State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
EMERGENT RELIEF
OAL DKT. NO. EDS 02277-22
AGENCY DKT. NO. 2022-33988
(**CONSOLIDATED**)

BRICK TOWNSHIP SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner,
v.
M.L on behalf of E.L.,
Respondent,
And,
M.L on behalf of E.L.,
Petitioner,
v.
BRICK TOWNSHIP SCHOOL DISTRICT
BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 02279-22
AGENCY DKT. NO. 2022-33988

Paul C. Kalac, Esq., appearing for petitioner-respondent Brick Township Board of Education (Weiner Law Group, LLP, attorneys)

Michael Flom, parent advocate appearing for respondent-petitioner M.L., pursuant to N.J.A.C. 1:1-5.4(a)(7) and 1:6A-5.1(b) (AFI, LLC)

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

STATEMENT OF THE CASE

By a request for emergent relief, petitioner M.L. (M.L. or petitioner)[1] seeks a finding that her minor child, E.L., is eligible for special education and related services or given a Section 504[2] Plan (504 Plan or Section 504) until the adjudication of the consolidated due process petitions pending before this tribunal.[3] In addition, M.L. seeks a finding that the respondent, Brick Township School District Board of Education (Board or respondent) intentionally discriminated against M.L. and her parent advocate, Mr. Flom, by unreasonably delaying responses and requests such as access to records and other communications. Finally, M.L. seeks a finding that the respondent acted with malice in its treatment of M.L and E.L. Respondent opposes these requests asserting they are premature in light of the pending assessments that will assist the respondent in determining whether E.L. is eligible for special education and related services.

PROCEDURAL HISTORY

This matter was submitted to this tribunal on May 25, 2022, for an emergent relief hearing and a final determination in accordance with 20 U.S.C. §1415 et seq., and 34 C.F.R. §§300.500 to 300.587. Oral argument was held on June 3, 2022. The record on the emergent application was held open for additional information and closed on June 6, 2022.

FACTUAL DISCUSSION AND FINDINGS

In addition to the parties' arguments, I have considered the documents submitted after the oral argument. E.L. is a fifth-grade general education student residing in boundaries of the Brick Township school district. E.L. has received Basic Skills Instruction (BSI) since 2017, and Intervention and Referral Services (I &RS) since 2018. From December 2017 to September 2020, E.L received speech services for articulation

[1] For ease of reference, M.L. will be referred to as petitioner and Brick Township Board of Education will be respondent.
[2] Section 504 of the Rehabilitation Act of 1973, *29* U.S.C. §794 (Pub. L. 93-112,Title V, §504 as amended)
[3] Brick Twp. BOE v. M.L. o/b/o E.L., EDS 02277-22, and M.L. o/b/o E.L. v. Brick Twp BOE, EDS 02279-22.

through a speech-only individual education plan (IEP). She also received school-based counseling. Despite these interventions, E.L. has struggled in school and has a history of absenteeism due to school anxiety and depression. Through mutual agreement, E.L. was assigned to home instruction beginning March 21, 2022. However, home instruction has been inconsistent due to scheduling issues on both sides. Moreover, home instruction was intended by both parties to be only a short-term placement pending the outcome of a determination of eligibility for special education and related services. If E.L. was deemed eligible, an IEP would be developed; if not, other avenues to return E.L. to the classroom would be explored.

E.L. was determined to be ineligible for special education services on January 18, 2022. M.L.'s request for a Section 504 Plan went unheeded by the respondent. On April 11, 2022, the parties held a re-evaluation planned meeting where it was agreed that the respondent would conduct psychiatric, and neurological evaluations and update the social history.[4] These assessments are still pending.[5]

While the assessments are pending, the petitioner seeks a Section 504 Plan with accommodations and supports as recommended by various independent evaluators retained by the petitioner who have diagnosed E.L. with:

- major depressive disorder by a social worker from The Positive Mind Counseling Space,
- generalized anxiety disorder and dyslexia by a learning disability teacher-consultant,
- anxiety depression and attention deficit hyperactivity disorder (ADHD) by ABC Pediatric Associates,
- generalized anxiety disorder and ADHD-inattentive type by a psychiatric nurse practitioner from Integrated Care Concepts & Consultation, and

[4] In February 2021, M.L. requested referral to the child study team. Respondent completed a social history on October 21, 2021, an educational evaluation on November 24, 2021 and psychological evaluation on January 5, 2022. An eligibility determination meeting was held on January 18, 2022, and the respondent found the student ineligible for special education services.

