State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 18402-2017
AGENCY DKT. NO. 2018-27295

R.K. O/B/O P.R.,
Petitioners,
v.
ROSELLE BOROUGH
BOARD OF EDUCATION,
Respondent.

R.K., pro se

Margaret M. Miller, Esq., for respondent (Weiner Law Group, LLP, attorneys)

Record Closed: January 10, 2018 Decided: January 18, 2018

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner R.K. on behalf of P.R. (R.K.), seeks an order by way of emergent relief to have the respondent, Roselle Borough Board of Education, (District) place her son P.R. Out-of-district at the ARC Kohler School in Mountainside, New Jersey (ARC Kohler), until a determination can be made for long term/permanent placement for P.R.

On December 13, 2017, R.K. filed a petition with the Office of Special Education Policy and Procedure (OSEPP), seeking emergent relief and due process hearing, pursuant to N.J.A.C. 6A-12.1 and N.J.A.C. 6A:14-2.7(r). The matter was transferred to the Office of Administrative Law (OAL) and received at the OAL on December 18, 2017, as an emergent and contested matter, and request for a due process hearing was retained by OSEPP. The emergent matter was heard on January 8, 2018, at the Newark, New Jersey offices of the OAL. The record remained open until January 10, 2018, to allow the District to submit copies of the pleadings it filed with the OAL concerning R.K.'s previously filed Petition for Due Process under Docket Number EDS-05765-16.

ISSUES

1. Does R.K.'s request for emergent relief qualify under N.J.S.A. 6A:14-2.7(r);
2. Should R.K.'s petition for emergent relief be dismissed because the proper process to challenge an IEP is a full due process petition;
3. Has R.K. met all the elements necessary to request emergent relief pursuant to N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 6A: 14-2.7(s).

DISCUSSION and CONCLUSION

R.K., brings this case on behalf of her son, P.R. a nine-year old student classified as eligible for special education and related services under the category of Emotionally Disturbed. R.K. has been diagnosed with mood disorder, not otherwise specified; oppositional defiant disorder; expressive language disorder; ADHD, combined presentation; Disruptive Mood Dysregulation Disorder, and Anxiety.

P.R. was determined eligible for special education services on December 22, 2014 and the District is the local educational agency responsible for providing P.R. with FAPE. P.R. has not attended school since May 6, 2016, due to R.K.'s refusal to return P.R. to the school setting because of allegations that the District cannot provide proper FAPE.

R.K. seeks an emergent order on the basis that P.R. requires a structured specialized school program in a therapeutic environment. As a result, R.K. seeks an out-

of-district placement in ARK Kohler with one-to-one paraprofessional and transportation where the staff are specifically skilled and trained to deal with his multiple diagnosis and to deescalate R.K.'s emotional outbursts which will minimize R.K.'s aggressive behavior. R.K. is under the belief that placement of R.K. in ARC Kohler can properly address R.K. multiple disabilities, including social anxiety disorder and other multiple diagnosis.

R.K. has previously applied for Due Process and Emergent Relief. By way of background, on or about February 22, 2016, R.K. filed a request for Due Process and Emergent Relief which was transmitted to the OAL as Docket No. EDS-09041-15 ("2015 Petition"). The application sought P.R.'s placement in an out-of-district placement for the 2015 extended school year. Judge Ellen Bass, A.L.J., denied the request for emergent relief and the matter was assigned to Judge Caridad F. Rigo, A.L.J. for a hearing on the merits. The underlying petition sought an out-of-district placement with a one-to-one paraprofessional aide for ESY and for the 2015/2016 school year.

Prior to the scheduled hearing, the parties reached a settlement. Pursuant to the terms of the Settlement Agreement ("Agreement 1"), the District agreed to amend P.R.'s June 3, 2015 IEP to reflect that P.R. would receive services of a one-to-one paraprofessional through December 23, 2015. The paraprofessional would be assigned to P.R. for the entire school day, subject to a fading plan that was incorporated by reference into Agreement 1. In exchange, R.K. was to withdraw the 2015 Petition and waive her rights to seek further redress for any claims that she had against the District arising prior to the date of Agreement 1.

