

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 11880-16

AGENCY DKT. NO. 2017 24866

K.I. ON BEHALF OF K.I.,

Petitioner,

v.

MOORESTOWN TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Robert A. Robinson, Esq., for petitioner (Disability Rights New Jersey, attorneys)

John Comegno II, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: February 1, 2017

Decided: March 7, 2017

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioner, K.I., on behalf of her daughter, K.I., alleges that respondent, the Moorestown Township Board of Education (Board), has violated her daughter's right to a free appropriate public education (FAPE) under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, by failing to develop a "Section 504 Plan" to accommodate

her daughter's celiac disease while she is at school.¹ The Board alleges that it has developed an Individualized Healthcare Plan (IHP) for the child which should be sufficient for her.

PROCEDURAL HISTORY

On July 6, 2016, the petitioner filed a request for a due-process hearing with the Office of Special Education Programs (OSEP). OSEP transmitted the petitioner's claim to the Office of Administrative Law, where it was filed on August 8, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On November 20, 2016, the petitioner filed a motion for summary decision alleging that K.I. is entitled to accommodations under a Section 504 Plan. On December 19, 2016, the Board filed a cross-motion for summary decision contending that K.I. is not eligible for a Section 504 Plan.

FACTUAL DISCUSSION²

K.I. was born in 2004 and currently attends middle school in the Board's jurisdiction. In October 2015 she was diagnosed with celiac disease, which is an autoimmune disorder in which the ingestion of gluten damages the small intestine.

On November 19, 2015, Patricia Bierly, a nurse practitioner with the Center for Celiac Disease at the Children's Hospital of Philadelphia (CHOP), and Ritu Verma, M.D., of the Division of Gastroenterology, Hepatology and Nutrition at CHOP, wrote letters advising the Board that K.I. was "followed" by CHOP for celiac disease, that K.I. should be allowed "to carry a water bottle with her at all times to hydrate as part of her care," and that "it is medically necessary that a student with celiac disease and the school which they attend work together."

¹ Since the mother and daughter have the same first and last initials, the mother will be referred to as the petitioner.

² The facts are not in dispute.

On November 30, 2015, the petitioner met with Arline Conigliaro, a counselor at the elementary school K.I. attended that year, to discuss K.I.'s celiac disease. As a result of that meeting, the Board agreed to develop an IHP for K.I.³

Between December 9, 2015, and December 11, 2015, the petitioner and Ms. Conigliaro exchanged emails about a Section 504 Plan for K.I. In one email, the petitioner said she was following up to see "where we are in the process of getting [K.I.'s] 504 plan in place." In another, the petitioner asked, "can you tell me who is in charge of doing the evaluation for the 504 plan need assessment & how long that will take?" and stated, "[t]his is all so new to us and our Dr. at CHOP said we absolutely need a 504 plan and that an [IHP] could be a part of the 504 but not a replacement for it." Ms. Conigliaro offered to schedule a meeting to further discuss the matter, but the petitioner did not accept the offer.

On December 16, 2015, at the petitioner's request, Ms. Bierly and Dr. Verma sent the principal of K.I.'s elementary school a letter confirming K.I.'s celiac-disease diagnosis and stated that "Celiac Disease can impact [K.I.] with concentration," and that "[i]f there is inadvertent gluten exposure [K.I.] may experience abdominal pain, diarrhea, vomiting or headaches." On December 18, 2015, the principal told the petitioner in an email, "[w]e will convene next week to discuss several 504 cases. . . . In the meantime, all of the accommodations we discussed will be in place through an [IHP]."

On December 23, 2015, the principal informed the petitioner by email, "[a]s we often do with unclear cases for 504 plans, we did have our District Legal Counsel review the letters from CHOP. At this time, the advice we have received is that [K.I.'s] Celiac can be appropriately addressed through the IHP, similar to how all severe food allergies are addressed." The principal attached to the email K.I.'s IHP, which was prepared by the school nurse and included general information about celiac disease and particular accommodations for K.I. Those accommodations included permission to carry water at

³ While not currently included in the State education regulations, "individualized healthcare plan" has been defined under N.J.A.C. 6A:16-1.3 as "a plan written by the certified school nurse that details accommodations and/or nursing services to be provided to a student because of the student's medical condition based on medical orders written by a physician in the student's medical home." 38 N.J.R. 2294(a) (June 5, 2006).

all times to ward off possible dehydration and liberal access to the bathroom. The accommodations also called for the cafeteria table to be cleaned prior to K.I.'s lunch, a placemat for her personal use, and access to sanitary wipes.

