State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING MOTION TO DISMISS
OAL DKT. NO. EDS 02620-24
AGENCY DKT. NO. 2024-37067

K.P. ON BEHALF OF A.P.,
Petitioner,
v.
MANVILLE BOROUGH BOARD OF EDUCATION, SOMERSET COUNTY,
Respondent.

K.P. on behalf of A.P., petitioner, pro se

David B. Rubin, Esq., for respondent

Record closed: April 29, 2024 Decided: May 29, 2024

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF CASE

Petitioner K.P. on behalf of minor child A.P. seeks an order requiring respondent Manville Borough Board of Education (Board) to provide A.P. with compensatory education for the period in which the Board allegedly delayed delivery of the report of a functional behavior assessment (FBA), and/or for the period in which A.P. allegedly was

denied a free and appropriate public education (FAPE) as required by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. (IDEA).[1]

PROCEDURAL HISTORY

On February 12, 2024, K.P. on behalf of minor child A.P. filed a petition (dated February 9, 2024) with the New Jersey Department of Education, Office of Special Education (OSE). The Board agreed to waive the resolution period, and on February 23, 2024, the petition was transmitted by the OSE to the Office of Administrative Law (OAL) for hearing 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 March 14, 2024, the parties appeared for a settlement conference before the Honorable Joseph Ascione, ALJ, but the matter did not settle. A telephone hearing was held on March 25, 2024, during which the Board requested a briefing schedule for its pending motion to dismiss, and a telephone hearing was scheduled for June 6, 2024.

On April 11, 2024, the Board filed a motion to dismiss. Petitioner responded on April 25, 2024; respondent filed its reply brief on April 29, 2024, and the motion is now ripe for review.

FACTUAL DISCUSSION AND FINDINGS

Respondent's motion was filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. The New Jersey Supreme Court explained that the analysis required when considering a motion to dismiss is "whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988) (citations omitted). Further:

> Because the matter arises on defendants' motion to dismiss, [the court must] accept as true the facts alleged in the complaint. . . . Plaintiffs are entitled to every reasonable

[1] In her petition, K.P. raises additional issues that were not accepted by the OSE.

> inference in their favor. A reviewing court must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim."
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> [Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625–26 (1995) (citations omitted); see also Maeker v. Ross, 219 N.J. 565, 569 (2014).]

A motion to dismiss should only be granted in the rarest of instances. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989).[2] In reviewing the complaint, the question is not whether the petitioner can prove the allegations, but whether the facts alleged are sufficient to state a cause of action. Id. at 746. Accordingly, for the purposes of the motion, all facts alleged by the petition will be deemed admitted, and I **FIND** as follows:

1. The Board administers the Manville Borough School District (District), a public school district serving students in grades kindergarten through eight.

2. As of the beginning of the 2021–2022 school year, A.P. was a seventh-grade student residing and attending school in the District.

3. A.P. was classified as eligible for special education and related services under the eligibility category "autistic."

4. On or about May 26, 2021, the Rutgers/Douglass Developmental Disabilities Center (Rutgers) concluded an assessment of A.P.'s "strong behaviors and difficulties with school," and the report of this assessment was provided to the District in a timely manner.

5. The Rutgers assessment was not reflected in the individualized education program (IEP) proposed by the District for A.P. for the 2021–2022 school year.

[2] See also F.G. v. MacDonell, 150 N.J. 550, 556 (1997) ("If a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion.").

6. On June 21, 2021, K.P. filed a petition for due process on behalf of A.P. on the grounds that the 2021–2022 IEP did not provide FAPE. After transmittal by the OSE of the due-process petition to the OAL, that matter was assigned to the Honorable Mary Ann Bogan, ALJ, for hearing.

7. On November 17, 2021, Judge Bogan issued an order directing that an FBA be completed.

8. On December 8, 2021, following a due-process hearing, Judge Bogan issued a final decision, concluding that the June 2021 IEP offered A.P. a FAPE and dismissing the petition.[3] K.P. did not appeal this decision.

9. The FBA was completed after the final decision was issued; the report on the FBA is dated January 17, 2022. The District did not provide the report of the FBA to K.P. directly.

10. On January 21, 2022, K.P. disenrolled A.P. from the District. K.P. and A.P. moved to the Chatham, New Jersey, school district (Chatham District), where A.P. was enrolled on January 23, 2022.

11. The FBA was delivered by respondent to the Chatham District on or before February 11, 2022. K.P. was notified of the receipt by the Chatham District of the FBA report on February 11, 2022.

12. A.P. began attending class in the Chatham District on March 3, 2022.

13. In her present petition, K.P. alleges that the FBA concludes that the behavior intervention plan (BIP) in the June 2021 IEP was insufficient, and that Judge

[3] K.P. on behalf of A.P. v. Manville Boro Bd. of Educ., OAL Dkt. No. EDS 06076-21, Final Decision (Dec. 8, 2021).

Bogan did not consider the FBA in concluding that the IEP provided FAPE and, had she done so, her decision may have been different.