Although the terms of Agreement 1 were placed on the record, R.K. did not sign the written Agreement. This resulted in the District filing a Motion to Enforce Settlement which was granted by Judge Rigo on September 11, 2015.

On September 14, 2015, P.R. returned to school where he was placed in the District's Behavioral Disabilities program and was assigned a one-to-one paraprofessional (on a rotating basis) at all times. Although Agreement 1 only required the District to provide the paraprofessional through December 23, 2015, the District

continued to provide the service in accordance with the fading plan developed by the District's Behaviorist.

Between September 14, 2015 and December 22, 2015, P.R. was absent from school a total of nineteen (19) days, exclusive of the eleven (11) school holidays and breaks. At R.K.'s request, an IEP meeting was held on January 29, 2016, at which time R.K. again requested that P.R. be placed out-of-district.

On or about February 22, 2016, R.K. filed a Petition for Due Process with OSEPP ("2016 Petition"), under OAL Docket Number EDS 05765-16 and Agency Number 2016-24047. The matter was assigned to Judge Leland S. McGee, ALJ. In the 2016 Petition, R.K. asserted that the District had no "medical basis" or "background" to support its decision to rotate paraprofessionals assigned to P.R. R.K. argued that the District's rotation of paraprofessionals demonstrated that it could not provide P.R. with an appropriate program and she asked that P.R. be placed in a therapeutic out-of-district placement.

On June 8, 2016, an in-person conference was held before Judge McGee. At that time R.K. was represented by counsel and the parties reached an agreement to retain an independent evaluator; the terms of the agreement were placed on the record and were memorialized in a letter dated June 16, 2016, from Respondent's counsel without objection from Petitioner's counsel (Agreement 2). On or about August 1, 2016, Petitioner's counsel filed a Substitution of Attorney wherein R.K. elected to represent herself pro se.

As a result of Agreement 2, the parties agreed that Craig Domanski, Ph.D., BCBA-D, (Dr. Domanski) would conduct an independent evaluation that was to include a student interview and home visit. Prior to the student interview and home visit, R.K. cancelled the evaluation scheduled for July 18, 2016, and failed to reschedule, causing the District to file a motion to enforce Agreement 2, on August 2, 2016, which Judge McGee granted on August 17, 2016.

Between August 17, 2016 and November 6, 2016, R.K. did not comply with Judge McGee's order concerning R.K.'s compliance with Agreement, resulting in the District filing a motion for summary decision on November 7, 2016, which motion was granted by Judge McGee on February 14, 2017, finding that R.K. failed to comply with Agreement 2 and the Order of enforcement.

Dr. Domanski issued a report on October 21, 2016. While Dr. Domanski made recommendations to improve the District's program, he opined that if these recommendations were integrated into the program, it "would be an appropriate placement for students who have been classified as having such behavioral needs".

In Judge McGee's discussion of the Initial Decision granting the District summary decision he states:

> With respect to a substantive claim, Petitioner [R.K.] acknowledged that she failed to comply with the agreement and failed to comply with my Order. She has not offered any indication that she has expert evidence to support her claim that Respondent's program does not or cannot meet the needs of her son. The report of Dr. Domanski outlined several potential program modifications that ostensibly would meet P.R.'s needs.
>
> However, Petitioner's failure to schedule the assessments, precluded her from having the opportunity to determine whether P.R.'s needs could be met by the District, or if an out-of-district placement is appropriate.
>
> Further, the failure to allow for an assessment prevented Petitioner [R.K.] from documenting what could have been the basis for an out-of-district placement. Further, Petitioner has given no indication that she has had an assessment done to determine what out-of-district school would in fact be appropriate for her son if any.

Notwithstanding the dismissal of R.K.'s Due Process Petition, R.K. refused to send P.R. to school. In response to a hearing scheduled in a truancy case against R.K. for October 3, 2017, R.K. contacted the District on September 22, 2017 requesting that an

"emergency" IEP meeting be scheduled. Accordingly, the District scheduled a meeting with R.K., at which time it was agreed that a re-evaluation would be conducted.