On April 15, 2016, Barbara Moran, who at the time was K.I.'s senior staff advocate with Disability Rights New Jersey, wrote to K.I.'s elementary school to request a Section 504 Plan to accommodate K.I.'s celiac disease. In the letter, Ms. Moran stated that "as a student with a documented and qualifying disability, [K.I.] is entitled to a Section 504 Plan." In response, by letter dated April 26, 2016, the Board maintained its position that "there was insufficient information to suggest that K.I.'s [IHP] was not, in all respects, sufficient." However, the Board offered to schedule a meeting to further discuss the need for a Section 504 Plan for K.I. and asked for "any additional medical documentation, information, or recommendations for individual accommodations that may be relevant to consider for purposes of a Section 504 Plan."

As the result of a meeting on May 23, 2016, the Board amended K.I.'s IHP to also include "[a]ccess to wash hands as necessary and specifically after handling products that contain gluten," notification to the "parent if classroom projects will include materials or products that contain gluten so that parent can make appropriate substitution if necessary," and "access to a microwave if necessary for her school lunch." The Board notified the petitioner, "If you disagree with the decision to provide the accommodations . . . through the amended IHP, you may initiate a request for an impartial hearing." On July 6, 2016, the petitioner filed her request for a due-process hearing, which was then transmitted to the OAL.

On September 7, 2016, Ms. Bierly and Dr. Verma wrote another letter to the Board setting forth the dietary and environmental accommodations necessary for K.I.'s celiac disease and explaining that K.I.'s "specific effects when she is exposed to gluten are headache, stomach ache, constipation, vomiting, loss of concentration, general feeling of malaise and an increase in her anxiety." In response, the Board devised a "comprehensive [IHP] detailing various precautions that would be taken in order to ensure that K.I. remain[s] gluten-free, and also detailing accommodations that would be made in the event that K.I. be exposed to gluten."

On November 20, 2016, the petitioner filed a motion for summary decision alleging that the Board has violated Section 504 by failing to provide K.I. with a Section 504 Plan and ordering the Board “to provide K.I. with a Section 504 Plan setting forth the necessary accommodations for her medical condition.” The petitioner argues that, by providing K.I. with an IHP instead of a Section 504 Plan to accommodate her celiac disease, the Board “disregarded its child find obligation under Section 504 to determine her need for a Section 504 Plan” and improperly “shifted the burden onto . . . [the petitioner] to provide medical evidence in support of such eligibility.”

The petitioner also argues that K.I. is entitled to a Section 504 Plan because

K.I. has a medical condition that meets the currently expansive definition of disability under Section 504. While K.I. may not be disabled around the clock, she is disabled whenever the episodic symptoms of her Celiac Disease manifest themselves. These symptoms specifically impact her learning and digestion.

In support of her motion, Ms. Bierly provided an affidavit in which she asserted, “[i]n my professional opinion, [K.I.] is substantially limited in the areas of learning and digestion whenever her Celiac Disease is triggered.” Ms. Bierly also reiterated that K.I.’s “specific effects when she is exposed to gluten are headache, stomach ache, constipation, vomiting, loss of concentration, general feeling of malaise and an increase in her anxiety.”

On December 19, 2016, the Board filed a cross-motion for summary decision alleging that “K.I. is not eligible for a Section 504 Plan, has at all times received appropriate accommodations through an [IHP], and is excelling in school.” In support of the Board’s motion and in opposition to the petitioner’s motion, Carole Butler, the Board’s director of curriculum and instruction, provided an affidavit in which she asserted that “[t]here has been no indication of Celiac Disease substantially limiting K.I.’s ability to learn in the classroom”; that “between October 3, 2014 and June 20, 2016, K.I. visited the nurse only twice for GI-related issues,” and, “[i]n both instances, K.I. was discharged to finish her school day”; that she has rarely been absent from

school; and that she has excelled academically, such that “K.I. has received only A’s and B’s since October 2015.”

LEGAL ANALYSIS AND CONCLUSION

The issue is whether the Board must provide K.I., a student who suffers from celiac disease, with accommodations in accordance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794.

Standards for Summary Decision

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, “[a] party may move for summary decision upon all or any of the substantive issues in a contested case.” N.J.A.C. 1:1-12.5(a). Such motion “shall be served with briefs and with or without supporting affidavits,” and “[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). However, a motion for summary decision shall be denied if, by responding affidavit, an adverse party “set[s] forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” Ibid. No genuine issue of material fact has been shown.

Section 504

Under Section 504, “[n]o otherwise qualified individual with a disability in the United States, as defined in . . . [29 U.S.C.A. § 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.A. § 794(a). For purposes of Section 504, “[t]he term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C.A.

