.M. was hospitalized from November 7, 2018 to November 16, 2018 at Jersey Shore University Medical Center and therefore could not attend the home instruction during that period of time.

R.M. is home at the present time and is able to attend home instruction. L.M. did admit to making numerous telephone calls in a row to the District personnel but explained that was because he had limited access to make the calls and called as much as he could when he had the chance.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

R.M. is currently fourteen years old and has been eligible for special education and related services since 2013 under the classification multiply disabled, based on his limited cognitive ability and medical condition of chronic spink 1 pancreatitis. The District conducted psychological and educational evaluations of R.M. on September 10, 2013 (P-

13 and P-15). The District conducted another psychological evaluation of R.M. on November 13, 2015 (P-14). It has been more than three years since R.M. has been evaluated and his parents refuse to consent to any re-evaluations. The District requires parental consent to conduct re-evaluations in order to develop an appropriate IEP for R.M. for high school. The District has offered to conduct the evaluations in the library and over the course of several days if necessary to accommodate R.M.'s needs.

R.M. has been on home instruction since March 2016 due to various flare-ups related to his diagnosis of chronic pancreatitis. The home instruction takes place at the Brick Township public library. The District is mindful of R.M.'s medical condition and has agreed to the home instruction but requires a doctor's order justifying this continued restrictive placement every sixty days. The last physician's note requesting home instruction was dated September 14, 2018 and was for a period of eight weeks (R-2). Parents have not provided the District with an updated physicians' request for home instruction.

The parents have supplied doctors' notes for missed home instruction from September 8, 2018 through September 13, 2018; September 17, 2018; October 17, 2018; October 29, 2018; November 7, 2018 through November 16, 2018; and November 21 and November 22, 2018 (R-4 and R-5). R.M. had unexcused absences and missed instruction for October 18, 19, 22, 23, 24, 25, 26, 30, 31 and November 1, 2, 5, 6, 19, 20, 26, 27, 28, 29 and 30, 2018.

On November 15, 2015 the District contracted with MOESC to provide tutoring services for R.M. however, the parents have not brought R.M. to the home instruction sessions because they wanted a tutor from the District and not an outside contractor (P-10, P-11, P-12 and P-16).

The parents did not attend or participate in the IEP meeting on June 14, 2018. The IEP dated June 14, 2018 classified R.M. as multiply disabled. As a result of his chronic pancreatitis diagnosis R.M. has been hospitalized numerous times over the past few school years. His absences, health concerns, and academic weaknesses were found to adversely affect him in the classroom without accommodations and modifications (P-9).

R.M.'s home instructor for seventh grade, Ms. Vie Brock supplied the present levels of academic achievement. The IEP was formulated by the CST, based on a review of records, as well as teacher, parent and CST input. Based upon the academic progress and data reported in the IEP from R.M.'s home instruction teacher, the IEP team recommended a pull – out replacement for language arts and math and in-class support for science and social studies. The IEP team also recommended a one to one para professional to assist with focusing and organization, an extended school year program to address issues with recoupment and reinforcement of skills and curb to curb transportation for the 2018-2019 school year (P-9).

Ms. Maciel, R.M.'s case manager and Ms. Hanson, the Director of Special Services for the District testified that the IEP was appropriate to meet R.M.'s needs based on all of the information available to them at the time the IEP was drafted.

R.M.'s parents have not consented to the IEP and have withheld their consent to have R.M. re-evaluated for an educational and psychological assessment.

The District requires updated educational and psychological evaluations of R.M.in order to develop an appropriate IEP and plan for R.M.'s transition to high school. It has been more than three years since assessments have been conducted of R.M.

LEGAL ANALYSIS AND CONCLUSION

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 to 1482. One purpose of the Act, 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.A. § 1400(d)(1)(A). This “free appropriate public education” is known as FAPE. In short, the Act defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C.A. § 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 individualized education program (IEP) required under sec. 614(d). 20 U.S.C.A. § 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). Eligibility for special education services starts with a comprehensive multi-disciplinary evaluation intended to identify disabilities that are interfering with learning and inform the decision to classify and individualize an educational program for a special needs student. N.J.A.C. 6A:14-3.4.

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 child study team 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.