Following the re-evaluation, the District proposed to continue to classify P.R. as eligible for special education and related services under the category of Emotionally Disturbed. The District proposed an in-District program with a transition, given that P.R. has not been in school since May of 2016.

R.K. appeared on January 8, 2018, in response to her application for emergent relief and testified and argued, without any evidentiary support, that the program offered by the District does not meet P.R.'s individual educational needs due to his "severe emotional outbursts" which "persist on a daily basis," and that he should be placed out-of-district. R.K. asserted further on January 8, 2018, without any support or expert opinion, that the ARC Kohler School is an appropriate interim/permanent placement for P.R. R.K. has also failed to establish that the ARC Kohler School would, in fact, enroll P.R., a student classified as Emotionally Disturbed, and/or that their program is designed to meet the needs of children with P.R.'s diagnoses. Furthermore, it was discovered on January 8, 2018, that R.K. has not initiated the intake process with ARC Kohler.

N.J.A.C. 6A:14-2.7(r) provides that emergent relief may only be requested for the following reasons:

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; and
iv. Issues involving graduation or participation in graduation ceremonies.

Here, R.K. has satisfied the requirements of N.J.A.C. 6A:14-2.7(r), in that there is an issue of placement of P.R., ARC Kohler pending the outcome of a due process proceeding.

N.J.A.C. 6A:14-2.7(s) provides that emergent relief may be granted if an administrative law judge determines from the proofs that: The R.K. will suffer irreparable harm if the requested relief is not granted; the legal right underlying the R.K.'s claim is settled; the R.K. has a likelihood of prevailing on the merits of the underlying claim; and, when the equities and interests of the parties are balanced, the R.K. will suffer greater harm than the respondent will suffer if the requested relief is not granted. I refer the parties to N.J.A.C. 1:1-12.6, and Crowe v. DeGioia, 90 N.J. 126 (1982), which echoes the regulatory standard for this extraordinary relief. It is well established that a moving party must satisfy all four prongs of the regulatory standard to establish an entitlement to emergent relief. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976).

Here, R.K. has failed to provide any evidentiary support, that the program offered by the District does not meet P.R.'s individual educational needs due to his "severe emotional outbursts" which "persist on a daily basis," and that he should be placed out-of-district. R.K. has also failed to provide any proof or evidence in the form of expert opinion, that the ARC Kohler School is an appropriate interim/permanent placement for P.R. R.K. has also failed to establish that the ARC Kohler School would, in fact, enroll P.R., a student classified as Emotionally Disturbed, and/or that their program is designed to meet the needs of children with P.R.'s diagnoses. [1]

In her prior Due Process Petition filing, R.K. had agreed to terms that address the same concerns she now raises in the within request for emergent relief. However, R.K. has elected to ignore her prior agreements and instead file a new due process petition. R.K.'s conduct does not give rise to establish she will suffer irreparable harm or has a likelihood of prevailing on the merits of the underlying claim.

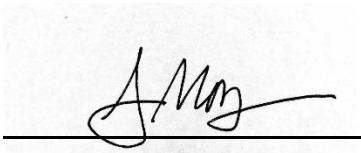
[1] Since it is determined that R.K. has not satisfied the requirements for emergent relieve, the District's argument that R.K.'s petition for emergent relief be dismissed because the proper process to challenge an IEP is a full due process petition shall not be addressed.

Based upon the proofs provided at the hearing on January 8, 2018, as well as the pleadings filed in connection with the within Request for Emergent Relief, I **CONCLUDE** that R.K. is unable to establish the four prongs of the regulatory standard to establish an entitlement to emergent relief, and R.K.'s request for emergent relief to have P.R. placed at the ARC Kohler School is **DENIED.**

ORDER

It is hereby **ORDERED** that R.K.'s request for emergent relief to have P.R. placed at the ARC Kohler School **DENIED**.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C.A. § 1415 (f)(1)(B)(i). 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.



January 19, 2018
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: January 19, 2018

Date E-Mailed to Parties: January 19, 2018

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