[5] It is unclear why an additional social history is needed since the prior one was completed less than one year ago. See, N.J.A.C. 6A:14-3.4(i).

- a clinical neuropsychologist recommended a comprehensive neuropsychological evaluation and home instruction.

In addition, M.L. has obtained reports and recommendations from Integrated Care Concepts & Consultation, and ABC Pediatric Associates reinforcing E.L.'s need for a 504 Plan. Based upon these independent evaluations, M.L. seeks a Section 504 Plan that includes: two hours of home instruction per day by an Orton Gillingham certified instructor until E.L. returns to school; assignment to the resource room in all core academics with multi-sensory instruction by a special education teacher; small group instruction five hours per week by a teacher certified in a scientific evidence-based Dyslexia program; one-to-one counseling, thirty minutes per week and on demand while on home instruction and in school by a therapeutic-level counselor (but not her current school counselor); an "enforceable pledge for the District not to interfere with the counselor's independence, or pressure, badger, harass, denigrate, humiliate, intimidate, or retaliate or engage in an similar actions against E.L. or M.L. in order to return to school in person." (Petitioner's Request for Emergent Relief, at. 10). In addition, goals and objectives and accommodations designed to address the emotional and academic issues were identified by the independent neuropsychologist and dyslexia evaluator and the specific recommendations made by the dyslexia evaluator; and a similar summer program for at least four weeks. Id.

Petitioner asserts that E.L.'s absences result from her school anxiety and depression and these absences along with the lack of appropriate academic and behavioral supports have negatively impacted her learning causing her to fall behind. As a remedy, petitioner seeks the accommodations outlined above in anticipation that E.L. will feel less anxious about returning to school.

Conversely, respondent asserts that a Section 504 Plan is premature until the child study team has determined whether E.L. is eligible for special education services.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 6A:14-2.7(r), provides in pertinent part that a party may apply in writing for a temporary order of emergent relief as part of a request for a due process hearing under very limited circumstances. Specifically,

> 1. Emergent relief shall only be requested for the following issues:
>
> i. Issues involving a break in the delivery of services;
>
> ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
>
> iii. Issues concerning placement pending the outcome of due process proceedings;
>
> iv. Issues involving graduation and participation in graduation ceremonies.

Here, the application for emergent relief concerns placement pending the outcome of due process proceedings in accordance with N.J.A.C. 6A:14-2.7(r)(1)(iii).

The standards to be met by the moving party in an application for emergent relief in a matter concerning a special needs child are set forth in N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A-14-2.7(s)1. 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 petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted. [Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).]

It is well established that a moving party must satisfy all four prongs of the regulatory standard to establish an entitlement to emergent relief. Id. at 132-35.

Turning to the emergent criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Id. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. Moreover, the harm must be substantial and immediate. Judice's Sunshine Pontiac, Inc. v. Gen. Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976). More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chems. Corp., 614 F.2d 351, 359 (D.N.J. 1980).

M.L. asserts that the foregoing standards have been satisfied. She contends that irreparable harm exists because: E.L. has not been in school for more than sixty days endangering her ability to succeed in school; the five years of BSI and I&RS have been ineffective; and home instruction has not allowed E.L. to access the curriculum as effectively as her non-disabled peers. In addition, M.L. asserts that her daughter has missed needed school counseling sessions. Indeed, both parties agree that remote counseling is not ideal. Conversely, the Board asserts that the petitioner failed to include any case law to support how E.L. will suffer irreparable harm if the accommodations requested are not provided and thus irreparable harm cannot be established.

