State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 15299-15

AGENCY DKT. NO. 2016-23419

D.O. ON BEHALF OF M.O.,

Petitioner,

v.

JACKSON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

_____

John D. Rue, Esq., for petitioner

Robert J. Pruchnik, Esq., for respondent (Campbell & Pruchnik, attorneys)

Record Closed: August 22, 2016 Decided: September 1, 2016

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 27, 2015, petitioner D.O. filed for due process, seeking compensatory education and reimbursement for expenses, on the basis that respondent, Jackson Township Board of Education ("the District" or "Jackson"), denied a free and appropriate public education (FAPE) to her son, M.O., by not providing evaluations and an

individualized education program (IEP) and, years later, providing an inadequate IEP.[1] The Department of Education's Office of Special Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 29, 2015. Petitioner filed an Amended Petition for Due Process on November 4, 2015. And respondent filed an Answer dated November 17, 2015.

Following prehearing telephone conferences, both Jackson and D.O. filed motions for summary decision on May 13, 2016. Jackson and D.O. each filed an opposition to the other's motion on May 25 and June 1, 2016, respectively. And on June 28, 2016, D.O. filed a reply brief. A final telephone conference was held on August 22, 2016, after which the record closed.

The issues are: (1) whether Jackson failed to fulfill its obligations under the IDEA to evaluate, and offer an appropriate educational program and services to M.O., a home-schooled child in need of special education and related services; (2) whether Jackson's May and June 2015 IEPs provided a FAPE in the least restrictive environment (LRE) to M.O., who had severe allergies that were known to Jackson; and (3) whether the District must compensate M.O. for a denial of FAPE, and reimburse D.O. for an independent educational evaluation when the cost of the evaluation exceeds the District's cost criteria.

FACTUAL DISCUSSION

M.O. is currently an eleven-year-old student who is eligible for special education and related services through the District under the category of autistic.[2] Before December 21, 2012, M.O. attended the Manchester School District ("Manchester").[3] An IEP in Manchester placed M.O. on home instruction, after which D.O. decided to home-school M.O.[4]

[1] This matter arises from D.O.'s claim that the District failed to provide her child with a free and appropriate public education from December 21, 2012, to October 20, 2015. (Petitioner's Brief in Support of Motion for Summary Decision.)
[2] Resp. Affidavit of Kerry Competello or "Competello Affidavit," Ex. Q.
[3] Resp. Affidavit of Kimberly Siciliano, or "Siciliano Affidavit," Ex. A.
[4] Competello Affidavit, Ex. B.

On December 21, 2012, D.O. registered M.O. in Jackson.[5] D.O. advised the District's registrar, Kimberly Siciliano, that she had been home-schooling M.O., and told Siciliano that she wanted to speak to the child study team before deciding upon a start date and requested to see available programs.[6] On or about January 3, 2013, the District received M.O.'s IEP from Manchester, reflecting home instruction through February 2012.[7] On or about January 17, 2013, D.O. met with the District's child study team to discuss M.O.'s educational needs.[8] On or about February 11, 2013, D.O. observed the District's SOLVE program.[9] On or about February 25, 2013, D.O. told the District that M.O. would not be enrolling.[10] However, on March 6, 2013, D.O. sent the District an email requesting enrollment, stating her suspicion that D.O. had a learning disability, and requesting evaluations.[11]

After the March 6, 2013, correspondence, a meeting was scheduled for March 19 to review M.O.'s records and develop a plan.[12] On March 18, D.O. cancelled the meeting because she was sick.[13] The meeting was rescheduled for March 21, but on March 20, D.O. notified the District that a psychiatrist had recommended hospitalization for M.O. and that she would contact the District when she had more information.[14] D.O. did not contact the District further.[15]

On or about September 13, 2013, M.O.'s case manager, Kerry Competello, contacted D.O. At that time, D.O. said that she intended to continue to home-school M.O., but asked about completing evaluations and an alternative program.[16] D.O. told Competello that she was interested in having M.O. tested academically and was

[5] Siciliano Affidavit.
[6] Id.
[7] Competello Affidavit.
[8] Supplemental Affidavit of D.O.
[9] Id.; Competello Affidavit.
[10] Id.; Supplemental Affidavit of D.O.
[11] Id.; Competello Affidavit, Ex. E.
[12] Supplemental Affidavit of D.O.
[13] Id.
[14] Id.; Competello Affidavit.
[15] Id.
[16] Id., PM-2. "PM-1, PM-2" (and so forth) references petitioner's numerical exhibits filed with her Motion for Summary Decision. "PO-1, PO-2" (and so forth) references petitioner's numerical exhibits filed in opposition to respondent's Motion for Summary Decision. PM-2 is an email dated September 13, 2013, from Kerry Competello to Robert Cerco.

interested in seeing alternative school placements.[17] Competello advised that she would "follow-up with the Director [of Special Education, Robert Cerco]"[18] and that she would "get back to" D.O.[19] Competello discussed D.O.'s matter with Robert Cerco, as evidenced by an email from her to Robert Cerco on September 13, 2013.[20] However, the District did not subsequently contact D.O. regarding her request for evaluations or alternative school placements and it did not provide an IEP for M.O. until 2015.[21]

There was no communication between the District and D.O. from September 2013 through April 1, 2015, when D.O. contacted the District. At that time, she asked about enrolling M.O. in school, but stated that first she wanted to see the programs the District could offer.[22] After being told she would have to enroll M.O. to observe the programs, D.O. completed the Registration Form on April 2, 2015.[23]

On April 23, 2015, D.O. confirmed in writing that she had home-schooled M.O. for three years and provided a prescription from a psychiatrist requesting home instruction.[24] At a meeting on May 1, 2015, D.O. gave the District M.O.'s prior evaluations and information about her teaching with him, and she informed that his allergies (corn starch, nuts and soy) can cause anaphylaxis and asthma.[25] Regarding M.O.'s allergies, the District stated that it would be able to accommodate M.O.[26] At that time, and pending new evaluations, the District provided a draft IEP that recommended the District's SOLVE program, a self-contained program where students can be grouped by ability and mainstreamed into general education when appropriate, rather than home instruction.[27]

