

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BARRY MAPP, by his parent and	:	
next friend, Nicole Cogdell and	:	
NICOLE COGDELL, individually	:	
and as the mother of Barry	:	
Mapp	:	
Plaintiffs	:	
vs.	:	
	:	CIVIL ACTION
WILLIAM PENN SCHOOL DISTRICT,	:	
et al.	:	
Defendants.	:	NO. 99-4440

GREEN, S.J. **SEPTEMBER _____, 2000**
MEMORANDUM and ORDER

Presently before the Court are two motions: (1) Defendant William Penn School District's Motion to Dismiss the Plaintiffs' Corrected First Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), the Plaintiffs' response thereto, and the Reply of Defendants William Penn School District, Dr. O'Toole, Dr. Bennett, and Tom Bradley; and (2) Defendants' unopposed Motion to Dismiss the Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 41(b). Also before the Court is counsel for the Plaintiffs' Certification of Inability to Respond to a Fed.R.Civ.P. 56 motion. For the reasons that follow, Defendant's Motion to Dismiss, pursuant to Fed.R.Civ.P. 12(b)(6), will be granted and the Motion to Dismiss, pursuant to Fed.R.Civ.P. 41(b), will be dismissed as moot.

FACTUAL BACKGROUND

Barry Mapp is a school-aged child who resides within the William Penn School District. Nicole Cogdell is the mother of Barry Mapp. Because Barry suffers from Attention Deficit Hyperactivity Disorder (ADHD) and certain learning disabilities, his

mother requested that the William Penn School District (“District”) provide Barry with special services and support to secure an appropriate education for her son.

At the commencement of the 1998-99 school year, the William Penn School District created an Individual Educational Program Plan (“IEP”) and Notice of Recommended Assignment for Barry. Ms. Cogdell refused to agree with the plan and placement and sought a hearing with the Pennsylvania Right to Education Office to challenge the district’s alleged failure to provide Barry with a free appropriate public education. In November 1998, the district placed Barry Mapp at Hill Top Preparatory School (“Hill Top”), a private school for students with “learning differences” located in Rosemont, Pennsylvania. This placement essentially rendered Ms. Cogdell’s administrative complaint moot and the parties did not participate in a due process hearing on the issue.

To facilitate Barry’s attendance at Hill Top, the district arranged for him to be transported to school on a bus that transported other students from the district to Hill Top and other private schools in that area. During the two hour bus ride to school, Barry often experienced difficulty maintaining appropriate behavior. In an effort to address Barry’s problems with the bus ride to school, the William Penn School District then assigned an aide to ride the bus with Barry, but the assistance of the aide did not resolve Barry’s behavioral problems during the bus ride. Since Barry continued to exhibit behavioral problems on the bus, both his mother and officials at Hill Top recommended that he be assigned an alternate transportation method.

Ms. Cogdell then discussed the issue of an alternate means of transporting Barry to Hill Top with Ronald Valangerveld, Director of Special Education in the District. In an

attempt to remedy the transportation problem, Ms. Cogdell and Mr. Valangerveld allegedly agreed to an interim plan, wherein Ms. Cogdell would accompany Barry to Hill Top on public transportation and would be reimbursed for her costs by the District.

Pursuant to the alleged interim plan, Ms. Cogdell accompanied Barry to school on public transportation and sought reimbursement from the District. However, the District denied her request for reimbursement. After her efforts to secure alternative transportation for Barry failed, Ms. Cogdell requested a pre-hearing conference with the William Penn School District to address Barry's transportation dilemma. The parties were unable to reach an agreement in the pre-hearing conference held in April 1999, therefore, Ms. Cogdell requested an administrative hearing through the Pennsylvania Right to Education Office. After conducting a due process hearing on the issue of Barry's transportation to Hill Top, Special Hearing Officer Vernard Trent issued an opinion and order, dated November 1, 1999, wherein the District was ordered to reimburse Ms. Cogdell for her expenses in transporting Barry to Hill Top.

On September 9, 1999, Barry Mapp, by and through his parent Nicole Cogdell, and Ms. Cogdell on her own behalf, filed this action under the Individuals with Disabilities Act, 20 U.S.C. § 1400 *et seq.*, ("IDEA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, Titles II and III of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ("ADA") and 42 U.S.C. §§ 1983, 1985 and 1988, seeking declaratory and injunctive relief and damages. Defendant William Penn School District now moves to dismiss the Plaintiffs' complaint arguing, *inter alia*, that Plaintiffs have not exhausted their administrative remedies under the IDEA. For the reasons that follow, the motion to dismiss, pursuant to Fed.R.Civ.P. 12(b)(6) will be granted.

LEGAL STANDARD

Because “failure to exhaust is ‘in the nature of statutes of limitation’ and do[es] not affect the district court's subject matter jurisdiction,” Anjelino v. New York Times Co., 200 F.3d 73, 87-88 (3d Cir.2000)(as amended), I will consider the Defendant’s Motion to Dismiss the Plaintiffs’ Complaint for failure to exhaust administrative remedies pursuant to Fed.R.Civ.P. 12(b)(6).

In considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court may only rely upon allegations in the complaint, exhibits attached to the complaint, and matters of public record. See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir.1993). Pursuant to Fed.R.Civ.P. 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 ,336 S.Ct. 2229, 2232-33 (1984). Of course, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir.1988).

DISCUSSION

A. EXHAUSTION REQUIREMENTS UNDER THE IDEA

In Count I of the Plaintiffs’ First Amended Complaint they allege that the Defendants violated the IDEA by (1) failing to provide Barry with a free appropriate

public education; (2) failing to develop an IEP for Barry's placement at the Hill Top Preparatory School; (3) failing to provide Barry with transportation services; and (4) failing to follow procedural requirements at the pre-hearing conference held in April 1999. Defendants assert that, with the exception of the transportation issue, all of these claims must be dismissed because the plaintiffs failed to exhaust their administrative remedies under the IDEA prior to bringing this action.

The IDEA requires state educational agencies which receive federal assistance to establish administrative procedures for resolving disputes as to the education of disabled children and provides criteria for adhering to those procedures. See 20 U.S.C. § 1415. This dispute resolution process encompasses three stages: (1) a hearing, at which the parties are afforded certain procedural protections; (2) an appeal process, wherein a party aggrieved by the findings and decision of the hearing process may appeal to the state's educational agency; and (3) the initiation of a civil action by a party aggrieved by the state agency's decision. See 20 U.S.C. §§ 1415 (b), (d) and (e). In accordance with these procedures, a party seeking relief under the IDEA must first exhaust their administrative remedies, which include a local due process hearing, and an appeal to the appropriate state agency, prior to filing a civil suit. 20 U.S.C. § 1415(f). Exhaustion of administrative remedies under the IDEA is not required where: (1) exhaustion would be futile or inadequate; (2) the issue presented is purely a legal question; (3) the administrative agency cannot grant the requested relief; or (4) where exhaustion would work severe or irreparable harm upon a litigant. Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 779 (3d Cir.1994).

In the instant case, Ms. Cogdell initiated the administrative process on two

occasions. Ms. Cogdell initiated her first request for administrative proceedings after she concluded that the William Penn School District allegedly failed to provide Barry with an appropriate educational program. During the pendency of those administrative proceedings, the District, with Ms. Cogdell's apparent approval, enrolled Barry at Hill Top Preparatory School. Therefore the administrative proceedings on the issue became moot and a due process hearing on the issue was not held.

According to the First Amended Complaint in the instant action, however, the district failed to develop an IEP for Barry's placement at Hill Top and this issue now forms the basis of a portion of the plaintiffs' current IDEA claim. The issue of whether the District failed to develop an IEP for Barry at Hill Top, however, has never been fully adjudicated in an administrative proceeding. And, the Plaintiffs' complaint does not set forth facts that would lead this Court to conclude that the exceptions to the general rule of exhaustion of administrative remedies apply in this case. Therefore, the Plaintiffs have failed to state a claim upon which relief can be granted on the issue of the District's alleged failure to develop an IEP for Barry Mapp at Hill Top because they have not yet exhausted their administrative remedies on this claim.

Ms. Cogdell's initiated the administrative process for the second time when she requested a pre-hearing conference with the District to address Barry's transportation to Hill Top. When Ms. Cogdell determined that the pre-hearing conference held did not resolve the issues between the parties, she requested an administrative hearing. The Right to Education Office assigned the matter to a Special Hearing Officer and a due process hearing was held. During the initial stages of the due process hearing, the District attempted to address whether Barry Mapp was appropriately placed at Hill Top.

However, after reviewing the parties' submissions with regard to the requested due process hearing and arguments presented in relation thereto, the Hearing Officer limited the scope of the hearing to the issue of whether Ms. Cogdell was entitled to reimbursement of the cost of Barry's transportation to Hill Top.¹ After conducting the administrative hearing, the Special Hearing Officer found in favor of Ms. Cogdell and ordered the District to reimburse her for monies expended to transport Barry to Hill Top. As she was the prevailing party on the issue of transportation reimbursement, Ms. Cogdell cannot now sustain a civil action for reimbursement of the fees expended for Barry's transportation because she has not alleged that she is a party aggrieved by the hearing officer's decision. See 20 U.S.C. § 1415(i)(2).

Moreover, the record clearly shows that the Hearing Officer did not decide any other issues related to Barry's transportation to Hill Top. Thus, to the extent that the Plaintiffs are now attempting to bring a civil action to address the District's actual provision of transportation for Barry to Hill Top, they have not fully exhausted their administrative remedies. Therefore, their complaint on the transportation issue must be dismissed.

