State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDS 00063-2020

AGENCY DKT. NO. 2020-30972

T.L. ON BEHALF OF T.L.,

Petitioners,

v.

MONMOUTH REGIONAL BOARD OF EDUCATION,

Respondent.

T.L., petitioners, pro se

Paul C. Kalac, Esq., for respondent (Weiner Law Group, attorneys)

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By request for emergent relief petitioner T.L. seeks the immediate implementation of a 504 Plan for her son, T.L., an award of compensatory education and other related relief as set forth in her request for emergent relief. That request was filed with the Office of Special Education Programs (OSEP) at the New Jersey Department of Education (Department) on January 2, 2020 and assigned the same docket number as petitioner's pending due process petition regarding the same issues.[1]

[1] On January 16, 2020, a telephone conference was held with Adminstrative Law Judge (ALJ) Scarola in the above captioned underlying due process matter filed by petitioner and a related petition filed by respondent Monmouth seeking consent for the evaluation of the minor T.L. Respondent's petition,

On January 14, 2020, the request for emergent relief was filed with the Office of Administrative Law (OAL) and scheduled for oral argument on January 21, 2020 before the undersigned. Oral argument was heard on that date.

FACTUAL DISCUSSION

T.L. is a fifteen-year-old freshman at Monmouth Regional High School (Monmouth). He attended Eatontown Borough (Eatontown) schools until his eighth-grade year (2017-18). Eatontown is a K-8 grade school district and by New Jersey law his school district for his high school years became respondent Monmouth. During his final year at Eatontown his mother, T.L. removed him from school during the second half of the year due to what she described as bullying and an unsafe environment at school. He remained home bound for the remainder of the 2017-18 school year as HIB, Superior Court and administrative proceedings ensued among T.L., Eatontown its staff and students involved in the bullying investigations and proceedings. In the fall of 2018, his education became the responsibility of Monmouth. It appears he did not attend school at Monmouth during the 2018-19 school year due to disagreements between T.L. and the District over his placement, including whether he would be safe from those who had bullied him in middle school. Although he was placed by Monmouth at another local public-school district, that attendance lasted only a few weeks and he remained home bound for the rest of the year. In late December 2018 Monmouth requested a series of evaluations for T.L. but did not receive consent for those evaluations from his mother. As a result of the differences between the parties, T.L. remained home bound for the rest of what would have been his ninth-grade year. During the 2018-19 school year, Monmouth did not file a due process petitioner regarding their needs for evaluations or other issues.

In September 2019, however, he began attending Monmouth as a ninth-grade student but without 504 Plan accomodations which had been provided to him since fifth grade. Monmouth again sought consent for evaluations from his mother who declined

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bearing OAL Docket No. EDS 16267-2019 is currently scheduled for hearing on February 11 and 19, 2020 before ALJ Frick. As the issues are related it is anticipated that the matters will be heard on the same dates by ALJ Frick.

to provide it. She questioned the necessity for the extent and number of evaluations requested and provided the District with updated medical on T.L.'s need for 504 accomodations. The District in turn deemed the information inadequate and filed for due process in the fall of 2019 to compel the requested evaluations. Petitioner, in turn, filed for due process shortly thereafter seeking a 504 plan for her son and related relief. In early 2020 she filed this request for emergent relief. At oral argument she focused her request for emergent relief on the immediate implementation of the 504 Plan under which her son had functioned at Eatontown.

Although petitioner's request for emergent relief listed a number of requests which also were contained in her petition for due process, the only relief amenable to being ordered in a request for emergent relief is the implementation of the 504 Plan. As such it it necessary to review the facts in the record regarding that plan. For the 2017-2018 school year, during which T.L. was in the eighth grade, Eatontown implemented a Section 504 Accommodation Plan to which his mother agreed.[2] The plan identified T.L.'s disabling conditions as "ADD: Attention Deficit Disorder," "Asthma," and "Sensory Processing Delay, Auditory Processing Delay, and Visual Perceptual Delay." Those diagnoses were based on various medical and other evaluations and classroom observations. The plan further identified "learning" as the major life activity affected by T.L.'s disabling conditions. The Plan included accommodations for T.L. with respect to the physical aspects of the classroom, such as where T.L. would sit; lesson presentation; homework and classwork assignments; and extended time for taking tests. Finally, the plan listed the location of T.L.'s accommodations as "general education classroom including specials and lunch."