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[17] Id.; PO-1, Supplemental Affidavit of D.O., at 3; Competello Affidavit, at 3.
[18] Id.
[19] Supplemental Affidavit of D.O., at 3.
[20] PM-2.
[21] Supplemental Affidavit of D.O., at 4. Notably, Competello does not specifically recall any follow-up with D.O. (Competello Affidavit, at 3.)
[22] Competello Affidavit.
[23] Id.
[24] Id. at 5.
[25] Supplemental Affidavit of D.O.; Competello Affidavit.
[26] (PO-1, Supplemental Affidavit of D.O., at 4; Resp. Affidavit of Tracy Decker, Supervisor of Special Education, at 5).
[27] Competello Affidavit, at 6.

The District's IEP team provided a final IEP on May 18, 2015, which recommended placement in the District's SOLVE program.[28] However, D.O. had previously observed the proposed classroom to include a kitchen where food was cooked or prepared at least three times weekly, and she was concerned about this placement because M.O. is severely allergic to nuts and cornstarch.[29] The District had been aware of M.O.'s allergies since 2012, when it received M.O.'s registration form.[30] Also, in May and June 2015, D.O. again informed the District of the allergies and she provided a letter from Dr. Robert Rabinowitz describing them (nuts, cornstarch, soy, rice, barley, and oats), the risk of anaphylaxis, and environmental restrictions.[31] However, the District did not provide for any specific modifications or accommodations in the IEP.[32] The final IEP from May 18, 2015, includes, in the top section on the cover, a line that says: "Special alerts: asthma, airborne allergy to nuts and cornstarch. Currently being prescribed QVAR, Zyrtec, Nasonex. Student requires an epi-pen."[33] This is the only mention of M.O.'s allergies in the May 2015 IEP.

On May 18, 2015, after receiving the May IEP, D.O. sent both a letter and an email to the District expressing her concerns with the IEP.[34] In this letter, D.O. expressed, among others, concerns that: "[1] There is no Action Plan in the IEP with regard to [M.O.'s] anaphylactic nut and airborne cornstarch allergies nor his asthma or other food and environmental allergies[;] [2] [t]here is no Action Plan as to how [M.O.'s] epi-pen or inhaler will be administered to him, if needed[;] [and] [3] [a] nut/food free class has not been proposed." The District acknowledged receipt of that letter in an email on May 21, 2015, and asked to schedule another IEP meeting.[35]

[28] Id. at 7, Ex. Q.
[29] Affidavit of D.O.
[30] Siciliano Affidavit, Ex. A. Also, M.O.'s records included a psychiatric report from Jersey Shore Medical Center, dated January 5, 2012, which stated as part of his medical history that M.O. was allergic to "tree nuts and peanuts." (PM-16.)
[31] PM-3, Supplemental Affidavit of D.O.
[32] PM-1, Supplemental Affidavit of D.O., at 4.
[33] Competello Affidavit, Ex. Q.
[34] Competello Affidavit, Ex. R.
[35] Competello Affidavit, Ex. S.

Another IEP meeting was held in June 2015 to review the District's evaluations.[36] At this meeting D.O. again noted her concerns about how the allergies would be addressed in school.[37] A final IEP was provided on June 23, 2015, that included the same allergy alert as on the previous IEP.[38] Again, this alert on the cover was the only mention of M.O.'s allergies in the IEP.[39] The IEP did not require, for instance, a "corn starch- and nut-free class, action plan in case of emergency, or [seating] where these foods are not consumed."[40] In this IEP, the District recommended transitioning M.O. to the SOLVE program during the extended school year.[41]

D.O. sought an independent educational evaluation of M.O., and on September 19, 2015, she engaged an independent evaluator for an initial assessment.[42] D.O. obtained the evaluation at an estimated cost of between $1,250 and $1,350, of which she has paid $1,000 and will be billed for the balance when she receives the report.[43] The District fee cap for this type of evaluation is $600.[44]

On or about October 20, 2015, D.O. opted to "decline the District's services" and advised the District that she had decided to home-school M.O.[45]

Based upon a review of the pleadings, and the parties' written submissions and attached exhibits, and drawing all reasonable inferences in favor of each respective non-moving party, for purposes of summary decision only, I **FIND as undisputed FACT** all of the above.

[36] Competello Affidavit, at 7.
[37] Resp. Affidavit of Tracey Decker, at 5.
[38] Id.; Competello Affidavit, Ex. T, June 2015 IEP.
[39] Competello Affidavit, Ex. T, June 2015 IEP.
[40] Affidavit of D.O.
[41] Competello Affidavit, Ex. T, June 2015 IEP.
[42] Amended Petition, at 14.
[43] Id.
[44] Resp. Affidavit of Robert Cerco, Ex. H.
[45] Supplemental Affidavit of D.O., at 5.