14. K.P. seeks compensatory education as the appropriate relief for the period in which the District allegedly failed to provide FAPE to A.P.

POSITIONS OF THE PARTIES

Respondent moves to dismiss the petition for failure to state a cause for which relief can be granted as it "resurrects grievances against A.P.'s former school district that were fully adjudicated" in the earlier matter before Judge Bogan and/or that are time barred.[4] (Ltr. Br. of Resp't in Support of Motion to Dismiss (April 11, 2024) (Resp't Br.), at 2.) The June 2021 IEP was already found to offer FAPE and the current petition, alleging once again that A.P. was denied FAPE, is barred by the doctrine of res judicata. The failure of Judge Bogan to consider the January 2022 FBA report is a red herring, as petitioner is using this allegation to reprise her claim for the failure of respondent to provide A.P. with FAPE. "The only difference is that K.P. now perceives that she might be better able to prove her case by relying on the FBA she contends was supplied late." (Id. at 7–8.)

Further, respondent argues that petitioner's claims were filed after the two-year statute of limitations. A.P. last attended school in the District on January 21, 2022, more than two years before the petition was filed. The "Board could not have possibly violated [A.P.'s] rights under the IDEA within the past two years." (Id. at 9.)

Petitioner responds that A.P. was denied FAPE by the June 2021 IEP for several reasons, including the "delayed provision of crucial documentation such as the results of the [FBA] . . . and failure of the FBA to address bullying concerns." (Ltr. Br. of Pet'r in Opposition to Motion to Dismiss (April 25, 2024) (Pet'r Br.), at 2.)[5] "While Judge Bogan

[4] The Board also argues that certain claims are barred as they do not arise under the IDEA, but the OSE did not transmit those issues for decision and, therefore, they are not considered here.

[5] In her brief, K.P. discusses her other claims arising under other laws, which were not accepted by the OSE and, therefore, are not considered here.

found the presence of a [BIP] in the [IEP] sufficient, the subsequent FBA indicated otherwise, highlighting the need for adjustments." (Ibid.)

With respect to the statute of limitations, petitioner argues that the date she "knew or should have known" of the information contained within the FBA was February 11, 2022, the date on which the report of the FBA was "accessible" to her. (Id. at 5.) The behaviors of A.P. described in the January 17, 2022, FBA report were "similar to those observed" in May 2021, which "may prove" that the District had the information needed to change the BIP included in the June 2021 IEP. (Ibid.)

In response, the Board states that even if the FBA did supply sufficient new evidence for K.P. to successfully set aside Judge Bogan's decision, petitioner was well within her rights (and the associated deadline) to seek judicial review on those grounds, but she did not. By this petition, she simply seeks "a back-door substitute for a timely appeal." (Ltr. Br. of Resp't in Reply to Pet'r's Br. in Opposition to Motion to Dismiss (April 29, 2024) (Reply Br.), at 3.)

LEGAL ANALYSIS AND CONCLUSION

Standards for a Motion to Dismiss

The rules of procedure governing petitions of appeal filed with the Commissioner permit a respondent to submit a motion to dismiss in lieu of an answer "on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason." N.J.A.C. 6A:3-1.5(g); N.J.A.C. 6A:3-1.10. However, these education rules do not offer any guidance on the standards by which such motions should be assessed.

The Uniform Administrative Procedure Rules (UAPR), N.J.A.C. 1:1-1.1 to -21.3, also do not address the standards for such motions. However, the UAPR, which "shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay," state that, "[i]n the absence of a rule,

a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes." N.J.A.C. 1:1-1.3(a).

Here, the court rule that fills the void is R. 4:6-2, which, like N.J.A.C. 6A:3-1.5(g) and N.J.A.C. 6A:3-1.10, allows for motions for judgment on the pleadings. And since R. 4:6-2 serves the interests of time and expense and may help achieve just results, it is compatible with the UAPR's purposes, and thus it is appropriate to assess respondent's motion to dismiss in lieu of an answer under the standards used by the courts in applying R. 4:6-2.

Under these standards, if the basis for a motion to dismiss is that the petition has advanced no cause of action, or failed to state a claim upon which relief may be granted, "the test for determining the adequacy of [the] pleading [is] whether a cause of action is 'suggested' by the facts," such that the "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing-Mart Morristown, 116 N.J. at 746 (citing R. 4:6-2(e); Velantzas, 109 N.J. at 192; Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)).

Importantly, for purposes of the motion, it does not matter whether the petitioner can ultimately "prove the allegation contained in the complaint" because "all facts alleged in the complaint and the legitimate inferences drawn therefrom are deemed admitted." Ibid. (citing Somers Constr. Co. v. Bd. of Educ., 198 F. Supp. 732, 734 (D.N.J.1961)); Smith v. City of Newark, 136 N.J. Super. 107, 112 (App. Div.1975) (citing Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); J.H. Becker, Inc. v. Marlboro Twp., 82 N.J. Super. 519, 524 (App. Div. 1964)). While "[a] complaint should not be dismissed . . . where a cause of action is suggested by the facts . . . a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder, 221 N.J. Super. at 552.