The Board will satisfy the requirement that a child with disabilities receive 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 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 LEd 2d 335.

In considering the appropriateness of an IEP, case law instructs that actions of the school district cannot be judged exclusively in hindsight. The appropriateness of an IEP must be determined as of the time it is made, and the reasonableness of the school district's proposed program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 564–65 (3d. Cir. 2010). An IEP is a “snapshot, not a retrospective.” Fuhrmann v East Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3rd Cir. 1991), citing Roland M. v Concord School Committee, 910 F.2d 983,992 (1st Cir. 1991). Thus, “in striving for ‘appropriateness’, an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” Ibid. Our courts have confirmed that “neither the statute nor reason countenance ‘Monday morning quarterbacking’ in evaluating a child’s placement.” Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 762 (3rd Cir. 1995), citing Fuhrmann, supra., 993 F.2d at 1040.

Parents who are dissatisfied with an IEP may seek an administrative due-process hearing. 20 U.S.C.A. § 1415(f). The burden of proof is placed on the school district. N.J.S.A. 18A:46-1.1. Unfortunately, due to R.M.’s medical condition, his education has been interrupted on several occasions due to flare ups as a result of his pancreatitis. The District has been trying to work with the parents and has provided home instruction to R.M. based on his doctor’s recommendation. The District requires continued medical authorization to continue this placement, which they have not received from Dr. Alfie.

N.J.A.C. 6A:16-10.1(a)(1) requires the parent(s) to submit to the school district a request that includes a written determination from the student’s physician documenting the continued need for home instruction. The school district shall forward the written determination to the school physician, who shall verify the need for home instruction. The school physician may contact the student’s physician to secure additional information

concerning the student's diagnosis or need for treatment and shall either verify the need for home instruction or shall provide the District board of education reasons for denial.

The parents have refused to allow the District to obtain medical records of R.M. by failing to execute a HIPPA form to allow the District to obtain necessary medical records. The parents have not attended IEP meetings and have withheld their consent to allow re-evaluations necessary to develop a new IEP for R.M. when it has been more than three years since the last evaluations were completed. The parents have failed to cooperate with the home instruction by bringing R.M. to the library when he is well, so that he may receive tutoring services and have been unreasonable in refusing the tutoring services offered by the District. N.J.A.C. 6A:16-10.1(b) allows the District to provide home instruction services through a contract with an educational services commission such as MOESC. Therefore, the parents' refusal to produce R.M. for home instruction because the instructor was not from the District's schools is not a valid reason to not bring R.M. to the home instruction.

The proposed IEP dated June 14, 2018 was developed by the IEP team based upon all information known to it at the time including the student's records, previous evaluations and input from his seventh-grade teacher, Ms. Vie Brock who provided him with home instruction last year (P-9). R.M.'s case manager, Ms. Maciel and the Director of Special Services for the District, Kristen Hanson, both special education professionals, testified that the proposed IEP was appropriate under the circumstances.

Therefore, I **CONCLUDE** that the District in this case has proven by a preponderance of the competent and credible evidence that the IEP proposed by the District offered R.M. a free and appropriate education with the opportunity for meaningful educational benefit appropriate in light of R.M.'s circumstances.

Recognizing that a child is not static, and that his or her needs evolve and change with time, the law moreover provides for a triennial review and reassessment of a child's needs and how they appropriately can be met.

N.J.A.C. 6A:14-3.8 provides that "within three years of the previous classification, a multi-disciplinary re-evaluation shall be completed to determine whether the student

continues to be student with a disability.” That re-evaluation begins with a review of existing data, classroom observations and input from teachers and related services providers. N.J.A.C. 6A:14-3.8(b). Based on that review, the Individualized Educational Program (IEP) Team is required to determine what, if any, additional data is needed to determine “[t]he present levels of academic achievement and functional performance and educational and related developmental needs of the student,” and “how they should appropriately be addressed in the student’s IEP” N.J.A.C. 6A:14-3.8(b)(iii). There thus are both situations where there is no need for additional assessments, and situations where the IEP Team determines that such assessments are essential to sound educational decision-making. The regulations make it plain, however, that additional formal assessments may be conducted only with the consent of the parent. N.J.A.C. 6A:14-2.3.