A. Motions for summary decision

On May 13, 2016, both D.O. and Jackson filed motions for summary decision. In support of her motion, D.O. argues that (1) Jackson failed in its obligation to offer D.O. a FAPE from December 21, 2012, to May 1, 2015; (2) Jackson failed to provide M.O. with a FAPE from May 2, 2015, to October 20, 2015, primarily because it did not accommodate his allergies; and (3) D.O. is entitled to reimbursement for M.O.'s psychiatric evaluations.[46] In opposition, Jackson argues it did not fail to provide a FAPE because it did not receive a specific request for evaluations from D.O., and that, when it attempted to conduct an initial meeting to discuss evaluations, D.O. failed to consent to evaluations for M.O.[47]

In support of its motion, Jackson claims that D.O.'s Petition must be dismissed because (1) D.O. never submitted a written request for an evaluation; (2) D.O. failed to provide consent for an evaluation of M.O.; (3) Jackson addressed M.O.'s allergies in each IEP and proposed an IEP that placed D.O. in the least restrictive environment; and (4) D.O.'s independent evaluation exceeded the cost of Jackson's maximum allowable fees for an independent evaluation.[48] In opposition,[49] D.O. claims that, despite her decision to home-school M.O., Jackson was required to provide M.O. a FAPE. D.O. claims that she never made any statement that would waive M.O.'s right to a FAPE, and that even if she did so orally, those types of waivers must be written. D.O. also claims that she requested that M.O. be evaluated and that it is the responsibility of the District to make reasonable efforts to evaluate M.O. If the District makes those efforts and still cannot evaluate M.O., D.O. claims that the District should have held an IEP meeting without her. Finally, D.O. claims that the independent evaluation that she obtained was not excessively costly and unreasonable and, in the alternative, she is entitled to Jackson's fee cap.

[46] Pet. Brief in Support of Motion for Summary Decision.
[47] Resp. Brief in Opposition to Petitioner's Motion for Summary Decision.
[48] Resp. Brief in Support of Motion for Summary Decision.
[49] Pet. Brief in Opposition to Respondent's Motion for Summary Decision.

LEGAL ANALYSIS AND CONCLUSION

A. Summary decision standard

Summary decision is appropriate "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." N.J.A.C. 1:1-12.5(b). A material fact precludes summary decision if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The standard in New Jersey requires judges to "engage in an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533. The adverse party must, by responding affidavit, "set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). When making a summary decision, the "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540. And "[i]n a due process hearing in which the question is whether the Board has fulfilled its statutory responsibility to provide a FAPE, the Board bears the burden of providing that it has met its legal obligation." Lascari v. Bd. of Educ. of the Ramapo-Indian Hills Reg'l Sch. Dist., 116 N.J. 30, 45 (1989).

B. Did the District fail to provide M.O. a FAPE between December 21, 2012, and May 1, 2015?

The primary purpose of the IDEA, 20 U.S.C.A. § 1400 to 1487, is to ensure that all disabled children are provided a FAPE. 20 U.S.C.A. § 1400(d)(1)(A). New Jersey has also enacted legislation and adopted regulations that assure all disabled children the right to a FAPE. See N.J.S.A. 18A:46-1 to -46. "The IDEA statutory framework imposes dual requirements on school districts, mandating both substantive and procedural compliance: first, they must provide [a FAPE] to a child with special needs,

and second, they must construct a program in the LRE and appropriate to the needs of the child." M.A. v. Voorhees Twp. Bd. of Educ., 202 F. Supp.2d 345, 361 (D.N.J. 2002) (citing Carlisle Area Sch. v. Scott P. by and through Bess P., 62 F.3d 520, 533–34 (3d. Cir. 1995), cert. denied, 517 U.S. 1135, 116 S. Ct. 1419, 134 L. Ed.2d 544 (1996), and Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200, 102 S. Ct. 3034, 73 L. Ed.2d 690 (1982)).

Under the IDEA, all children with disabilities residing in a state must be "identified, located, and evaluated and a practical method [must be] developed and implemented to determine which children with disabilities are currently receiving needed special education and related services." 20 U.S.C.A. § 1412(a)(3)(A). This requirement applies to all "children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools." 20 U.S.C.A. § 1412(a)(10)(ii)(I). "The purpose of the child-find evaluation is to provide access to special education." Fitzgerald v. Camdenton R-III Sch. Dist., 439 F.3d 773, 775 (8th Cir. Mo. 2006). The IDEA provides that the school district "shall conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability under this part." 20 U.S.C.A. § 1414(a)(1)(A). The goal of the evaluation is to determine the educational needs of the child. Ibid.; see 20 U.S.C.A. § 1414(a)(1)(C)(i)(II).

These IDEA provisions have been incorporated through New Jersey regulations. N.J.A.C. 6A:14-3.3. In New Jersey,

> [e]ach district board of education shall develop written procedures for students age three through 21, including students attending nonpublic schools located within the district regardless of where they reside, who reside within the local school district with respect to the location and referral of students who may have a disability due to physical, sensory, emotional, communication, cognitive or social difficulties.
>
> [N.J.A.C. 6A:14-3.3(a).]

Those procedures include referrals by parents, district staff, or state agencies, and an evaluation to determine eligibility for special education and related services. N.J.A.C. 6A:14-3.3(a)(3)(ii), -3.3(a)(3)(iii). "The activities undertaken to locate nonpublic school students with disabilities shall be comparable to activities undertaken to locate public school students with disabilities," and the board of education must consult with the nonpublic school about how to perform these activities. N.J.A.C. 6A:14-3.3(a)(2).

The parent of a child with a disability may "make a written request for an evaluation to determine eligibility for services under this chapter," and that "request shall be considered a referral and shall be forwarded without delay to the child study team for consideration." N.J.A.C. 6A:14-3.3(d).

> When a . . . student is referred for an initial evaluation to determine eligibility for special education programs and services under this chapter, a meeting of the child study team, the parent and the regular education teacher of the student who is knowledgeable about the student's educational performance or, if there is no teacher of the student, a teacher who is knowledgeable about the district's programs, shall be convened within 20 calendar days (excluding school holidays, but not summer vacation) of receipt of the written request. This group shall determine whether an evaluation is warranted and, if warranted, shall determine the nature and scope of the evaluation, according to N.J.A.C. 6A:14-3.4(a). The team may also determine that an evaluation is not warranted and, if so, determine other appropriate action. The parent shall be provided written notice of the determination(s), which includes a request for consent to evaluate [the student].
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> [N.J.A.C. 6A:14-3.3(e).]

