

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

JOSEPH M., by and through his natural parent	:	CIVIL ACTION
and next friend, KIMBERLY F.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SOUTHEAST DELCO SCHOOL DISTRICT,	:	
	:	
Defendant.	:	
	:	
	:	NO. 99-4645

Reed, S.J.

March 19, 2001

MEMORANDUM

Plaintiffs Joseph M. and Kimberly F. filed suit alleging that Southeast Delco School District (“Delco”) violated Joseph M.’s rights under the Individuals with Disabilities Education Act (“IDEA”), 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.*, and 42 U.S.C. § 1983 (“section 1983”).¹ Currently before this Court are the motion of plaintiffs for partial summary judgment (Document No. 13)² and the motion of defendant for summary judgment (Document No. 21), both of which were filed pursuant to Rule 56 of the Federal Rules of Civil Procedure. In addition, Defendant filed a motion to strike the motion of plaintiffs for partial summary judgement (Document No. 19); and plaintiffs filed a motion to strike the motion of defendant for summary judgment (Document No. 14). Upon consideration of the motions of plaintiffs and

¹ This Court has original jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under federal law. This Court also has jurisdiction pursuant to 20 U.S.C. § 1415 (i) (3) (A), which provides that district courts of the United States shall have jurisdiction under section 1415 of the IDEA.

² Plaintiffs filed a motion for judgment on the record or in the alternative a motion for partial summary judgment. This Court does not know to what a “motion on the record” refers. Whether counsel means the now archaic “judgment on the whole record” or “case stated,” neither are presently in use in the federal courts, and thus this Court will consider the alternative title of a motion for “partial summary judgment”

defendant, and the responses thereto, the motion of plaintiffs for summary judgment will be granted in part and denied in part; the motion of defendant for summary judgment will be granted in part and denied in part; the motion of defendant to strike will be denied; the motion of plaintiffs to strike will be denied in part and granted in part.

I. The IDEA generally

Before addressing the background of this case, a general overview of the IDEA and a basic knowledge of certain words and phrases defined therein is necessary in order to understand the factual and procedural history of this case. The IDEA mandates that all children with disabilities between the ages of 3 and 21 receive a “free appropriate public education” (“FAPE”). 20 U.S.C. § 1412 (a) (1) (A). The statute and its implementing regulations provide a complex scheme by which evaluations are conducted and educational programs implemented. See 20 U.S.C. § 1414; 34 C.F.R. § § 300.320-350, 300.500-543.

The heart of the entitlement to FAPE is provided through the Individualized Education Plan (“IEP”). See Michael C. ex rel. Stephen C. v. Radnor Township Sch. Dist., 202 F.3d 642, 645 n. 2 (3d Cir. 2000), cert. denied, 121 S.Ct. 47 (2000) (calling IEP the ““centerpiece”” of IDEA) (citing Honig v. Doe, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). “The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child’s abilities, outlining the goals for the child’s education and specifying the services the child will receive.” Id. (citations omitted). It “must include, among other things, a statement of the child’s current level of educational performance, annual goals for the child, *specific educational services to be provided*, and the extent to which the child will participate in regular educational programs.” Id. (citations omitted) (emphasis added). In Pennsylvania, a

comprehensive evaluation report (“CER”) helps create the IEP. See 22 Pa. Code § § 14.25, 342.25.

Further protections grew out of a class action, supplementing this intricate scheme. The class suit was brought on behalf of current and future disabled children whose school districts had determined that they cannot be appropriately educated in a public education setting and who have waited more than 30 days for an appropriate setting. See generally Cordero v. Pennsylvania Dep’t of Educ., 795 F. Supp. 1352 (M.D. Pa. 1992). The litigation resulted in the addition of further safeguards which require school districts and states to work together to ensure that these children be appropriately placed. See generally Cordero v. Pennsylvania Dep’t of Educ., C. A. No. 3:CV-91-0791 (M.D. Pa. Jan. 27, 1993), *available at* http://www.pde.psu.edu/bbpages_reference/40001/400013523.html; Cordero v. Pennsylvania Dep’t of Educ., 795 F. Supp. 1352 (M.D. Pa. 1992).

