



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 06822-2022

AGENCY DKT. NO. 2022-34521

M.M. ON BEHALF OF A.B.,

Petitioner,

v.

**GREATER EGG HARBOR REGIONAL
BOARD OF EDUCATION,**

Respondent.

M.M., on behalf of A.B., pro se

Kasi M. Gifford, Esq. and Rachel M. Taylor, Esq. on the brief, for respondent
(Cooper Levenson, PA, attorneys)

Record Closed: February 6, 2023

Decided: March 16, 2023

BEFORE **CARL V. BUCK III**, ALJ:

STATEMENT OF THE CASE

On June 20, 2022, under separate OAL Docket No. EDS 04848-2022 petitioner M.M., on behalf of A.B., filed a request for emergent relief with the Department of Education, Office of Special Education (OSE).¹ Specifically, M.M., A.B.'s mother, sought **emergent relief** (emphasis added) to allow A.B. to participate in the Cedar Creek High School's (Cedar Creek) graduation ceremony on June 21, 2022. Petitioner simultaneously

¹ At the time that application was filed, A.B. was eighteen years old. On June 17, 2022, he provided M.M. authority to act on his behalf as it related to his education needs. A copy of the same was attached to that application.

filed a due process action seeking reimbursement of educational services. Petitioner, through counsel, then filed a motion to amend that petitioner seeking reimbursement of educational services under this OAL Docket No. EDS 06822-2022.

PROCEDURAL HISTORY

Petitioner filed this petition for (1) emergent relief and (2) due process with OSE on June 16, 2022. OSE transmitted the matter to the Office of Administrative Law (OAL), where it was filed on June 20, 2022, and scheduled for oral argument on this same date of June 20, 2022. A final decision on the emergent action was issued on June 21, 2022, by the Honorable Tama B. Hughes, ALJ which ordered that A.B. be allowed to participate in his graduation ceremony provided that he completes summer classes to receive the required credits to complete his two remaining core classes, math and english, and have his diploma conferred. A.B. did complete his online summer courses, he received his diploma, and officially graduated from the District at the conclusion of the 2021-2022 academic year.

On June 16, 2022, petitioner also filed a due process hearing request on the underlying matter.

During pendency of the due process appeal the petitioner was represented, for a period, by Bradley R. Flynn, Esq.² On August 24, 2022, Mr. Flynn filed “Petitioner’s Motion to Amend” (which contained a number of typographical errors) alleging, among other things, that the Board had denied petitioner a FAPE by failing “to produce an Individual Education Plan (IEP) that was tailored to his specific needs.” (C-2.)

Hearing dates were originally scheduled for January 2023. On October 11, 2022, the Board filed a Motion to Dismiss Petitioner’s Motion to Amend (R-1.) On October 21, 2022, Mr. Flynn filed a motion to be relieved as counsel (C-3.)

FACTUAL DISCUSSION

² Mr. Flynn entered his appearance on August 20, 2022, by letter to the Hon. Carol Cohen, ALJ who was scheduled to conduct a settlement conference in the matter on August 24, 2022. (C-1.)

For purposes of deciding this motion to amend the petition and countermotion to dismiss petitioner's motion to amend, the following facts are undisputed, and **I FIND** them as **FACT**.

A.B., who turned nineteen in January 2023, was allowed to participate in graduation exercised in June 2022 per the decision issued by the Hon. Tama B. Hughes, ALJ provided he complete two courses by the end of the summer of 2022.

By information and belief, A.B. completed those courses and was graduated from High School at the end of the 2021-2022 academic year.

The process of prosecuting the due process portion of the action was scheduled for a settlement conference before the Hon. Carol Cohen, ALJ on August 24, 2022.

On August 20, 2022, an entry of appearance was filed by Bradley Flynn, Esq. who filed a notice of motion to amend on August 24, 2022.

On October 11, 2022, respondent filed a response to the motion to amend.

On October 21, 2022, Mr. Flynn filed a notice of motion to be relieved as counsel, which was granted.

Oral argument on the motion was scheduled for and held January 19, 2023. Petitioner did not appear at the hearing nor did petitioner provide any reason for not appearing. Respondent provided supplemental information after the hearing and the record closed on February 6, 2023.

At no time did petitioner provide any documentation or evidence showing that she/he had previously requested adjustments, modifications, or alterations to A.B.'s then existing IEP plan(s).

LEGAL DISCUSSION

The standards to be met by the moving party in an application to amend are contained in N.J.A.C. 1:1-6.2(a), which provides that unless it would be precluded by law or any constitutional principles, a pleading may be freely amended when, within the judge's discretion, an amendment would be in the interest of efficiency and the avoidance of over-technical pleading requirements and would not create undue prejudice. Likewise, when a petition for due process hearing needs to be amended, the amendment may only occur if the petitioner receives consent from the respondent, or the administrative law judge allows the petitioner to amend the petition pursuant to N.J.A.C. 6A:14-2.7(i). Generally, parties should be provided leaves to amend when justice so requires, unless such an amendment would be considered inequitable or futile. Free Speech Coalition, Inc. v. Att'y Gen. of U.S., 677 F.3d 519, 545 (3rd Cir. 2012). See also Forman v. Davis, 371 US 178, 182 (1962) (stating that amendments to pleadings may be denied due to the following: undue delay, bad faith, undue prejudice, repeated failures to cure deficiencies, or futility of amendment).