Parental consent must be obtained before the school district conducts any assessment as part of an initial evaluation. N.J.A.C. 6A:14-2.3(a)(1). Consent must also be obtained before "any assessment as part of a reevaluation, except that such consent is not required if the district board of education can demonstrate that it had taken reasonable measures, consistent with (k)7 below, to obtain such consent and the parent failed to respond." N.J.A.C. 6A:14-2.3(a)(3). "A meeting may be conducted without the parent in attendance if the district board of education can document that it is

unable to secure the participation of the parent. The school shall maintain a record of its attempts to arrange the meeting [with the parent] . . . ." N.J.A.C. 6A:14-2.3(k)(7).

"The IDEA does not require school districts to provide services to all children with disabilities." Fitzgerald, supra, 439 F.3d at 775. "Rather, the IDEA allows parents to decline services and waive all benefits under the IDEA. See 20 U.S.C.A. 1414(a)(1)(D)(ii)(II). When parents waive their child's right to services, school districts may not override their wishes. See id." Ibid. "[T]he IDEA's requirements for gathering information during an evaluation and using the evaluation's results are pointless when parents refuse consent, privately educate the child, and expressly waive all benefits under the IDEA." Id. at 776. "Congress intends that a district may not force an evaluation [when a parent refuses consent]. Where a home-schooled child's parents refuse consent, privately educate the child, and expressly waive all benefits under the IDEA, an evaluation would have no purpose." Id. at 777.

In K.B. and D.B. ex rel. L.B. v. Morris School District, Morris County, EDS 15435-12, Final Decision (November 15, 2013), <http://njlaw.rutgers.edu/collections/oal/>, the administrative law judge (ALJ) concluded that the district's procedural violations denied FAPE where the district violated its child-find obligations by its failure "to timely and thoroughly evaluate [the child], together with the CST's failure to formally schedule an IEP meeting, effectively [making] it impossible for [the] parents to choose a public school program for their son." The ALJ found that there was not a lack of parental cooperation when the district did not "forward formal notice of an IEP meeting to the family, . . . [or] take the steps outlined by regulation to document a parental refusal to attend an IEP meeting, and in turn, conduct the meeting without them." The ALJ also found that the district's duty to provide educational services, such as conducting evaluations and holding an IEP meeting, were conditioned on a student's domicile in the district rather than a student's enrollment in the district. "The courts have made it plain that delivery of services under IDEA cannot be conditioned on formal enrollment in the public schools." K.B. and D.B. ex rel. L.B., supra, EDS 15435-12, Final Decision (November 15, 2013), <http://njlaw.rutgers.edu/collections/oal/> (citing Moorestown Twp. Bd. of Educ. v. S.D., 811 F. Supp.2d 1057 (D.N.J. 2011)).

> To hold otherwise would allow the school to slough off any response to its duty until the parents either performed the futile act of enrolling their son for one day and then withdrawing him as soon as the IEP was complete, or, worse, leaving the child in an arguably inadequate program for a year just to re-establish his legal rights. Neither action seems to be compelled by the statutory scheme or the case law.
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> [Ibid.]

In Jackson Township Board of Education v. S.G. and K.G. ex rel. A.G., EDS 00034-15, Final Decision (May 13, 2016), <http://njlaw.rutgers.edu/collections/oal/>, parents of a Jackson student requested an evaluation by the child study team shortly after registering the student in the district. The ALJ determined that this contact by the parents should have been treated as an initial referral, and under N.J.A.C. 6A:14-3.3(e) "'a meeting of the child study team, the parent and the regular education teacher of the student who is knowledgeable about the student's educational performance or, if there is no teacher of the student, a teacher who is knowledgeable about the district's programs, shall be convened within 20 calendar days . . . .'" S.G. and K.G., supra, EDS 00034-15, Final Decision (May 13, 2016), <http://njlaw.rutgers.edu/collections/oal/> (quoting N.J.A.C. 6A:14-3.3(e)). The ALJ also stated:

> N.J.A.C. 6A:14-2.7(k) provides that procedural violations may lead to a finding that FAPE was denied if the violations impeded the child's right to FAPE; impeded the parents' opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. It is "no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." Bd. of Educ. v. Rowley, 458 U.S. 176, 205-6, 102 S. Ct. 3034, 3050, 73 L. Ed. 2d 690, 712 (1982). Our courts have observed that "[t]he procedural requirements of the IDEA are essential to the fulfillment of its purposes." D.B. and L.B. o/b/o H.B. v. Gloucester Twp. Sch. Dist., 751 F. Supp.2d 764 (D.C.N.J. 2010). Where, as in this case, the District responded to a referral for special education with no attention to the procedural processes that guide the delivery

> of services, I am left with the conclusion that [the child] was denied FAPE.
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> [S.G. and K.G., supra, EDS 00034-15, Final Decision (May 13, 2016), <http://njlaw.rutgers.edu/collections/oal/>.]

These procedural protections also apply to disabled children who are home-schooled. See Forstrom v. Byrne, 341 N.J. Super. 45 (App. Div. 2001) (discussing the responsibilities that school districts have regarding students with disabilities who are being home-schooled); NJDOE FAQ: Homeschooling, Question 10, <http://www.state.nj.us/education/genfo/faq/faq_homeschool.htm> (New Jersey Department of Education ("DOE") description of procedures for evaluating a home-schooled student).[50]

Although New Jersey permits home-schooling, the IDEA does not mention or define it. Id. at 52; N.J.S.A. 18A:38-25. "Regulations promulgated pursuant to the IDEA define 'private school children with disabilities' as 'children with disabilities enrolled by their parents in private schools or facilities. . . .' 34 C.F.R. § 300.450." Ibid. However, "[w]hat constitutes a private school . . . is determined by state law." Ibid. (citing Hooks v. Clark Cnty. Sch. Dist., 228 F.3d 1036, 1039 (9th Cir. 2000)); (United States Office of Special Education Programs policy letter, 18 Indiv. with Disabilities Law Rep. 742, 744 (1992) (stating that the "determination of whether a home education constitutes private school placement must be made on the basis of state law").