If parents are dissatisfied with the IEP, they are entitled to an “impartial due process hearing.” 20 U.S.C. § 1415 (f) (1). Parents may also request a hearing if the school made a change in placement of a disabled student contrary to the procedures laid out in the IDEA. See 20 U.S.C. § 1415 (f) (1), (k) (4); 34 C.F.R. § § 300.319-329. For example, if school authorities decide to take disciplinary action against a disabled student by putting the child in an alternative setting, the IEP team must conduct a manifestation determination review within ten days of that decision. See 20 U.S.C. § 1415 (k) (4); 34 C.F.R. § § 300.319-329. If that procedure was not followed, parents may request a hearing.

States may choose either a one-tiered or two-tiered administrative system for hearing complaints. Pennsylvania has a two-tiered system, whereby the initial hearing occurs at a local

educational agency followed by an “independent” review of that hearing at the state agency level. See 20 U.S.C. § 1415 (g); 22 Pa. Code § 14.64. Thus, in Pennsylvania, the decision by the hearing officer is appealed to the special education appeals panel. See 22 Pa. Code § 14.64 (m). The aggrieved party of the panel decision may then appeal to federal court. See 20 U.S.C. § 1415 (i) (2).

II. Background

At the time that the complaint was filed in this case, on September 15, 1999, Joseph M. was a fourteen-year-old boy incarcerated at the Cornell Apraxas Youth Center (“Cornell Apraxas”) in South Mountain, Pennsylvania. It appears that after the complaint was filed, Joseph M. returned home to his mother, Kimberly F., who resides in Sharon Hill, Pennsylvania, which lies in the Southeast Delco school district. (Pls.’ Mot. at ¶ 6.)

On or about December 10, 1998, while attending Ashland Middle School, a CER was conducted which indicated, *inter alia*, that Joseph M. had a “significant history of aggressive behavior with peers” and was prone to starting fires. (Pls.’ Ex. 1.) The CER concluded that Joseph M. was emotionally disturbed. (Id.) On January 21, 1999, an IEP was developed by the IEP team that consisted of Delco personnel and Kimberly F. The IEP recommended that Joseph M. receive a full-time emotional support placement outside of the District.³

The events that took place after this mutual decision are in large part disputed by the parties. According to Delco, the school promptly forwarded several private school referrals to

³ Plaintiffs contend that the CER observed that Joseph M. needed an extensive psychological evaluation and recommended a residential placement. Defendant disagrees that such an assessment was made in the CER. This Court has read the CER and determined that no such placement was recommended in the CER. However, this point of contention is minimal since a residential placement was clearly recommended in the IEP.

locate a proper placement for Joseph M. By way of proof, Delco offers an affidavit of Charles Fastiggi, the Director of Student Support Services for Delco. (Def.'s Ex. D.) Plaintiffs allege that the district failed to meet its obligations under IDEA with respect to securing a placement. In support, plaintiffs note that Delco did not file the "Cordero INITIAL Report"⁴ with the Pennsylvania Department of Education until May 17, 1999. (Pls.' Ex. 11.) Plaintiffs further contend that between the issuance of the CER and April, 1999, Delco took disciplinary action against Joseph M. on at least seven (7) occasions, which included filing reports with the Police Department. (Pls.' Ex. 3.)

The parties agree that on April 21, 1999, Joseph M. started a small fire in the school cafeteria. The school notified the police and a delinquency petition was subsequently filed by Officer Blackson. Joseph M. was later incarcerated at Cornell Apraxas as a result of this incident. On or about May 26, 1999, an expedited impartial due process hearing was held before a Pennsylvania special education hearing officer. According to the transcript, plaintiffs alleged that the actions taken by Delco on April 21, 1999, constituted an illegal change of placement in violation of the IDEA. (Pls.' Ex. 5.) Plaintiffs requested that Delco place Joseph M. in an appropriate educational setting as required under the IDEA. The Hearing Officer requested briefing from the parties. Apparently, defendant submitted its brief, and plaintiffs, despite being granted a 10 day extension, never filed their brief. (Pls.' Ex. 9 at 6 n. 4.) On the narrow issue of whether reporting Joseph M. to the authorities constituted a change of placement in violation of the IDEA, the hearing officer determined that Delco had acted within the law. (*Id.* at 6.) The hearing officer further noted that he lacked the authority to grant plaintiffs' requested relief --

⁴ This report is filed pursuant to the Cordero class action explained above.

immediate placement in an appropriate educational setting -- because Joseph M. was in a juvenile detention center at that time. (Id. at 5.)