Both parties agree that E.L. needs to return to school and the delay in returning to school is making it difficult for E.L. to catch up with her instruction. According to the attendance logs, E.L. was absent twenty-five days from September 20, 2021, until March 1, 2022. By mutual agreement, she was put on home instruction on March 21, 2022, due to her anxiety and the respondent does not dispute that E.L. has received only twenty hours of the thirty-three hours of expected home instruction. Indeed, during oral argument, the petitioner's parent advocate stated that home instruction had ceased and thus E.L. was not receiving any academic instruction. This is untenable. While E.L. is

not receptive to remote instruction or counseling, the parties must collaborate to find appropriate supports that will reduce E.L.'s anxiety and return her to school.[6]

Under State regulation, general education students on home instruction must be referred to the child study team for evaluation after sixty days. N.J.A.C. 6A:16-10.1(c)5. Specifically, this regulation states:

> For a student without disability, the home instruction shall meet the New Jersey Student Learning Standards, and the requirements of the district board of education for promotion to the next grade level. When the provision of home instruction will exceed 60 calendar days, the school physician shall refer the student to the child study team for evaluation pursuant to N.J.A.C. 6A:14.

This regulation supports the view that home instruction is not intended to be a long-term solution for a general education student. Accordingly, I **CONCLUDE** that the petitioner has met the requirements of the first prong.

As to the second and third prongs of the standard for emergent relief, the petitioner has demonstrated that her claim is well settled in her favor and that she has a likelihood of prevailing on the merits of the underclaim. Petitioner asserts that E.L. is entitled to a free and appropriate education (FAPE) under Section 504 and the respondent failed to take all necessary steps to ensure that E.L. returned to school.[7] States who receive federal funding for education are obligated to identify, classify, and provide a "free appropriate public education" (FAPE) to all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412; N.J.S.A. 18A:46-8; N.J.A.C. 6A:14-1.1. School districts have an affirmative and continuing obligation to identify and evaluate students reasonably suspected of a disability under the [Individuals with Disabilities Education Act] IDEA and Section 504. This responsibility is known as a district's "child find" obligation**.** 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111. In M.S. v. Randolph Bd. of Educ., 2019 U.S. Dist. LEXIS 169184 (D.N.J. Sep. 30, 2019), motion for reconsideration denied, 2020

[6] Respondent stated it is willing to assist in helping E.L. transition back into school.

[7] Petitioner cites to N.J.A.C. 6A:14-33(d)1 for support but it does not exist. N.J.A.C. 6A:14-3.3(d)1 authorizes a parent to submit written request for an eligibility evaluation which is deemed a referral which must be forwarded to the child study team for consideration. This does not appear to be relevant to this second prong.

U.S. Dist. LEXIS 159103 (D.N.J. Aug. 31, 2020), the U.S. District Court for the District of New Jersey stated:

> That obligation requires school districts to "identif[y] and evaluate[]" "children who are suspected of having a qualifying disability" "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." W.B. v. Matula, 67 F.3d 484, 501 (3d Cir. 1995), abrogated on other grounds, A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (3d Cir. 2007). The Child Find obligation is an affirmative duty, and therefore a public school "must do more than wait for an eligible disabled student to contact it." Moorestown Twp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 1066 (D.N.J. 2011) (Bumb, J.). When a school district violates its Child Find obligation by failing to identify a student with a disability, "and provides no specialized instruction to the student to meet the unique needs of his/her disability, the student has been denied a FAPE." Lauren G. ex rel. Scott G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375, 391 (E.D. Pa. 2012) (citing Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 238-39, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009)).
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> [Id., at *16-17 (D.N.J. Sep. 30, 2019)].

Each district must develop written procedures to identify students within the location of the district who may have a disability due to "physical, sensory, emotional, communication, cognitive, or social difficulties." N.J.A.C. 6A:14-3.3(a). These procedures must include evaluation measures to determine a student's eligibility for special education and related services. N.J.A.C. 6A:14-3.3(a)(3)(iii).