> If the State recognizes home schools as private schools, children with disabilities in those home schools must be treated in the same way as other private school children with disabilities. If the State does not recognize home schools as private schools, children with disabilities who are home-

[50] The DOE states that "[w]hen the public school district receives a written request for special education evaluation, the district must review the request in a meeting of the child study team, the parent/guardian and the regular education teacher. This procedure applies to children who are educated at home. At the meeting, current information about the child is reviewed to determine whether an evaluation is warranted. If an evaluation is warranted, another determination will be made regarding the assessment procedures. Written notice of the determinations is given to parent/guardian. Once the assessments are completed, a meeting in accordance with N.J.A.C. 6A:14-2.3(i)1 is held to determine whether the child is eligible for special education and related services." It goes on to state, "If the child is eligible for special education and related services, the public school district must make a free, appropriate public education available only if the child enrolls in the district. If the child does not enroll in the public school district, but the district chooses to provide services, the district would develop a plan for the services to be provided."

> schooled are still covered by the child find obligations of SEAs and LEAs, and these agencies must insure that home-schooled children with disabilities are located, identified and evaluated, and that FAPE is available if their parents choose to enroll them in public schools.
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> [Id. at 53 (quoting 64 Fed. Reg. 12406, 12602 (Mar. 12, 1999)).]

Further, it has been held that "New Jersey's definition of nonpublic school [does] not include home schooling." L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp.2d 290, 296 (D.N.J. 2003).

Here, M.O. was being home-schooled before D.O. registered M.O. in Jackson. Regardless of how New Jersey characterizes home-schooled students, the District must fulfill its child-find obligations under the IDEA. These obligations include identifying, locating, and evaluating M.O. It is not disputed that M.O. was properly identified and located. At issue is the fact that D.O. initially registered M.O. in the District on December 21, 2012, but M.O. was not evaluated and provided an IEP until after an IEP meeting on May 1, 2015, and therefore was not provided services until then.

In March 2013, D.O. attempted to meet with the District to develop a plan for M.O. However, due primarily to her own illness and M.O.'s subsequent hospitalization, D.O. twice cancelled these meetings and did not reschedule with the District through the summer. On September 13, 2013, the District contacted D.O., and at that time she again inquired about an evaluation of M.O. and possible alternative placements. As in S.G., this inquiry should have been treated as an initial referral and the district should have scheduled a meeting within twenty calendar days. However, after the conversation on September 13, 2013, the District neither scheduled a meeting with D.O. nor arranged a meeting without her to consider evaluations for M.O. Thus, the District did not satisfy its "child-find" obligation to evaluate M.O.

It is the District's obligation to evaluate M.O. to determine whether he is entitled to special education and related services and, if he is, then the District must offer a FAPE. The District claims D.O. refused to consent to an evaluation when she cancelled

the meetings in March. However, as in K.B., there is no lack of consent in this matter because, after the September 13, 2013, conversation, the District did not forward formal notice of an IEP meeting to D.O. or take the steps outlined by regulation to document D.O.'s refusal to attend an IEP meeting, and in turn, conduct the meeting without her.

While the District took steps toward fulfilling its obligation to evaluate M.O. by cooperating with D.O. in March 2013, it failed to schedule an evaluation upon D.O.'s request in September 2013. The fact that D.O. also said that she was homeschooling M.O. does not relieve the District of its obligation to evaluate M.O. upon request because M.O. is a disabled child domiciled in the District. The District's obligation is conditioned on domicile, rather than enrollment in the District. Thus, under the IDEA, upon D.O.'s request for an evaluation in September 2013, the District had a duty to arrange an evaluation meeting for M.O. The District failed to fulfill this obligation because it did not schedule such a meeting and it did not evaluate M.O. until May 2015.

Therefore, I **CONCLUDE** that the District failed to evaluate or offer an IEP for D.O. until May 2015, although he was domiciled and registered in the District as of December 2012, and it thus did not provide M.O. a FAPE from March 6, 2013, when D.O. first requested evaluations, to May 1, 2015.

C. Did the IEPs from May 2015 and June 2015 provided M.O. a FAPE?

D.O. claims that the IEPs from May 2015 and June 2015 denied M.O. a FAPE because D.O. requested home instruction and because the classroom where the District placed M.O. has an active kitchen which may be harmful to M.O. due to his allergies.

A FAPE requires "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Rowley, supra, 458 U.S. at 188–89, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701. Although the IEP need not provide an optimal level of services or maximize the potential of a disabled student, the IEP must confer more than a trivial or de minimus educational benefit. M.A., supra, 202 F. Supp.2d at 361 (citing Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 181 (3d Cir.

1988)). An IEP is required to provide significant learning and confer meaningful educational benefit, which is to be measured in relation to the individual child's potential. Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 247 (3d. Cir. 1999). The meaningful-educational-benefit standard was reaffirmed in T.R. v. Kingwood Township Board of Education, 205 F.3d 572, 577 (3d. Cir. 2000). In evaluating the adequacy of an IEP, the focus should be on the IEP actually offered and not on what could have been provided. Lascari, supra, 116 N.J. at 46.

A state must provide special education and related services in the least restrictive environment. 20 U.S.C.A. § 1412(a)(5). "Thus, disabled children should be mainstreamed to the maximum extent appropriate and their removal from the regular education environment should occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." S.C. ex rel. S.C. v. Millburn Twp. Bd. of Educ., EDS 11158-99, Final Decision (May 22, 2000), <http://njlaw.rutgers.edu/collections/oal/> (citing 20 U.S.C.A. § 1412(a)(5)). A school district "is responsible for providing an IEP reasonably calculated to enable [a disabled child] to participate in the mainstream classroom to the maximum extent appropriate." Ibid. The Third Circuit U.S. Court of Appeals adopted a two-part test in Oberti v. Board of Education of Clementon School District, 995 F.2d 1204 (3d. Cir. 1993), for assessing compliance with the LRE requirement:

> "First, the court must determine whether education in the regular classroom, with the use of supplementary aids and services can be achieved satisfactorily." Factors to consider in determining this first prong are: (1) the steps the school district has taken to accommodate the child in a regular classroom; (2) the child's ability to receive an educational benefit from regular education; and (3) the effect the disabled child's presence has on the regular classroom. The second requirement mandates that if the court finds placement outside a regular classroom is necessary, the court must examine "whether the school has mainstreamed the child to the maximum extent appropriate, i.e., whether the school has made efforts to include the child in school programs with nondisabled children whenever possible."