On appeal to the Special Education Appeals Review Panel, plaintiffs filed exceptions arguing that the hearing officer erred in not finding that Delco had failed to provide FAPE by having Joseph M. remain in a Delco school. (Pls.' Ex. 10 at 3.)⁵ The panel determined that this argument had not been raised below, and therefore, could not be considered on appeal. (Pls.' Ex. 10 at 4.) The panel noted, however, that, “[w]e have deep concerns that the process and programs to place Joseph according to the clear terms of the IEP may be defective in his case.” (Id. at 4-5.) The panel urged plaintiffs to use “all means at their disposal,” including, further due process hearings. (Id. at 5.) Plaintiffs then filed an action in this Court seeking relief under the IDEA and section 1983 and requesting development of an IEP offering FAPE, compensatory and punitive damages, compensatory education services, and reimbursement of fees and costs, including costs incurred in obtaining an independent evaluation. Plaintiffs move this Court to find in their favor on liability and to set a hearing to determine damages.

III. Discussion

A. The Motion of Defendant to Strike

Defendant filed a motion to strike the motion of plaintiffs for partial summary judgment on the grounds that plaintiffs filed their motion three (3) days after the court ordered deadline for

⁵ Plaintiffs also argued that the hearing officer violated Joseph M.'s constitutional and statutory rights by issuing a decision prior to the submission of certain evidence. Plaintiffs were apparently referring to an Order issued by the Court of Common Pleas of Delaware County on June 16, 1998, which requires schools to refer to the local law enforcement any threats of violence made by students. (Pls.' Ex. 7.) This Order was not brought before the hearing officer. However, the hearing officer noted its absence and determined that the Order, even if submitted, would not have effected his ruling. (Pls.' Ex. 9 at 6 n. 4.) The appeals panel affirmed the decision by the hearing officer regarding this point.

filing dispositive motions. Defendant has failed to show any prejudice. Therefore, I will deny the motion of defendant to strike the motion filed by plaintiffs.

B. Cross Motions for Summary Judgment

1. Legal Standard for Summary Judgment

According to Rule 56 (c) of the Federal Rules of Civil Procedure, a court may grant summary judgment if “... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56 (c). As to determining which facts are “material,” the substantive law acts as a guide. See Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is “genuine” where “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. Additionally, “inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion.” Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)). “A court may not weigh the evidence or make credibility determinations; these tasks are left to the fact-finder.” Boyle v. County of Allegheny Pennsylvania, 139 F.3d 386, 393 (3d Cir. 1998).

The moving party initially bears the burden “of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S.

317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986) (quoting Fed. R. Civ. P. 56 (c)). The nonmoving party must then, “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56 (e). The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts,” Matsushita, 475 U.S. at 586, and must produce more than a “mere scintilla” of evidence to demonstrate a genuine issue of material fact and avoid summary judgment. See Big Apple BMW, Inc. v. BMW of North Am., Inc., 974 F.2d 1358, 1363 (3d Cir.1992), cert. denied, 507 U.S. 912 (1993).

When opposing parties file cross-motions for summary judgment, the court must consider each motion separately, and “each side must still establish a lack of genuine issues of material fact and that it is entitled to judgment as a matter of law.” United States ex rel. Showell v. Philadelphia AFL-CIO Hospital Ass’n., Civ. No. 98-1916, 2000 WL 424274, at *1 (E.D. Pa. Apr. 18, 2000) (quoting Nolen v. Paul Revere Life Ins. Co., 32 F. Supp. 2d 211, 213 (E.D. Pa.1998) (citing Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968))).