B. CLAIMS BROUGHT PURSUANT TO SECTION 504 OF THE REHABILITATION ACT, ADA and 42 U.S.C. §§ 1983, 1985 and 1988.

Section 1415(f) of the IDEA states that before a plaintiff brings claims under other statutes that seek relief that is also available under the IDEA, the administrative procedures set forth in section 1415 shall be exhausted to the same extent as would be

¹ In so limiting the hearing, the Hearing Officer further ruled that the District could go forward with administrative proceedings on the IEP issue in another administrative proceeding.

required had the action been brought under the IDEA. 20 U.S.C. §1415(f). This provision prevents plaintiffs from “circumventing the IDEA’s exhaustion requirement by taking claims that could have been brought under the IDEA and repackaging them as claims under some other statute - e.g., section 1983, section 504 of the Rehabilitation Act, or the ADA.” Jeremy H. v. Mt. Lebanon School Dist., 95 F.3d 272, 279 (3d.Cir. 1996). Therefore, for the reasons set forth above, Plaintiffs must first exhaust their administrative remedies under the IDEA before they can assert their claims under the ADA, Section 504 of the Rehabilitation Act, 42 U.S.C. §§1983, 1985 and 1988.

C. NICOLE COGDELL’S CLAIMS

Nicole Cogdell also brings claims in her own right pursuant to Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, and the First and Fourteenth Amendments via 42 U.S.C. §§ 1983, 1985 and 1988, alleging that the District “harassed, intimidated and attempted to dissuade her from asserting the rights of her son.” (Pls.’ Compl. at ¶¶ 61 and 66). I will dismiss Ms. Cogdell’s claims brought in her own right pursuant to Title II of the ADA and Section 504 of the Rehabilitation Act because she has not alleged that she is a qualified individual with a disability, which is required to state a claim under both statutes. See 42 U.S.C. § 12132 and 29 U.S.C. § 794.

Similarly, Ms. Cogdell has not set forth allegations sufficient to state a claim pursuant to 42 U.S.C. §§1983, 1985 and 1988. Therefore, her claims brought pursuant to these statutes will also be dismissed pursuant to Fed.R.Civ. P.12(b)(6).

CONCLUSION

For the reasons set forth above, I will dismiss the Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to exhaust administrative remedies. To the extent that Plaintiff Cogdell asserts claims in her own right, those claims will also be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Since I am dismissing the action pursuant to Fed.R.Civ.P. 12(b)(6), I will also dismiss the Defendants' Rule 41(b) Motion as moot. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BARRY MAPP, by his parent and	:	
next friend, Nicole Cogdell and	:	
NICOLE COGDELL, individually	:	
and as the mother of Barry	:	
Mapp	:	
Plaintiffs,	:	
vs.	:	
	:	CIVIL ACTION

WILLIAM PENN SCHOOL DISTRICT, :
et al. :
: NO. 99-4440

ORDER

AND NOW, this _____ day of September 2000, upon consideration of (1) the Defendant William Penn School Districts' Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), the Plaintiffs' response thereto, and the Reply of Defendants William Penn School District, Dr. O'Toole, Dr. Bennett, and Tom Bradley; and (2) Defendants' unopposed Motion to Dismiss the Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 41(b), **IT IS HEREBY ORDERED** that:

1. Defendant William Penn School Districts' Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is **GRANTED**. The Plaintiffs' Complaint is **DISMISSED WITHOUT PREJUDICE** to Plaintiffs reasserting those claims subject to the exhaustion requirements of 20 U.S.C. § 1415 after the requirement of exhaustion has been met. Plaintiff Cogdell's claims brought in her own right will also be **DISMISSED WITHOUT PREJUDICE** to her filing a Second Amended Complaint, wherein she clearly sets forth allegations sufficient to sustain her claims brought pursuant to 42 U.S.C. §§ 1983, 1985, 1988 and the First and Fourteenth Amendments of the United States Constitution. The Second Amended Complaint, if filed, **shall be filed within twenty days of this Order;**² and

² Plaintiff's Corrected First Amended Complaint is not a model of clarity in that it does not clearly set forth the conduct said to violate her Constitutional rights. In addition, it does not particularly identify the specific Defendants that Ms. Cogdell intends to charge with the alleged

2. Defendants' unopposed Motion to Dismiss the Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 41(b) is **DISMISSED as MOOT.**

BY THE COURT,

CLIFFORD SCOTT GREEN, S.J.

violations. If Ms. Cogdell decides to file a Second Amended Complaint on her own behalf, she should correct these deficiencies.

As for her claim under > section 1985(3), Plaintiff must establish: (1) a conspiracy; (2) motivated by a class-based discriminatory animus designed to deprive a person or class of persons to equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) injury to person or property or the deprivation of any right or privilege of a citizen of the United States. See > Lake v. Arnold, 112 F.3d 682, 684 (3d Cir.1997). There is no evidence in the record of the alleged conspiracy between the named defendants and thus, Plaintiff's mere reliance on her unsupported allegations cannot maintain a S> 1985 claim.