> [M.A., supra, 202 F. Supp.2d at 365 (citing Oberti, 995 F.2d at 1215–17) (internal citations omitted).]

"The law requires that the proposed IEP provide a FAPE in the LRE—it does not and cannot require that the district provide the best education in exactly the manner dictated by the parents." Id. at 370. In M.A., the court applied the Oberti test and found that an autistic child should be placed at an out-of-district school, despite the parents' objection, to obtain a meaningful educational benefit. Id. at 368.

Here, the District created an IEP that placed M.O. in a special education classroom with other students because the IEP team determined that this placement is the LRE. The District claims that it is equipped to accommodate M.O.'s severe allergies. However, D.O. emphasizes that the special education classroom contains an active kitchen, which may cause a severe and dangerous allergic reaction. The District had been aware of M.O.'s allergies since 2012, when it first received M.O.'s registration form and, subsequently, additional school records.

Also, on May 18, 2015, after receiving the May IEP, D.O. sent a letter to the District expressing her concerns with the IEP, that: "[1] There is no Action Plan in the IEP with regard to [M.O.'s] anaphylactic nut and airborne cornstarch allergies nor his asthma or other food and environmental allergies[;] [2] [t]here is no Action Plan as to how [M.O.'s] epi-pen or inhaler will be administered to him, if needed[;] [and] [3] [a] nut/food free class has not been proposed."[51] The District acknowledged receipt of D.O.'s letter and arranged to schedule another IEP meeting. But the only mention of M.O.'s allergies in the June IEP was the same "special alert" on the top of the cover page listing his allergies and medications. The final June IEP did not provide any accommodation or modification that M.O. would receive to protect him from an allergic reaction. While the District is not required to provide an education in exactly the manner dictated by the parents, it is required to provide a safe environment for the students to confer a meaningful educational benefit.

[51] Competello Affidavit, Ex. R.

The District cannot possibly provide a FAPE if it is placing M.O. in constant danger of a severe allergic reaction. In evaluating the adequacy of an IEP, the focus must be on the IEP actually offered and not on what could have been provided. Neither the May IEP nor the June IEP provided any accommodation for M.O.'s allergies despite the District's knowledge and D.O.'s requests. M.O. was placed in a classroom with an active kitchen and, even though the District's representatives stated that they could accommodate M.O., the IEP did not provide any plan as to how to protect M.O. from an allergic reaction while in a classroom with an active kitchen. Because the IEP did not offer any accommodations to prevent M.O. from having an allergic reaction, it could not confer a meaningful educational benefit to M.O.

Therefore, I **CONCLUDE** that the District failed to provide M.O. a FAPE from May 1, 2015, to October 20, 2015.

D. Is D.O. entitled to reimbursement for the independent educational evaluation?

Parents may request an independent educational evaluation (IEE) if they disagree with a district-conducted evaluation. N.J.A.C. 6A:14-2.5(c)(2). The Administrative Code sets out the requirements for this independent evaluation:

> Such independent evaluation(s) shall be provided at no cost to the parent unless the school district initiates a due process hearing to show that its evaluation is appropriate and a final determination to that effect is made following the hearing. . . . Any independent evaluation purchased at public expense shall: (i) Be conducted according to N.J.A.C. 6A:14-3.4; and (ii) Be obtained from another public school district, educational services commission, jointure commission, a clinic or agency approved under N.J.A.C. 6A:14-5, or private practitioner, who is appropriately certified and/or licensed, where a license is required.
>
> [N.J.A.C. 6A:14-2.5(c)(1)–(2).]

In response to a request for an IEE, a school district has two options; it must either (1) file a timely due-process complaint to request a hearing to show that its evaluation is

appropriate, or (2) ensure that the requested IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2)(i)–(ii) (2016); N.J.A.C. 6A:14-2.5(c)(1).

Under the IDEA, the only criteria the district may impose on an IEE at public expense are:

> (1) If an [IEE] is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an [IEE].
>
> (2) Except for the criteria described in [the previous paragraph], a public agency may not impose conditions or timelines related to obtaining an [IEE] at public expense.
>
> [34 C.F.R. § 300.502(e) (2016).]

The United States Department of Education has provided interpretive guidance regarding this agency-criteria regulation by explaining that,

> [i]n order to ensure the parent's right to an independent evaluation, it is the parent, not the district, who has the right to choose which evaluator on the list will conduct the IEE. . . . [W]hen enforcing IEE criteria, the district must allow parents the opportunity to select an evaluator who is not on the list but who meets the criteria set by the public agency.
>
> [Letter to Parker, 41 IDELR 155 (OSEP 2004), available at <http://www.ed.gov/policy/speced/guid/idea/letters/2004-1/parker022004iee1q2004.pdf>.]

In Letter to Parker, the DOE answered an inquiry explicitly on the issue of whether a school district has the authority to restrict a parent's choice of evaluator to those on lists maintained by the state or the district. Thus, pursuant to 34 C.F.R. § 300.502(e) (2016), the district is allowed to specify a list of evaluators that meet its criteria, including those concerning reasonable cost, as long as it permits the parents

the opportunity to select an evaluator who is not on the list but who meets said criteria.[52] "The maximum fee cannot simply be an average of the fees customarily charged in the area, but rather must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees." NJ OSEP Independent Education Evaluations Frequently Asked Questions (September 2013) (relying on February 5, 1990, Letter to Thorne, 16 IDELR 606).