An "individual with a disability" is defined under Section 504 as any person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment." 29 U.S.C. 705(20)(B). Section 504 defines a disability as a physical or mental impairment that substantially limits a person's ability to participate in a major life activity, such as learning. Section 504 has a broad definition of "disability." Children who are not eligible for an IEP may, therefore, be eligible for a 504 Plan.

Here, the respondent determined that E.L. was ineligible for special education on January 18, 2022, but the respondent inexplicably failed to address the petitioner's request for a Section 504 Plan for E.L. Anxiety-related behaviors were observed at school and the anxiety caused E.L. to miss a significant amount of school days which should have triggered the respondent to consider other options, including a 504 Plan.

Respondent contends that the petitioner's failure to cite relevant case law renders petitioner's claims meritless. However, I **CONCLUDE** there is a settled legal right for the respondent to have considered reasonable accommodations under Section 504 for E.L. after its determination that E.L. was ineligible for special education services. Similarly, petitioner satisfies the likelihood of success on the merits. Despite the BSI and I&RS interventions, it is undisputed that E.L. demonstrated anxiety-related behaviors which resulted in excessive absences and yet the respondent failed to comply with its affirmative duty to determine if there were reasonable accommodations, in addition to BSI and I&RS, to help E.L. I **CONCLUDE** therefore, that the petitioner has met the second and third prongs.

The final requirement for emergent relief entails a balancing of the interests between the parties. Petitioner asserts there is significant psychological damage if E.L. continues in home instruction that will negatively impact her academic achievement which the respondent does not dispute. Respondent, however, contends that the twelve items petitioner seeks as relief will result in additional expense to the school district, in particular the request for an Orton Gillingham instructor two hours per day and a summer program. However, I find the potential educational and emotional harm to E.L. exceeds any potential additional cost to the Board. While home instruction is better than no instruction, it is only a stop-gap measure. Accordingly, I **CONCLUDE** petitioner has met its burden that E.L. will suffer greater harm than the respondent.

In her request for emergent relief petitioner seeks a finding that the respondent intentionally discriminated against her and her parent advocate by unreasonably delaying the responses to, and denying reasonable requests for access to records and communications not just for M.L. "but any parent of non-disabled students in the District." (Petitioner's Motion for Emergent Relief at 10.) However, petitioner has failed to provide

evidence that the respondent's alleged delayed responses were intentional and a pretext for discrimination because of E.L.'s suspected disability. Section 504 provides:

> No otherwise qualified individual with a disability in the United States . . . 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). Such program or activity includes the operations of a local educational agency. 29 U.S.C. § 794(b)(2)(B). An "individual with a disability" is defined under the Rehabilitation Act as any person who has "a physical or mental impairment that substantially limits one or more major life activities of such individual," has "a record of such an impairment," or is "regarded as having such an impairment."
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> [29 U.S.C. § 705(20)(B).]

To establish a violation of § 504 of the Rehabilitation Act, it must be established that (1) E.L. has a disability; (2) E.L. was "otherwise qualified" to participate in school programs or activities; (3) the respondent received federal financial assistance; and (4) E.L. was excluded from participation in, denied the benefits of, or subjected to discrimination under any school programs or activities. Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280, (3d Cir. 2012). It has not yet been established that E.L. has a disability, accordingly a claim of discrimination under Section 504 is premature. Accordingly, I **CONCLUDE** this request for relief is denied. Additionally, petitioner asserts that the respondent acted maliciously towards her and E.L., however, petitioner has failed to provide any evidence to support this allegation. Moreover, Section 504 affords no remedy for malicious conduct; therefore, this claim must fail.

E.L.'s eligibility for special education services is the crux of this petition. Petitioner asserts that her daughter is eligible under the category of Other Health Impaired based upon the reports from the independent evaluators. However, this issue cannot be decided on an application for emergent relief and will be adjudicated during the pending due process proceedings.

