State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDS 05765-16
AGENCY DKT.NO. 2016-24047

R.K. O/B/O P.R.,
Petitioner,
v.
BORO OF ROSELLE BOARD OF EDUCATION,
Respondent.

R.K., petitioner, pro se

Margaret Miller, Esq., for respondent (Weiner, Lesniak, attorneys)

Record Closed: February 6, 2017 Decided: February 14, 2017

BEFORE **LELAND S. McGEE**, ALJ:

STATEMENT OF THE CASE

P.R. was a first-grade student eligible for special education and related services under the category of emotionally disturbed. His initial Individualized Education Program (IEP) was developed on December 22, 2014.

Petitioner, R.K., filed a request for Due Process hearing seeking an out-of-district placement for P.R., challenging the Boro of Roselle's Board of Education (Respondent or District) decision to rotate the paraprofessionals assigned to P.R. Petitioner later retained an

attorney who filed an Amended Petition seeking an out-of-district placement; a determination that the District denied P.R. FAPE; a determination that the proposed program for the 2015-2016 school year is inappropriate; an Order directing the District to develop an IEP for the remainder of the 2015-2016 school year, extended school year programing for the summer of 2016, and for the 2016-2017 school year; and order providing for compensatory education, and attorney's fees and appropriate costs.

PROCEDURAL HISTORY

On or about February 22, 2016, Petitioner filed a Petition for Due Process with the Office of Special Education Programs, Department of Education (Department). On or about March 16, 2016, Respondent filed an Answer and Separate Defenses. Petitioner retained legal counsel and on April 12, 2016, filed an Amended Petitioner for Due Process. On April 19, 2016, Respondent filed an Amended Answer and Separate Defenses. The matter was transmitted to the Office of Administrative Law on April 15, 2016, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On April 25, 2016, an in-person Pre-Hearing Conference was held before the undersigned and a Prehearing Order was issued on May 11, 2016. On June 8, 2016, an in-person conference was held. At that time Petitioner 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. On or about August 1, 2016, Petitioner's counsel filed a Substitution of Attorney wherein Petitioner elected to represent herself pro se.

On August 5, 2016, Respondent filed a Motion to Enforce the Agreement reached on June 8, 2016. On or about August 10, 2016, Petitioner filed an Answer to the Motion and on or about August 11, 2016, Respondent filed a Reply to the Answer. On August 17, 2016, the undersigned granted the Motion. On August 22, 2016, a telephone conference call was held during which time Petitioner confirmed that she would comply with my order of August 17, 2016. The previously scheduled hearing dates of September 19 and 21, 2016, were adjourned to give Petitioner an opportunity

to have interviews conducted. She was advised that there could be consequences for her continued refusal to send her son to school. A new hearing date was scheduled for February 6 and 13, 2017.

On November 7, 2016, Respondent filed the within Motion for Summary Decision. Petitioner filed an Answer on November 8, 2016, and Respondent filed a reply to the Answer on November 17, 2016. On November 21, 2016, Petitioner sent a letter apologizing for failing to comply with my Order and argued against the motion. On January 25, 2017, Respondent submitted a letter in furtherance of the Motion for Summary Decision.

FINDINGS OF FACT

I **FIND** the following to be the **FACTS** of the case:

1. P.R. was born on September 8, 2008, and is classified as Eligible for Special Education and Related Services under the category of Emotionally Disturbed. He has been diagnosed with mood disorder NOS, oppositional defiant disorder, expressive language disorder, ADHD, combined presentation, Disruptive Mood Dysregulation Disorder, Anxiety.
2. The District is the local educational agency responsible for providing P.R. with a Free and Appropriate Public Education (FAPE).
3. P.R. originally attended school in the City of Elizabeth's Public School District, where he was not classified as eligible for special education and related services. Upon his transfer to the District, P.R. was placed in a general education program.
4. P.R. was referred for an evaluation and determined eligible for special education and related services on December 22, 2014. Since P.R. had not previously received special educational services, it was determined that he should remain in the general education program with support services.
5. Petitioner filed a request for Due Process and Emergent Relief, which was transmitted to the Office of Administrative Law as Dkt. No. EDS-09041-15 (2015 Petition). The Emergent Relief Application sought P.R.'s placement

in an out-of-district placement for 2015 Extended School Year. Ellen Bass, ALJ denied the request for Emergent Relief and the matter was assigned to Caridad F. Rigo, ALJ, 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.