A court considers an amendment futile if it is frivolous or advances a claim or defense that is legally insufficient on its face. Harrison Beverage, 133 F.R.D. 463, 468 (D.N.J. 1990). In determining whether an amendment could be considered legally insufficient on its face, a court shall employ the standard applicable to Rule 12(b)(6), a motion to dismiss. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3rd Cir. 1997). When a court reviews a motion to dismiss pursuant to 12(b)(6), a court must accept as true all facts alleged in the complaint and must draw in the Plaintiffs' favor resulting reasonable inferences. White v. City of Phil., 118 F. Supp. 2d 564, 467 (E.D. Pa. 2000). A motion to dismiss must be granted if the Plaintiffs can prove no set of facts which would support their claims and entitled them to relief as a matter of fact and law. Nami v Fauver, 82 F.3d 63 (3rd Cir. 1996). Furthermore, when determining futility of an amendment there must be a showing that the claim or defense is not accompanied by a showing of plausibility sufficient to present a triable issue. Harrison, 133 F.R.D. at 468.

Applying the above to the within matter, I **FIND** that petitioner M.M. has not provided sufficient reason to show that his motion to amend should be granted, therefore the attempt to amend the petition is deemed futile. An issue raised by petitioner is that the District has failed in its obligation to provide A.B. with a FAPE. However, this duty was

terminated when A.B. graduated from the District at the end of the 2021-2022 academic year. Further there is no documentation that A.B. requested modification, alteration or change to his IEP in place during the 2021-2022 academic year notwithstanding information provided by respondent that a number of meetings occurred during which A.B. could have made such request.

Under the Individuals with Disabilities Education Act (IDEA), a disabled student is entitled to a FAPE until that student reaches the age of twenty-one (21). K.M. & T.M. o/b/o R.M. v. KeyPort Board of Educ., EDS 10269-14 (Final Decision 2015.) However, a school district is under no obligation to make a FAPE available to students who have graduated from high school with a regular high school diploma. Id. See also, D.C. ex rel. T.C. v. Mount Olive Twp. Bd. Of Educ. Civil No.: 12-5592 (KSH) (D.N.J. Mar. 31, 2014) (stating that regulations clarify that a state is under no obligation to make a FAPE available to children with disabilities who have graduated from high school with a regular high school diploma.) A regular high school diploma is defined as the standard high school diploma awarded to a student in the state that is fully aligned with state standards. M.N. v. Sparta Twp. Bd. Of Educ., 2022 U.S. Dist. LEXIS 67316. Graduation amounts to a change in placement under the IDEA; and therefore, parents must contest the proposed graduation through a due process hearing. D.C. ex rel. T.C., Civil No. 12-5592, which did not happen here.

Further, as A.B. is no longer a matriculated student, the District is no longer statutorily required to provide him with a FAPE or any other post-graduate education. See K.M. & T.M. o/b/o R.M., OAL Docket No. EDS 10269-14 (“where a student properly graduates, i.e., graduates in accordance with his IEP, it is plain that requiring a school district to provide post graduate education is inconsistent with state practice”).

As to petitioner’s contention that the Board did not offer him an appropriate IEP, no documentation of this allegation was shown during this, or the prior, case. M.M. never provided a request to the District for A.B. to be re-evaluated. According to N.J.A.C. 6A:14-3.8(a), within three (3) years of a student’s previous classification, the student shall be re-evaluated to determine whether the student continues to be a student with a disability. A re-evaluation can be conducted earlier if conditions warrant a re-evaluation or if a student’s

parent or teacher requests the re-evaluation. Here, according to A.B.'s IEP, he was not eligible for re-evaluation until January 2, 2023.³ Therefore, by the time A.B. was to be statutorily considered for a re-evaluation he had graduated from the District's high school and was no longer eligible for educational services.

During the school year, the District held three different meetings regarding A.B.'s IEP: October 4, 2021, January 24, 2022, and March 31, 2022. During these meetings, M.M. did not indicate or request that she would like for the District to re-evaluate A.B. In addition to the meetings, the District staff engaged in consistent communication with M.M. regarding A.B.'s academic performance; and during these communications M.M. again failed to articulate to the District a request for re-evaluation. Therefore, based on the above stated facts, the District did not have a statutorily prescribed obligation to re-evaluate A.B. as he was not eligible for re-evaluation until 2023, and M.M. failed to request a re-evaluation.

Under all the foregoing, I **DENY** petitioner's motion to amend the petition and **GRANT** the respondent's motion to dismiss the motion to amend the petition.

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that petitioners' request to amend his motion is hereby **DENIED** and that the respondent, Greater Egg Harbor Regional High School District Board of Education's motion to dismiss the motion to amend is hereby **GRANTED**. An amendment of this action is not permitted.

³ According to A.B.'s IEP, his most recent re-evaluation eligibility meeting was on January 3, 2020, which was prior to him attending the District's high school. Therefore, any prior re-evaluations would have been the responsibility of his prior high school. It should be noted that petitioner admits, in the proposed amended petition, that Charter Tech violated their obligation to conduct the triennial evaluations when it decided to not re-evaluate A.B. and determined that no further evaluations were warranted. See "Exhibit B" – Charter Tech IEP.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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 (2022). 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.



March 16, 2023 _____

DATE

CARL V. BUCK III ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

CVB/tat

APPENDIX
LIST OF EXHIBITS

For petitioner:

None

For respondent:

R-1 October 11, 2022, submission

R-2 January 19, 2023 submission

For Court:

C-1 Notice of appearance, August 20, 2022

C-2 Petitioner's motion to amend, August 24, 2022

C-3 Notice of motion to be relieved as counsel, October 21, 2023