2. Merits of Claims Brought

Before addressing the merits of the claims brought before this Court, I note that in IDEA actions, a district court “shall receive the records of the administrative proceedings; shall hear additional evidence at the request of a party; and ... basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415 (i) (2) (B). This Court is further directed to “afford ‘due weight’ to state administrative proceedings in evaluating claims under IDEA.” Carlisle Area School v. Scott P., 62 F.3d 520, 527 (3d Cir. 1995), cert. denied, 517 U.S. 1135 (1996) (citing Board of Educ. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982)). District courts are afforded the discretion in

determining the proper amount of deference to accord the administrative proceedings. See id. (citing Oberti v. Board of Educ., 995 F.2d 1204, 1219 (3d Cir. 1993)). In sum, this Court “must consider the administrative findings of fact,” but is “free to accept or reject them.” Id. (citing Oberti, 995 F.2d at 1219) (quoting Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853, 857 (11th Cir. 1988)). At the same time, if this Court departs from the agency’s ruling, it should offer an explanation for that departure. See Id. (citing Doyle v. Arlington County School Bd., 953 F.2d 100, 105 (4th Cir. 1991)).

Claim that Delco violated the IDEA by reporting Joseph M. to the authorities

Plaintiffs characterize the issue presented to this Court as whether Delco’s referral of Joseph M. to the Delaware County Court of Common Pleas pursuant to a directive from that Court violates the IDEA. (Pls.’ Mem. at 1.) Plaintiffs rely on Morgan v. Chris L., 927 F. Supp. 267 (E.D. Tenn. 1994), aff’d, 106 F.3d 401, No. 94-6561, 1997 WL 22714 (6th Cir. 1997), cert. denied, 520 U.S. 1271 (unpublished opinion), for the proposition that the school’s referral constituted a change in the educational placement of Joseph M. in violation of the procedural protection afforded under the IDEA. (Pls.’ Mem. at 2.) The court in Morgan did determine on the record before it that the school violated the plaintiff’s procedural rights under the IDEA when it filed a petition in juvenile court without first holding an IEP meeting because the school’s actions constituted a change in placement. See Morgan, 927 F. Supp. at 270. However, Morgan was decided before the 1997 amendments to the IDEA were enacted. Specifically, the IDEA now provides that:

- (9) Referral to and action by law enforcement and judicial authorities
 - (A) *Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate*

authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

20 U.S.C. § 1415 (k) (9) (emphasis added);⁶ see also 34 C.F.R. § 300.529 (implementing regulation leaves 1415 (k) (9) (A) unchanged).

By the plain language of the statute, it appears that Morgan was effectively overruled by the 1997 changes to the statute.⁷ Section 1415 (k) (9) (A) clearly places no requirement on schools to conduct a manifestation determination review before notifying the authorities where a disabled child commits a crime.⁸ See State v. David F., 1998 WL 828117, at *1 (Conn. Super. Ct. Nov. 6, 1998) (civil action number not reported); School Bd. of Indian River County, No. 00-0052E, 33 *Individ. with Disabilities Educ. Law Rep.* 57 (Vt. Administrative Court Apr. 25, 2000); Bensalem Township Sch. Dist., No. 915, 32 *Individ. with Disabilities Educ. Law Rep.* 26, (Pa. Appeals Panel June 6, 1999); Northside Indep. Sch. Dist., 28 *Individ. with Disabilities Educ. Law Rep.* 1118 (Tex. Administrative Court June 16, 1998); Warren County (PA) Sch. Dist., No.

⁶ Plaintiffs never allege that Delco failed to forward records as mandated under section 1415 (k) (9) (B), so this Court is under the impression that Delco handed Joseph M.'s records to the appropriate authorities in accordance with the law.

⁷ In fact, commentators have noted that section 1415 (k) (9) was passed in direct response to the Sixth Circuit decision in Morgan. See Terry Jean Seligmann, Not as Simple as ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments, 42 *Ariz. L. Rev.* 77, 127 n.211 (2000); Julie F. Mead, Ph.D., Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA, 127 *Ed. Law Rep.* 511, 523 (1998).