6. The hearing on the 2015 Petition was scheduled for September 11, 2015. However, prior to the start of that hearing, the parties reached a settlement, which was placed on the record that day. The parties agreed that the terms of the settlement would be memorialized in a written agreement.

7. Pursuant to the terms of the agreement, the District agreed to amend P.R.'s June 3, 2015, IEP to reflect that P.R. would receive the services of a one-to-one paraprofessional through December 23, 2015. The agreement provided that a paraprofessional would be assigned to P.R. for the entire school day, subject to a fading plan that was incorporated by reference into the settlement agreement. In exchange, Petitioner was to withdraw the 2015 Petition, and release and waive her rights to seek further redress for any claims that she had against the Board arising prior to the date of the settlement agreement.

8. Following the hearing, Petitioner refused to sign the settlement agreement, despite the fact that the agreement was placed on the record. As a result, the Board filed a Motion to Enforce the Settlement Agreement. Judge Rigo granted the Board's motion on September 11, 2015.

9. P.R. returned to school on September 14, 2015, where he was placed in the District's Behavioral Disabilities Program and a one-to-one paraprofessional was assigned to him at all times on a rotating basis. The Settlement Agreement only required the District to provide the services of the paraprofessional aide through December 23, 2015. However, the District continued to provide the one-to-one paraprofessional after December 23 in accordance with the fading plan developed by the District's Behaviorist.

10. 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 Petitioner's request, an IEP meeting was

held on January 29, 2016, at which time Petitioner requested that P.R. be placed out-of-district.

11. On February 22, 2016, Petitioner filed the within request for Due Process asserting that the District had no "medical basis" or "background" to support its decision to rotate the paraprofessionals assigned to P.R. Petitioner asserted that the District's rotation of aides demonstrated that the District could not provide an appropriate program for P.R. and, thus, she asked that P.R. be placed in a therapeutic placement, out-of-district.
12. After filing for Due Process, Petitioner obtained legal representation who filed an Amended Petition for Due Process on April 12, 2016, with the consented of Respondent.
13. On June 8, 2016, at an in-person conference held and the parties agreed that an independent evaluation would be conducted to determine whether the District's program was appropriate. The terms of the agreement were placed on the record and the District provided the written memorialization of the agreement as approved by Petitioner's counsel.
14. The parties, agreed that Craig Domanski, Ph.D., BCBA-D, of The Data Group would conduct the Independent Review.
15. Thereafter, Petitioner's counsel submitted a duly executed Substitution of Counsel wherein Petitioner elected to represent herself pro se.
16. On July 18, 2016, Dr. Domanski was scheduled to conduct a home visit and student interview. That morning, Petitioner canceled the appointment. Petitioner failed to contact Dr. Domanski to reschedule a parent interview, student interview or home visit.
17. The District filed a Motion to Enforce the Agreement which the undersigned granted on August 17, 2016.
18. On October 21, 2016, Dr. Domanski issued a report regarding the district's program.
19. P.R. has not attended school in the District for any part of the 2016-2017 school year.