In her petition, K.P. alleges that the District did not provide her with the results of the FBA in a timely fashion, the result of which is that she did not have information supporting her claim that the June 2021 IEP proposed by the District denied FAPE to A.P. Even more significant, K.P. alleges that she provided the District with Rutgers'

assessment of A.P. in May 2021, which the District disregarded. The results of the District's FBA confirmed the recommendations of Rutgers and, therefore, supported her argument that the Rutgers assessment should have been considered by the child study team when it developed the June 2021 IEP, and particularly the BIP.

Review of Judge Bogan's decision calls some of petitioner's allegations into question. For example, Judge Bogan does not mention testimony regarding the Rutgers assessment and a report of the assessment was not admitted as an exhibit. Here, petitioner may argue that had she known that the FBA would support the Rutgers assessment, she would have used the Rutgers assessment to prove her case. Even so, the FBA was not completed in time for its consideration by the parties or the judge. K.P. appears to fault Judge Bogan for her failure to consider the results of the FBA when evaluating the June 2021 IEP, but the FBA was not completed until seven months after the June 2021 IEP was issued.

Further, petitioner was reluctant to have an FBA conducted; but for the District obtaining an emergent order requiring petitioner's cooperation with evaluations, there would not have been an FBA. As stated in the petition, K.P. deems the FBA insufficient.

Significantly, neither party requested an adjournment of the due process hearing pending receipt of the FBA report. In February 2022, upon receipt of the FBA report, K.P. could have appealed the final decision on the grounds that she had new evidence, but she did not do so.

Notwithstanding the inconsistencies in K.P.'s present arguments, the ability of respondent to defend against petitioner's claims is no reason to prevent petitioner from pursuing those claims, as limited as those claims may be. Using the above-described standards, petitioner's allegations support a cause of action for denial of FAPE under the IDEA from the date on which the District obtained the FBA, which allegedly supports the recommendations allegedly supplied to the District prior to the development of the June

2020 IEP, through the date of A.P.'s disenrollment. I therefore **CONCLUDE** that she has made a claim for which relief can be granted.[6]

A petition for due process filed under the IDEA, however, must be brought within strict statutory timelines. The statute provides that

> [a] parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this [subchapter], in such time as the State law allows.
>
> [20 U.S.C. § 1415(f)(3)(C).]

Elsewhere, the statute provides that the procedures required by the IDEA shall include:

> (6) An opportunity for any party to present a complaint—
>
> (A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and
>
> (B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this [subchapter], in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

[6] I note that petitioner contends that between October 20, 2021, and April 25, 2022, A.P. did not have an IEP. (Pet'r Br. at 2.) That claim ignores the July 2, 2021, order of the Honorable Susan L Olgiati, ALJ, granting K.P.'s emergent petition for stay put in A.P.'s then-current program and placement. Judge Olgiati's order remained in effect until the final decision was issued on December 8, 2021, finding that the June 2021 IEP provided FAPE. (See OAL Dkt. No. EDS 06076-21, Final Decision at 2.) If, after A.P. was enrolled in the Chatham District, there was any delay in developing a new IEP, K.P. must seek redress from the new district, pursuant to N.J.A.C. 6A:14-4.1(g)(1).

[20 U.S.C. § 1415(b)(6).]

The Third Circuit Court of Appeals has interpreted these provisions to mean that "parents have two years from the date they knew or should have known of the violation to request a due process hearing through the filing of an administrative complaint[.]" G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 626 (3d. Cir. 2015). In G.L. the parties had urged that these two statutory provisions contained an incongruity that arguably expanded the window for relief available to a petitioner. The court rejected this argument, holding that the IDEA's "two-year statute of limitations . . . functions in a traditional way, that is, as a filing deadline that runs from the date of reasonable discovery and not as a cap on a child's remedy for timely-filed claims that happen to date back more than two years before the complaint is filed." Id. at 616.

Without more information, it appears that while petitioner knew that a report on the FBA was pending, she did not know of the contents of the report until it was provided to her by the Chatham District on February 11, 2022, meaning that the limitations period began on that date. Her petition, though dated February 9, 2024, was not actually received at the OSE until February 12, 2024,[7] one day after the statute of limitations had expired.

ORDER

For the reasons set forth above, I **ORDER** that the motion of respondent Manville Borough Board of Education to dismiss the petition of K.P. on behalf of A.P. for failure to state a claim on which relief may be granted under the IDEA within the applicable statute of limitations is hereby **GRANTED** and K.P.'s petition is hereby **DISMISSED**.

[7] February 9, 2022, was a Wednesday; February 12, 2022, was a Saturday. Although the OSE was closed on Saturday, the office did not penalize K.P. for weekend delivery, but used the date on which her petition reached the OSE email account.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2024) 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. § 1415(i)(2); 34 C.F.R. § 300.516 (2024). 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.

May 29, 2024
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/ld
c: Clerk OAL-T