⁸ This provision stands in contrast to other IDEA provisions which govern disciplining students. For example, if school authorities decide to take disciplinary action against a disabled student by putting the child in an alternative setting, the IEP team must conduct a manifestation determination review within ten days of that decision. See 20 U.S.C. § 1415 (k) (4); 34 C.F.R. § § 300.319-329.

03-97-1239, 28 Individ. with Disabilities Educ. Law Rep. 485, (Office of Civil Rights, U.S. Dep't of Educ. investigation report Nov. 5, 1997); Letter to Holt, 32 Individ. with Disabilities Educ. Law Rep. 207 (Jul. 27, 1999) (letter issued from U.S. Department of Education, Office of Special Education Programs providing that “there is nothing in IDEA that prohibits school officials from reporting a crime committed by a child with a disability to appropriate state law enforcement or judicial authorities, to the same extent that crimes committed by children without disabilities would be reported”). In light of the 1997 amendments, this Court affirms the decision of the special education panel to the extent that it affirmed the decision of the hearing officer that a school district may report criminal conduct to the juvenile authorities without conducting a manifestation hearing.⁹

Claim that Delco failed to provide FAPE after the IEP meeting

Plaintiffs make a closely related, yet separate argument, that Delco violated the IDEA by having Joseph M. remain in a Delco school after the IEP, which recommended a contrary placement, was issued. Defendant contends that plaintiffs never exhausted this claim and that this failure bars plaintiffs' claims in federal court. Delco primarily relies on Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272 (3d Cir. 1996), in support of its proposition that plaintiffs may not bring this claim. Delco argues that in Jeremy H., the Court of Appeals held that parents had to exhaust the following claims relating to: (1) compensation for costs incurred during a temporary move in order to enroll in a different public school, (2) the belief that the district

⁹ In addition, Plaintiffs appear to argue that Delco referred Joseph M. directly to juvenile court which is not an “appropriate” authority under section 1415 (k) (9). However, the petition filed in the Juvenile Court for the County of Delaware was filed by Howard Blackson, a Juvenile Officer of the Darby Township Police Department. (Pls.' Ex. 6; Def.'s Mot. ¶ 22.) Given the text of the petition, it appears to this Court, that the school notified law enforcement who in turn filed the petition in juvenile court. Thus, plaintiffs' argument fails.

should not be involved in the evaluation process, and (3) enforcement of the relief granted at due process. (Def’s Mem. at 12.) Delco points to the fact that in Jeremy H., the court pointed out that the appeals panel had rejected the claim regarding evaluations because it had not been raised below. See id. at 284. I first observe that the court in Jeremy H. actually held that plaintiffs did *not* have to exhaust the enforcement claim. See Jeremy H., F.3d at 283. As to the claims brought in Jeremy H. regarding moving expenses and school involvement in evaluations, this Court finds them distinguishable. Here, plaintiffs essentially claim that Delco failed to implement the agreed upon recommendation in the IEP. This Court will not be conducting a factual inquiry into what kind of educational placement is appropriate for Joseph M., or who should conduct evaluations for Joseph M., both of which are areas of inquiry where an expertise in education would be of assistance. See id. (noting that “principal purpose” of due process procedure is allow state and local agencies to take ““primary responsibility for formulating the education to be accorded to a handicapped child””) (quoting Board of Educ. v. Rowley, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982)). Rather, the only factual question here is whether Delco took the necessary steps to secure Joseph M.’s agreed upon and appropriate education setting. Thus, the question of law here is whether plaintiffs must exhaust a claim for failure to implement an IEP.