In the fall of 2019, T.L. obtained updated speech, neurodevelopmental, and auditory processing reports and recommenations regarding T.L.'s need for a 504 Plan from his pediatricians and from the Children's Specialized Hospital, a Robert Wood Johnson Hospital affiliate. The speech evaluation revealed "expressive and receptive language skills that are within functional limits compared to other children his chronological age." While T.L. did "not qualify for outpatient speech and language

[2] That plan, along with related medical documentation, were provided at oral argument by T.L. and are attached hereto.

therapy," the evaluator "suggested that the school reinstate [T.L.'s] section 504 accommodations . . . [to] include preferential seating, classroom breaks as needed, an FM [frequency modulation] system, clear written and verbal instructions of assignments, extended due date and time allotted for tests."

Additionally, his pediatrician confirmed T.L.'s diagnoses of ADD and Central Auditory Processing disorder, Sensory Processing Delay, Visual Percepotion Delay as well as Fine and Gross Motor Delay. He noted that "these contribute to him doing things especialy handwriting at a slower rate than other students." He recommended that T.L. receive a Section 504 plan to address his inattention and organizational skills such as extend[ed] time for testing, classwork, and homework assignments and reduced workload and a person to scribe. Further, the auditory processing evaluation showed certain deficits and abnormalities and the evaluator recommended strategies and exercises to strengthen those areas. Finally, the records supplied by T.L.'s mother at the emergent hearing include notes/prescriptions from pediatricians who recommended a Section 504 plan to address T.L.'s ADD and processing difficulties.

LEGAL ARGUMENT AND CONCLUSION

Under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, "[n]o otherwise qualified individual with a disability in the United States, as defined in [29 U.S.C. § 705(20)] . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]" 29 U.S.C. § 794(a).

Section 504 applies to "all of the operations of" a local school district. 29 U.S.C. § 794(b). Under the law's school-specific regulations, 34 C.F.R. §§ 104.31 to -104.39, "[a] recipient that operates a public elementary or secondary education program or activity shall provide a free, appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 C.F.R. § 104.33(a).

In this regard, local school districts "shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure." 34 C.F.R. § 104.36. Compliance with Section 504's procedural safeguards may be achieved through adherence to the procedural safeguards under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to -1485. Ibid.

In New Jersey, those procedural safeguards include a parent's or school district's right to an impartial hearing regarding Section 504 issues such as the identification, evaluation, and educational placement of a child. N.J.A.C. 6A:14-2.7(w). Those procedural safeguards also provide that "[e]ither party may apply in writing for a temporary order of emergent relief as a part of a request for a due process hearing" regarding "[i]ssues involving a break in the delivery of services" and "[i]ssues concerning placement pending the outcome of due process proceedings." N.J.A.C. 6A:14-2.7(r).

In this matter petitioner has requested emergent relief. Generally, the standards to be met by the moving party in an application for emergent relief in a matter concerning a special needs student are set forth in N.J.A.C. 1:6a-12.1(e) and N.J.A.C. 6A-14.27(m)1. See also Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). They provide that a judge may order emergency relief if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitiioenr's claim is settled;
3. The petitioner has a likelihood of prevailing on the merties fo the underlying claim; and

4. When the eequities and interests fo the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

However, in a matter involving the application of "stay put", the above criteria do not need to be met.

Generally, like under the IDEA, no change shall be made to the student's program or placement pending the outcome of a Section 504 due process hearing.[3] N.J.A.C. 6A:14-2.6(d)(10); N.J.A.C. 6A:14-2.7(u); see also 20 U.S.C. § 1415(j). Under IDEA jurisprudence, the Third Circuit has held that the "stay-put" mechanism "acts as an automatic preliminary injunction" and "protects the status quo of a child's educational placement while a parent challenges a proposed change to, or elimination of, services." Drinker by Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (discussing the federal analogue to New Jersey's stay-put provisions) (citation omitted); C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 71-72 (3d Cir. 2010). In other words, the stay-put requirement "substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships." Zvi D. v. Ambach, 694 F.2d 904, 906 (2nd Cir. 1982). A child's "educational placement" for stay-put purposes has been interpreted as "the operative placement actually functioning at the time the dispute" arises between a parent and a school district. Drinker, 78 F.3d at 867.