Finally, petitioner relies upon two cases for her contention that her daughter is entitled to a 504 Plan.[8] First, in M.G. and S.K. o/b/o B.K. v. Princeton Regional Bd. of Ed., 2013 N.J. AGEN LEXIS 364 (April 12, 2013), the Administrative Law Judge (ALJ) granted emergent relief to the petitioners because the Princeton school district failed to develop a 504 Plan for the student who had an anxiety disorder which caused him to engage in self-stimulatory behavior. The school district suspended the student indefinitely without a hearing for engaging in inappropriate behavior with other students. The facts of this case are distinguishable as noted by the respondent (e.g. the school district suspended the student without due process and did not want the student to return finding the student a danger to himself and others. In addition, the Princeton school district failed to conduct any evaluations for the student prior to suspending him). However, this case is instructive in that the ALJ determined that the school district "effectively took no action to address those behaviors despite having knowledge of them. Such action could have included the development of a 504 Plan, evaluation for special education services and in the interim an aide to redirect disruptive behaviors." Id. at *20. The Board in the present controversy similarly had knowledge of E.L.'s anxiety-related behaviors and absences and failed to consider a 504 Plan for her.

The petitioner also relies upon T.L. o/b/o T.L. v. Monmouth Regional Bd. of Ed., OAL Dkt. No. EDS 00063-20 (January 22, 2020) where the ALJ granted the petitioner's request for emergent relief seeking immediate implementation of her son's prior 504 Plan pending the outcome of due process proceedings between the petitioner and the school district. The student had a 504 Plan in middle school that was not implemented when he enrolled in the regional high school. The parent, like M.L., obtained reports and recommendations from independent evaluators corroborating the student's need for a 504 Plan but the school district deemed the information inadequate and filed for due process. This case is distinguishable because the student had a pre-existing 504 Plan and the mother declined consent for the high school to conduct evaluations. Another distinguishing factor is that the ALJ's decision to grant emergent relief is based upon the "stay put" provision of the IDEA which mandates that no change shall be made to a student's program or placement pending the outcome of mediation, an expedited due

[8] The parent advocate raised these cases at oral argument and failed to provide copies in advance. The respondent was given additional time to review the cases and respond.

process hearing, a due process hearing or any administrative or judicial proceeding. N.J.A.C. 6A:14-2.6(d)(20); N.J.A.C. 6A:14-2.7(u). In the present case, "stay put" is not relevant because E.L. is currently a general education student.

Having considered the parties' arguments and submissions, I **CONCLUDE** petitioner shall be granted the emergent relief sought to have the respondent create a Section 504 Plan for E.L. during the pendency of the due process petitions. I **CONCLUDE** the petitioner has demonstrated, by a preponderance of the evidence, that the risk of harm to E.L. is too great to allow E.L. not to have additional support to assist her in returning to school. I am mindful that there is only one week or less remaining in the current school year and full implementation of the 504 Plan is unlikely. However, the respondent shall be required to develop a 504 Plan for E.L. without haste, to address her academic needs and include behavioral supports that will encourage E.L. to leave the house and attend school, pending the outcome of the underlying due process petitions. The parties certainly will not achieve their mutual goal of returning E.L. to school if nothing is done to assist her.

In addition, I **CONCLUDE** that the home instruction must resume, and the Board must make-up the missed home instruction from March 21, 2022, to the present. The 504 Plan must be designed collaboratively among the parties because some of the accommodations sought by the petitioner are ambiguous (i.e., "enforceable pledge").

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that petitioners' application for emergent relief is **GRANTED**. The respondent will:

1. convene immediately to develop a 504 Plan for E.L.
2. resume home instruction, and
3. schedule make-up instruction for the home instruction missed from March 21, 2022, to the date of this Order.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. 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.

June 10, 2022
DATE

KIM C. BELIN, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

KCB/sm

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

P-1 Letter Brief for Emergency Relief

P-2 Final decisions in two Office of Administrative Law cases

For respondent:

R-1 Letter Brief in Opposition to Motion for Order of Emergent Relief

R-2 Email response to petitioner’s cases