As Delco argues, the IDEA requires that plaintiffs exhaust their claims through the administrative process before seeking relief in federal court.¹⁰ See 20 U.S.C. § 1415 (l). While

¹⁰ Specifically, the statute provides that “before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.” 20 U.S.C. § 1415 (l).

the policy mandating exhaustion is “a strong one,” the Court of Appeals for the Third Circuit has established certain exception to that general rule. See Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778 (3d Cir. 1994) (citing Honig v. Doe, 484 U.S. 305, 327, 108 S. Ct. 592, 606, 98 L. Ed. 2d 686 (1988)). The Court of Appeals, relying on a Report to the United States House of Representatives submitted during congressional consideration of the IDEA (“House Report”), determined that where administrative proceedings would prove “futile or inadequate” because, for instance, the relief sought would be unavailable, plaintiffs need not exhaust.¹¹ See W.B. v. Matula, 67 F.3d 484, 495-96 (3d Cir. 1995) (citing H.R. Rep. No. 99-296, at 7, 99th Cong., 1st Sess. 4 (1985) noting exhaustion excused where “hearing officer lacks the authority to grant the relief sought”).¹²

The House Report relied on by the Court of Appeals provides additional examples of situations in which exhaustion is not mandated. In a passage of particular relevance in this case, the Report notes that:

Typically, a parent is required to exhaust administrative remedies where complaints involve the *identification, evaluation, education placement*, or the provision of a free appropriate public education to their handicapped child. However, there are certain situations in which it is not appropriate to require the use of due process and review procedures ... before filing a law suit. These include complaints that ... it would be futile to use due process procedures (e.g., *an agency has failed to provide services specified in the child's ... IEP....*)

¹¹ Other exceptions include where the question presented is “purely legal” or where exhaustion would amount to “severe or irreparable harm” upon the litigant. See Komninos, 13 F.3d at 778. Where a party seeks refuge under the severe and irreparable harm exception, the party must meet a high threshold, including, but not limited to, furnishing the court with “affidavits from competent professionals along with other hard evidence that the child faces irreversible damage if the relief is not granted.” Id. at 779.

¹² I note for clarity that the 1997 amendments to the IDEA made no substantive changes to the exhaustion provision. See 20 U.S.C. § 1415 Historical and Statutory Notes, Prior Provision, § 1415 (f). Thus, the legislative history contained in the House Report from 1985 remains indicative of congressional intent.

House Report at 7; see also 131 Cong. Rec. S10396-01 (daily ed. July 30, 1985) (statement of Sen. Simon, cosponsor of EHA¹³: “It is important to note that there are certain situations in which it is not appropriate to require the exhaustion of EHA administrative remedies before filing a civil law suit. These include complaints that ... an agency has failed to provide services specified in the child’s individualized educational program.”); 131 Cong. Rec. H9964-02 (daily ed. Nov. 12, 1985) (statement of Rep. Miller, cosponsor of EHA: making identical statement as Sen. Simon); Heldman v. Sobol, 962 F.2d 148, 159 n.11 (2d Cir. 1992) (acknowledging same exceptions); Thus, this legislative history of the IDEA suggests an exhaustion exception for situations concerning the *implementation* of an IEP, as opposed to the *contents* of an IEP. Cf. Lester H. v. Gilhool, 916 F.2d 865, 869-70 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991) (noting that courts require exhaustion where the “peculiar expertise” of a hearing officer is needed to develop a factual record concerning the development of an appropriate IEP); Matula, 67 F.3d at 496 (extending exhaustion exception to section 1983 claims and relying in part on the determination in Lester H. that “IDEA mandates resort in the first instance to administrative hearings so as to develop the factual record and resolve evidentiary disputes concerning, for example, evaluation, classification and placement”). Thus, I conclude that plaintiffs’ claim regarding a denial of FAPE falls under the implementation exception to the exhaustion requirement.