DISCUSSION AND LEGAL ANALYSIS

A motion for summary decision shall be granted "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(a). If "a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

A motion for summary decision before the OAL must be analyzed "in accordance with the principles set forth by the New Jersey Supreme Court in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)." Nat'l Transfer v. New Jersey Dep't of Envtl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002). The rule the Court announced was that a determination that there is a genuine issue of material fact:

> requires the motion judge to consider whether 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. 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" . . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. It is critical that a trial court ruling on a summary judgment motion not "shut a deserving litigant from his [or her] trial" . . . . To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed "worthless" and will "serve no useful purpose."
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> [Brill, supra, 142 N.J. at 540-41 (emphasis added).]

In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact relevant to the case. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious.'" Id. at 529 (citations omitted). If a careful review under

this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law.

In this case, the material factual issue is whether respondent made a substantial effort to implement an offer of FAPE. The materials offered in support of Respondent's motion, specifically: the IEP; the various Progress Reports for IEP Goals and Objectives; the notes of the IEP meetings in which Petitioner was a participant; correspondence reflecting Respondent's effort to comply with my Order and the parties' agreement to have an independent evaluation; the Program Evaluation submitted by Craig Domanski, Ph.D., BCBA-D; and related Certifications, establish that Respondent made a substantial effort to implement the IEP.

Federal funding of state special education programs is contingent on the states providing a "free and appropriate education" (FAPE) to all disabled children. 20 U.S.C.A. § 1412. The Individuals with Disabilities Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C.A. § 1400 et seq. "[T]he IDEA specifies that the education the states provide to these children 'specially [be] 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.'" D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citations omitted). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1(d). Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C.A. § 1412(a)(1)(A)-(B). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

New Jersey follows the federal standard that the education offered "must be 'sufficient to confer some educational benefit' upon the child." Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted). The IDEA does not require that a school district "maximize the potential" of the student but requires a school district to provide a "basic floor of opportunity". Hendrick Hudson

Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200, 102 S. Ct. 3034, 3047, 73 L. Ed. 2d 690, 708 (1982). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a "trivial" or "de minimis" educational benefit is required, and the appropriate standard is whether the child's education plan provides for "significant learning" and confers "meaningful benefit" to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (internal citations omitted).

As noted in Bayonne, an Individual Education Plan (IEP) is the primary vehicle for providing students with the required FAPE. D.S., supra, 602 F.3d at 557. An IEP is a written statement developed for each child that explains how FAPE will be provided to the child. 20 U.S.C.A. § 1414(d)(1)(A)(i). The IEP must contain such information as a specific statement of the student's current performance levels, the student's short-term and long-term goals, the proposed educational services, and criteria for evaluating the student's progress. See Id. § 1414(d)(1)(A)(i)(I)-(VII). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general education curriculum and "be measurable" so both parents and educational personnel can be apprised of "the expected level of achievement attendant to each goal." N.J.A.C. 6A:14-3.7(e)(2). Further, such "measurable annual goals shall include benchmarks or short-term objectives" related to meeting the student's needs. N.J.A.C. 6A:14-3.7(e)(3). The school district must then review the IEP on an annual basis to make necessary adjustments and revisions. 20 U.S.C.A. § 1414(d)(4)(A)(i).

A due process challenge can allege substantive and/or procedural violations of the IDEA. If a party files a petition on substantive grounds, the Administrative Law Judge (ALJ) must determine whether the student received a FAPE. N.J.A.C. 6A:14-2.7(k). If a party alleges a procedural violation, an ALJ may decide that a student did not receive a FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or (3) caused a deprivation of educational benefits. Ibid.

With respect to a substantive claim, Petitioner 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 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.

Petitioner alleges a procedural violation by contending that Respondent failed to adequately explain why it rotated paraprofessionals assigned to P.R., and that there were deficiencies in P.R.'s IEP thereby denying him a FAPE. Petitioner also claims that Respondent did not follow IDEA procedures and conduct evaluations. Petitioner's procedural claim is without merit because she has failed to cooperate with the District's effort, as was mutually agreed, to have an independent assessment performed to determine what the appropriate program is for P.R.