Here, D.O. does not dispute that the District may establish reasonable cost criteria for independent evaluations, but instead merely claims that the District's $600 fee cap is unreasonable.[53] The District does not dispute that petitioner is entitled to $600 as reimbursement for the independent evaluation. Petitioner cannot genuinely argue that the District's criteria, including its fee cap, deprived her of the right to an independent psychiatric evaluation, or even to select the evaluator. Under these circumstances, I **CONCLUDE** that D.O. is entitled to reimbursement for an independent psychiatric evaluation in the amount of $600.

E. Is D.O. entitled to compensatory education for M.O.?

The purpose of compensatory education is to remedy past deprivations of FAPE. M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996). Such a remedy, when appropriate, should be awarded "for the time period during which the school district knew or should have known of the inappropriateness of the IEP, allowing a reasonable time for the district to rectify the problem." Id. at 397. Compensatory education requires school districts to "belatedly pay expenses that [they] should have paid all along." Id. at 395. If it has been determined that a child was deprived of FAPE, compensatory education will "replace educational services the child should have received in the first place," and such a remedy "should aim to place disabled children in the same position they would have occupied but for the school district's violations of

[52] It is further noted that even when a requested evaluator is alleged to not meet agency criteria, the parents have the opportunity "to demonstrate that unique circumstances justify the selection of an evaluator that does not meet agency criteria" through due process. Letter to Parker.

[53] Petitioner's Brief in Opposition of Respondent's Motion for Summary Decision, at 20.

IDEA." Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 717–18 (3d Cir. 2010) (quoting Reid v. Dist. of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005)).

Petitioner contends that M.O. is entitled to compensatory education retroactive to September 2012, or from March 2013 to May 1, 2015, because of respondent's failure to offer an IEP during that time period, as well as from May 2, 2015, to October 20, 2015, because the IEPs were deficient. As discussed above, the District had a duty to offer M.O. evaluations and an IEP, because he is domiciled within the district and D.O. requested both evaluations and an alternate placement.

Here, M.O. was deprived of an IEP with an appropriate educational program and services from March 6, 2013, through May 1, 2015, and from May 2, 2015, through October 20, 2015, when D.O. expressly rejected the District's services. During that time he was home-schooled by D.O.[54] According to the May 2015 IEP, for proposed services from May 6, 2015, to April 29, 2016, M.O. was placed in the SOLVE Program, with special education classes, on a modified day schedule, which included (once) daily instruction of: 50 minutes of literacy; 40 minutes of social studies; and 195 minutes with an individual personal aide. The IEP also provided for a behavior intervention plan; classroom modifications; supplementary aids and services; supports for school personnel; and door-to-door transportation. According to the June 2015 IEP, for proposed services from July 6, 2015, to August 13, 2016, D.O. was entitled to ESY for four hours, five days a week, including one hour daily of social skills, math, and literacy.

Therefore, I **CONCLUDE** that equitable considerations dictate that M.O. is entitled, at a minimum, to compensatory education commensurate with the number of hours that are reflected for the programs and services in the above IEPs, in an educational environment that is appropriate for his needs, including all necessary precautions for his allergies, for the period of March 6, 2013, through October 20, 2015, to compensate for the District's denial of FAPE. This compensatory education shall, to

[54] Though D.O. home-schooled M.O., she did not make a unilateral out-of-district placement and then claim tuition costs. See Lauren W. v. DeFlaminis, 480 F.3d 259, 272 (3d Cir. 2007).

the extent possible, restore M.O. to the educational level where he would have been but for the denial of FAPE as described above.

ORDER

Accordingly, I hereby **ORDER** that petitioner's motion for summary decision is **GRANTED**, as herein stated, and for the reasons set forth above respondent's motion for summary decision is **DENIED**. I further **ORDER** that respondent provide the relief requested by petitioner, specifically as set forth above.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2016) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2016). 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.

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September 1, 2016
DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency

Date Mailed to Parties:

/lam

LIST OF EXHIBITS

For Petitioner:

Petitioner's Memorandum of Law in Opposition to respondent's Motion for Summary Decision

Exhibit 1	Supplemental Affidavit of D.O.
Exhibit 2	Request for parental participation at a meeting
Exhibit 3	Jackson School District Authorization for Release of Student Records
Exhibit 4	Jackson School District Release of Records Authorization
Exhibit 5	Email dated May 12, 2013
Exhibit 6	Letter dated February 16, 2016, to Joanne L. Butler, Esq., from John D. Rue, Esq.
Exhibit 7	Letter dated May 5, 2016, to Robert W. Bingham II, ALJ, from John D. Rue and Proposed Revised Prehearing Order
Exhibit 8	Jackson Township Board of Education Policies
Exhibit 9	Email dated January 2, 2013
Exhibit 10	Letter dated October 1, 2013, to Chief of Administrators, et al., from Kathy Ehling
Exhibit 11	United States Department of Education, Office of Special Education and Rehabilitative Services, letter from Stephanie S. Lee
Exhibit 12	Switlik Elementary School Invitation for Immediate Review for a Transfer Student, dated April 17, 2015
Exhibit 13	Jackson Township School District Meeting Attendance Sign-in Sheet, dated May 1, 2015
Exhibit 14	Email dated February 23, 2016
Exhibit 15	Email dated February 25, 2013
Exhibit 16	Fax cover sheet dated January 19, 2012, faxing medical documents

Petitioner's Memorandum of Law in Support of Petitioner's Motion for Summary Decision

Exhibit 1 Respondent's Amended and Supplemental Response to Petitioner's First Notice to Produce
Exhibit 2 Email dated September 13, 2013
Exhibit 3 Note from Allergy, Asthma and Clinical Immunology, dated June 3, 2015
Exhibit 4 Affidavit of D.O.
Exhibit 5 Email dated March 12, 2013
Exhibit 6 Email dated March 20, 2013
Exhibit 7 Email dated May 6, 2013
Exhibit 8 Email dated May 6, 2013
Exhibit 9 Email dated May 9, 2014
Exhibit 10 Jackson Township School District Student Registration Form