Here, T.L.'s mother seeks emergent relief regarding her son's placement pending the outcome of the due process proceedings between her and Monmouth. However, identifying T.L.'s stay-put placement is complicated by the fact that, when the parties filed their due process complaints, there was no operative Section 504 placement actually functioning for T.L. That is, Monmouth never implemented the Section 504 plan developed by Eatontown, nor did Monmouth Regional develop and implement a new

[3] While Section 504 regulations are silent regarding "stay put," the federal agency responsible for enforcing Section 504 has concluded that "stay put" rights are implied under Section 504. Office for Civil Rights Letter to Zirkel, 22 IDELR 667 (May 15, 1995).

Section 504 plan upon T.L.'s enrollment in the district. Instead, T.L. has not been educated under any Section 504 plan since he first enrolled in the Monmouth Regional school district for the 2018-2019 school year.

In order to ascertain T.L.'s stay-put placement, it is appropriate to refer to the New Jersey regulation regarding intrastate transfers for guidance. That regulation provides that "[f]or a student who transfers from one New Jersey school district to another New Jersey school district, if the parents and the district agree, the IEP [individualized education program] shall be implemented as written" but that, "[i]f the appropriate school district staff do not agree to implement the current IEP, the district shall conduct all necessary assessments and, within 30 days of the date the student enrolls in the district, develop and implement a new IEP for the student." N.J.A.C. 6A:14-4.1(g).

Here, T.L. did not "transfer" from one district to another, but instead was entitled to attend high school in the Monmouth Regional district by virtue of the statutory relationship between Monmouth and his district of residence, Eatontown, which does not have its own high school. However, it would seem that the intrastate transfer provision, N.J.A.C. 6A:14-4.1, should guide school districts that receive special education or Section 504 students from sending school districts. Thus, in accordance with N.J.A.C. 6A:14-4.1(g), a receiving school district should either swiftly implement a child's prior Section 504 plan, implement a new one, or determine that the child is no longer eligible for Section 504 accommodations.

However, unlike the situation in which a parent unilaterally transfers a child from one New Jersey school district to another – a situation in which "the stay-put is inoperative," J.F. v. Byram Twp. Bd. of Educ., 629 Fed. Appx. 235, 238 (3rd Cir. 2015) - T.L. did not unilaterally transfer to Monmouth Regional, but instead enrolled there under a mandated relationship between Eatontown and Monmouth. Thus, stay-put is appropriate in this matter.

The question becomes what T.L.'s stay-put placement is. For various reasons, from the record before me, upon T.L.'s enrollment, Monmouth did not implement T.L.'s prior Section 504 plan, develop or implement a new one, or determine that T.L. is no longer eligible for a Section 504 plan. Nor did it promptly seek relief unfer due process in 2018 when issues first arose between the parties. Thus, T.L.'s current educational placement does not include Section 504 accommodations. While the parties have filed due process petitions disputing whether and to what extent T.L. is entitled to Section 504 accommodations, the appropriate remedy during the pendency of those proceedings is for T.L. to "stay-put" in his prior Section 504 plan. He had been educated under a Section 504 plan for several school years prior to his enrollment at Monmouth and the fact that he is not currently receiving any accommodations is untenable. T.L. presented updated medical recommending a continuation of 504 Plan accomodations for her son sufficient to buttress her argument that the prior 504 Plan should be implemented pending the out come of the underlying due process petitions filed by the parties. As such, T.L. is entitled to emergent relief in the form of a stay-put placement under the Section 504 plan under which he was educated during the 2017-2018 school year and her request for such relief is **GRANTED**.

All other relief requested in this emergent motion is **DENIED** without prejudice to such requests for relief being heard and determined in the underlying due process matters currently pending between the parties.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent Monmouth shall immediately implement the 504 Plan for T.L. which was previously in place for his 2017-18 school year.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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.

Patricia M Kerins

January 22, 2020
DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency: Janaury 22, 2020 (emailed)

Date Mailed to Parties:

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