In order "[t]o prevail on a claim that a school district failed to implement an IEP . . . the school [must have] failed to implement substantial or significant provisions of the IEP, as opposed to a mere de minimis failure, such that the disabled child was denied a meaningful educational benefit." Melissa S. v. Dist. of Pittsburgh, 183 Fed. Appx. 184, 187 (3d Cir. 2006). The record in the present matter establishes that Respondent implemented P.R.'s IEP. Petitioner has not identified evidence by way of Certification or other expert report that he was denied a meaningful educational benefit by Respondent. A New Jersey District Court determined that the East Orange Board of Education did not deprive a student of a FAPE despite the fact that the student "was without an IEP for approximately one year, between May 18, 2004 and May 25, 2005." N.P. ex rel. J.P. v. E. Orange Bd. of Educ., Civ. No. 06-5130 (DRD), 2011 U.S. Dist. LEXIS 11171, *23 (D.N.J. Feb. 3, 2011).

In N.P., for most of the 2004-2005 school year, the student was not enrolled in the District because he "was placed on home instruction from October 2004 until June 8, 2005," during which he "spent approximately four months of that time in the hospital to stabilize his behavior." Id. at *23-24. Senior District Judge Debevoise determined that "[w]hile these circumstances are certainly lamentable, they do not amount to the loss of an educational benefit. Therefore, the absence of an IEP during the 2004-2005 school year did not deprive J.P. of an FAPE." Id. at *24. "Furthermore, as a practical matter, under such fluctuating circumstances, it is unclear how the Board would have been able to properly develop an IEP for J.P." Id. at *24, n.12.

In N.P. it was determined that the school district did not deny the student a FAPE by failing to develop any IEP for an entire school year because the student was not enrolled due to home instruction and extended hospitalization. Here respondent actually did develop an IEP but could not implement it due to the parent's failure to cooperate with the District, failure to comply with duly entered settlement agreement, and failed to comply with two court Orders. In addition, Petitioner has refused to send her son to school.

The IDEA authorizes hearing officers and courts to award "such relief as the court determines is appropriate" 20 U.S.C.A. § 1415(i)(2)(C)(iii), and compensatory education is the judicially created equitable remedy intended to "'compensate [the student] for rights the district already denied . . . because the School District violated [the] statutory rights while [the student] was still entitled to them.'" Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 717 (3d Cir. 2010) (quoting Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990)). The purpose of compensatory education is to "'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 [he or she] would have occupied but for the school district's violations of IDEA.'" Ferren C., supra, 612 F.3d at 717-18 (quoting Reid v. Dist. of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005)). Importantly, "[t]he FAPE analysis for compensatory education is not backward looking—courts must look at a school district's actions during the period of the alleged deprivation." Mary Courtney T. v. Sch. Dist. of Philadelphia, 575 F.3d 235, 251 (3d Cir.

2009). Thus, compensatory education is an equitable remedy intended to bring a student to the point where the student would be, if FAPE had not been denied. In the present case, Petitioner has not permitted the assessment process to proceed. As a result, it has been impossible to determine the appropriate educational program for P.R. whether it be within the district or an out-of-district placement.

CONCLUSION

I **CONCLUDE** that there is no genuine dispute of material fact in this matter that might defeat Summary Decision and require a full evidentiary hearing. Petitioner failed to comply with the agreement reached with advice of counsel which was also placed on the record. Further, the undersigned issued an Order which required her to comply with the agreement. Specifically, to facilitate an interview by an independent evaluator selected through legal counsel. Based upon Petitioner's failure to comply I **CONCLUDE** that Respondent did not deny Petitioner F.A.P.E. during a time when he was entitled to it. For the foregoing reasons I **CONCLUDE** that Respondent's Motion for Summary Decision should be granted.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Respondent's Motion for Summary Decision is hereby **GRANTED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2010) 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 (2010). 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.

February 14, 2017
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: February 14, 2017

Date Mailed to Parties:

lr/dr