§ 12102(1).⁴ The term “major life activities” includes “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” and “also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C.A. § 12102(2).

Importantly, the definition of disability must be construed broadly, such that “[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability”; “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active”; and, “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.” 42 U.S.C.A. § 12102(4)(C), (D), (E)(i).

Section 504 applies to “all of the operations of” a local school district. 29 U.S.C.A. § 794(b). Under the law’s school-specific regulations, 34 C.F.R. §§ 104.31 to - 104.39 (2016), “[a] recipient that operates a public elementary or secondary education program or activity shall provide a [FAPE] 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) (2016). The law further requires a local educational agency to “conduct an evaluation . . . of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. § 104.35(a) (2016).

Under Section 504, local educational agencies “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

⁴ Under 29 U.S.C.A. § 705(20)(B), “the term ‘individual with a disability’ means, for purposes of [29 U.S.C.A. § 794], any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).”

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 (2016).

To prevail on a Section 504 claim alleging the denial of a FAPE, a parent must show that her child "(1) has a disability; (2) was otherwise qualified to participate in a school program; and (3) was denied the benefits of the program or was otherwise subject to discrimination because of her disability." Chambers v. Sch. Dist. of Philadelphia Bd. of Educ., 587 F.3d 176, 189 (3d Cir. 2009) (citations omitted).

Under the facts presented above, the Board violated Section 504 by failing to accommodate K.I.'s disability through a Section 504 Plan. The Board must now develop and implement a Section 504 Plan in accordance with federal law. K.I. has a disability that entitles her to a Section 504 Plan and the Board has denied K.I. the benefits of its educational programs by failing to accommodate her disability in accordance with Section 504.

First, K.I. has a qualifying disability under Section 504 because her celiac disease is a physical impairment that substantially limits major life activities such as learning, concentrating, and digestive and bowel functions. In this regard, Ms. Bierly certified that K.I. "is substantially limited in the areas of learning and digestion whenever her Celiac Disease is triggered" and that K.I.'s "specific effects when she is exposed to gluten are headache, stomach ache, constipation, vomiting, loss of concentration, general feeling of malaise and an increase in her anxiety." Thus, K.I.'s celiac disease is episodic, and "would substantially limit a major life activity when active." The fact that K.I. has rarely missed school or that she is excelling academically does not raise a genuine issue whether K.I.'s celiac disease is a qualifying disability under Section 504.

Second, K.I. is qualified to participate in the Board's educational programs and has been denied the benefits of those programs through the Board's failure to provide her with a Section 504 Plan to accommodate her disability. The U.S. Department of Education's Office of Civil Rights (OCR), which is the federal agency that enforces

Section 504, has interpreted Section 504's mandates as "requir[ing] that public schools take steps that are necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities." Washington (NC) Montessori Pub. Charter Sch., 60 I.D.E.L.R. 79 (August 16, 2012). In the context of food allergies, the OCR has explained that,

[a]s the vast majority of students without disabilities do not face a significant possibility of experiencing serious and even life-threatening reactions to their environment while they attend school, Section 504 . . . require[s] that [a school] provide students with peanut and/or tree nut allergy (PTA)-related disabilities with a medically safe environment in which they do not face such a significant possibility. Indeed, without the assurance of a safe environment, students with PTA-related disabilities might even be precluded from attending school, i.e., may be denied access to the educational program.

[Ibid.]

Here, K.I. faces a significant possibility of experiencing serious reactions to gluten if the Board does not provide a medically safe, i.e., gluten-free, environment while she attends school. If K.I. is exposed to gluten while at school, she would be denied access to the benefits of school programs. As such, the petitioner has shown that the Board has denied her daughter a FAPE under Section 504. Because the requirements of a Section 504 Plan cannot be satisfied through the provision of an IHP, the Board must now create a Section 504 Plan for K.I. in accordance with federal law.⁵

CONCLUSION

Based on the foregoing, I **CONCLUDE** that the petitioner's motion for summary decision must be granted and that the Board's motion for summary decision must be denied.

⁵ For violations of Section 504, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 29 U.S.C.A. § 794a. However, the OAL is not a court and does not have the authority to award attorney's fees.

ORDER

I **ORDER** that the petitioner's motion for summary decision is **GRANTED**. Because the Board has violated Section 504 by failing to provide K.I. with a Section 504 Plan, it is hereby **ORDERED** that the Board forthwith provide K.I. with a Section 504 Plan setting forth the necessary accommodations for her medical condition. The Board's motion for summary decision is **DENIED**.

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.

March 7, 2017
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SMS/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Brief

For respondent:

Brief