Pursuant to N.J.A.C. 6A:14-2.7(b), the District, as part of its responsibilities for the development of R.M.’s IEP is entitled to a due process hearing when it has been unable to obtain the required consent to conduct a re-evaluation and to obtain the release of R.M.’s records. R.M.’s parents have withheld consent to have their son re-evaluated even though more than three years have elapsed since he was last evaluated. R.M. is in need of special education and related services and has been classified multiply disabled since 2013. The IDEA and Section 504 require school districts to provide accommodations for individuals with disabilities. The District cannot develop an appropriate IEP to meet R.M.’s needs without the re-evaluations and access to medical records.

The IEP team has decided that an educational and psychological re-evaluation of R.M. is warranted. R.M. has received home instruction for the past two years and it is necessary that updated evaluations be conducted to determine an appropriate high school program for him.

I **CONCLUDE** based on the record before me, that the District’s request for leave to conduct formal assessments as part of a re-evaluation of R.M. is reasonable, appropriate, and necessary to guide the IEP team’s programmatic decision-making.

ORDER

Based on the foregoing, the relief sought by the District in its' petition is **GRANTED** and the parents are directed to make R.M. available for educational and psychological evaluations. The parents are also directed to provide updated doctors' notes regarding the continued need for home instruction and to allow the school physician contact with R.M.'s treating physician so that the District can plan for R.M.'s educational needs in light of his medical condition. The parents are further directed to cooperate with the provisions of home instruction and bring R.M. to the home instruction sessions, unless they submit medical proof to the District that R.M. is unable to attend due to his illness. The parents are also directed to attend R.M.'s IEP meetings, either in person or by telephone.

Parent's petition is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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 (2018). 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.

December 21, 2018

DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency

December 21, 2018 (emailed)

Date Mailed to Parties:

CAT/mel

APPENDIX

Witnesses

For Brick Township Board of Education:

Janet Maciel
Kristen Hanson

For L.M. and D.M. on behalf of R.M.:

L.M.

Exhibits

For Brick Township Board of Education:

- P-1 Parents' Due Process petition (four pages)
- P-2 District's Answer (two pages)
- P-3 District's Due Process Petition (five pages)
- P-4 August 28, 2018 Order of Consolidation (three pages)
- P-5 March 28, 2018 letter to parents requesting update note for Home Instruction
- P-6 District's request to parents for physician's note
- P-7 June 14, 2018 request for updated evaluation and parents' response (three pages)
- P-8 June 14, 2018 District's request for IEP review
- P-9 June 14, 2018 proposed IEP and parents' response (thirteen pages)
- P-10 November 15, 2018 email from Eileen Gallagher (MOESC) to Kristen Hanson
- P-11 Resume/credentials of proposed instructor (two pages)

- P-12 Email from Eileen Gallagher to Kristen Hanson dated November 16, 2018 regarding parents' noncompliance
- P-13 R.M.'s September 10, 2013 psychological evaluation (eight pages)
- P-14 R.M.'s November 13, 2015 psychological evaluation (seven pages)
- P-15 R.M.'s September 10, 2013 educational evaluation (seven pages)
- P-16 Email from Eileen Gallagher to Kristen Hanson dated November 27, 2018 regarding refusing services from MOESC

For L.M. and D.M. on behalf of R.M.:

- R-1 August 29, 2018 letter of Marcos Alfie, M.D.
- R-2 Brick Township Public Schools Physician's Request for Home Instruction Form completed by Dr. Alfie September 14, 2018
- R-3 September 12, 2018 prescription of Dr. Alfie
- R-4 December 3, 2018 note from parents attaching note from Jersey Shore University Medical Center dated November 16, 2018; a note from the Emergency Department dated November 21, 2018; and a copy of the refusal to consent to the proposed IEP form signed by L.M. dated October 15, 2018
- R-5 Note from parents faxed on November 20, 2018 attaching: a September 13, 2018 authorization to return to school from Jersey Shore University Medical Center; notes from the Valerie Fund Children's Center for Pediatric Cancer and Blood Disorder dated September 17, 2018 and October 17, 2018; and a note from Shore Children's Dental Care dated October 29, 2018