Petitioner's Amended Petition

Exhibit A Jackson School District Registration Form
Exhibit B Fax cover sheet, dated January 3, 2013, faxing Authorization for Release of Student Records
Exhibit C Manchester Township Board of Education Letter to Jackson School District, dated January 3, 2013
Exhibit D Jackson School District Department of Special Education, Child Study Team Attendance Form, dated May 1, 2015
Exhibit E Email dated March 6, 2013
Exhibit F Jackson School District Department of Special Education, Summary of Child Study Team Actions Record of File Review
Exhibit G US Postal Return Receipt to Ms. Kerry Competello from Mrs. and Mr. O., and letter dated April 23, 2015, with attached document
Exhibit H US Postal Return Receipt to Ms. Kerry Competello from O., and prescription dated April 23, 2015, for M.O.
Exhibit I Email chain dated April 27, 2015, with attached documents

Exhibit K Switlik Elementary School, Draft Individualized Education Program for M.A.O.

Exhibit L Email, dated May 13, 2015

Exhibit M Jackson Township School District, Individualized Education Program for M.A.O.

Exhibit N Letter dated May 18, 2015, to Dr. Cerco from D.O.

Exhibit O Email chain and Middlesex Regional Educational Services Commission Request for Home Instruction

Exhibit P Jackson Township School District, Draft Individualized Education Program for M.A.O.

Exhibit Q: Jackson School District, Department of Special Education, letter dated June 23, 2015, to Parents of M.O. from Lance Halpern, School Psychologist, with documents

Exhibit R Letter dated July 17, 2015, to Dr. Robert Cerco from D.O.

Exhibit S Jackson School District, Department of Special Education, letter dated July 3, 2015, to Mr. and Mrs. O. from Robert J. Cerco, Director of Special Education

Exhibit T Email dated September 15, 2015

Exhibit U Spectrum Health Associates bill information, printed September 19, 2015, for patient N.O.

Exhibit V Letter dated October 20, 2015, to Dr. Stephen Genco from D.O.

Exhibit W Jackson Township Board of Education Policy

Exhibit X Resolution

Exhibit Y Barnegat Board of Education Vendor Analyses for Meridian Pediatric Associates, P.C.; Barnegat Township Schools Purchase orders, dated October 1, 2014; Barnegat Board of Education Requisition, dated October 1, 2014; Letter dated April 16, 2015, to Warren H. Wolf Elementary School from Matthew Schiff, M.D., P.A.

For respondent:

Affidavit of Tracey Decker

Affidavit of Dr. Robert Cerco

Exhibit A Emails dated June 12, 2015; Jackson School District Request for Administrative Homebound or Administrative Supplemental; Jackson School District Tutoring Regulations; Jackson Township Board of Education Homebound Payroll Voucher; Payroll Cutoff Schedule 2014–15 School Year; Email dated June 2, 2015

Exhibit B Audio CD of meeting, dated June 15, 2015

Exhibit C Middlesex Regional Education Servicers Commission Request for Home instruction

Exhibit D Audio CD of interview

Exhibit E Chain of emails

Exhibit F Letter dated July 17, 2015, to Dr. Robert Cerco from D.O.

Exhibit G Letter dated July 30, 2015, to Mr. and Mrs. O. from Dr. Robert J. Cerco

Exhibit H Resolution

Exhibit I Email dated August 26, 2015

Exhibit J Letter dated October 20, 2015, to Dr. Stephen Genco from D.O.

Exhibit J Letter dated October 22, 2015, to Mr. and Mrs. O. from Robert J. Cerco

Affidavit of Kimberly Siciliano

Exhibit A Jackson Township District Registration Form

Exhibit B Email dated February 25, 2013

Exhibit C Jackson Township School District Student Registration Form

Affidavit of Kerry Competello

Exhibit A Jackson School District Department of Special Education Summary of Child Study Team Actions, Record of File Review

Exhibit B	Fax cover sheet, dated January 3, 2013, faxing Authorization for Release of Student Records
Exhibit C	Jackson School District, Switlik Elementary School, Release of Records Authorization
Exhibit D	Emails dated February 25, 2013
Exhibit E	Email dated March 6, 2013
Exhibit F	Switlik Elementary School Invitation for Immediate Review for a Transfer Student, dated April 17, 2015
Exhibit G	Letter dated April 23, 2015, from Mr. and Mrs. O. to Ms. Kerry Competello
Exhibit H	Switlik Elementary School Invitation for Immediate Review for a Transfer Student Meeting Confirmation Form
Exhibit I	Switlik Elementary School Invitation for Immediate Review for a Transfer Student, dated April 24, 2015
Exhibit J	Letter dated April 27, 2015, to Mrs. Kerry Competello from Mr. and Mrs. O.
Exhibit K	Switlik Elementary School Invitation for Immediate Review for a Transfer Student, dated April 27, 2015
Exhibit L	Jackson Township School District Meeting Attendance Sign-in Sheet, dated May 1, 2015
Exhibit M	Meeting notes
Exhibit N	List of Challenges/Difficulty
Exhibit O	Letter dated May 13, 2015, to Mrs. Kerry Competello from D.O.
Exhibit P	Jackson Township School District Department of Special Education, Receipt for IEP, executed by D.O. on May 8, 2015
Exhibit Q	Jackson Township School District, Individualized Education Program for M.A.O.
Exhibit R	Email dated May 21, 2015
Exhibit S	Email dated May 21, 2015
Exhibit T	Switlik Elementary School, Draft Individualized Education Program for M.A.O.
Exhibit U	Letter dated June 23, 2015, to Parents or Guardians of M.O. from Lance Halpern, School Psychologist