I now turn to liability. Plaintiffs contend that Delco failed to take action in finding Joseph M. an appropriate placement. Specifically, plaintiffs argue that the “Cordero INITIAL report” was not filed with the state until May 17, 1999, approximately four months after the IEP

¹³ The EHA refers to the Education of the Handicapped Act, the predecessor of IDEA.

was issued and suspiciously close to the expedited due process hearing that occurred on May 26, 1999. (Pls. Ex. 11.) The Cordero litigation clearly established that under the IDEA school districts in this state must identify, “no less frequently than weekly,” all disabled children for whom the district is unable to provide an appropriate educational program and for whom the delay in needed services has lasted, or will likely last, for more than 30 days. See Cordero v. Pennsylvania Dep’t of Educ., C. A. No. 3:CV-91-0791, at ¶ C 1 (M.D. Pa. Jan. 27, 1993), *available at* http://www.pde.psu.edu/bbpages_reference/40001/400013523.html (“Cordero Court Order”); cf. 20 U.S.C. § 1414 (d) (2) (statutory provision relating to implementation of the IEP); 34 C.F.R. § 300.342 (federal regulation of the same). Within five (5) business days of that identification, districts must report to the State Department of Education “pertinent details” concerning each such child.¹⁴ See id. at ¶ C 4.

Delco does not deny that the report was filed untimely. Rather, defendant claims that “any delay in the filing of a Cordero Report did not affect Joseph M.’s educational program, as his placement at ... Cornell Apraxas did not affect Joseph M.’s educational program.” (Def.’s Resp. at ¶ 14.) This response wholly misses the fact that *before the fire setting incident occurred*, Delco had an obligation to report to the state the fact that for nearly three months Joseph M. was without an appropriate placement. Delco also asserts by way of affidavit that without delay, the school forwarded several private school referrals to locate a proper placement for Joseph M. (Def.’s Ex. D.) However, after more than thirty days had elapsed from the time of that IEP was issued with the recommendation for a residential placement, Delco’s efforts to

¹⁴ These details include: “information concerning the student and the type of program/placement that he or she requires; the length of time that has elapsed since that program/placement was determined to be needed; and a copy of the current IEP.” Cordero Court Order, at ¶ C 4.

find a private school became moot because under the Cordero court order, Delco was required to seek state assistance in securing a placement for Joseph M.

Delco does not point to anything in the record to show that it abided by the safeguards created by the Cordero litigation. Thus, there appears an absence of a genuine issue of material fact as to whether Delco took the necessary steps in implementing the IEP as no reasonable jury could find that Delco abided by the Cordero court order. I conclude that plaintiffs' motion for summary judgement will be granted with respect to their claim that Delco is liable for failing to implement the IEP.¹⁵ To be clear, however, Delco is only liable for the period between when it was mandated to report Joseph M.'s lack of placement to the state, which was on or about February 21, 1999,¹⁶ and when it reported Joseph M.'s criminal activity to the appropriate authorities, which was on or about April 21, 1999. Once Delco acted within the law and reported Joseph M.'s conduct, Delco cannot be held liable for failing to implement Joseph M.'s IEP because Joseph M. was then placed in juvenile detention. Clearly, Delco could not place Joseph M. in a residential program when he was residing under law at Cornell Apraxas. Thus, the period of liability is approximately two months. The motion filed by plaintiffs for partial summary judgement concerns liability only, and I make no conclusions regarding damages.¹⁷

¹⁵ I briefly note that plaintiffs spend considerable time arguing that Delco denied Joseph M. his right to FAPE by using section 1415 (k) (9) to avoid its obligation to secure an out-of district placement for Joseph M. Because Delco clearly violated the procedures which were established under the Cordero class action, this Court will not address the merits of plaintiffs' argument regarding Delco's alleged abuse of referral power.

¹⁶ Joseph M.'s IEP was issued on January 21, 1999. Delco should have reported his lack of placement thirty days later which would have been on or about February 21, 1999.

¹⁷ In the complaint, plaintiffs request immediate development of an IEP. Plaintiffs, however, fail to raise this claim in their brief, thus this court is left to believe that plaintiffs no longer wish to proceed on this claim.

Claim brought under section 1983

The futility exception to exhaustion which was explained above has been applied in this Circuit where claimants seek section 1983 damages which are not available under the IDEA. See Matula, 67 F.3d at 496. This exception does not allow claimants to circumvent the exhaustion requirement by casting an IDEA claim as a section 1983 claim. See id. at 495. The Court of Appeals in Matula based this determination on the 1985 House Report to the IDEA which provides that “parents alleging violations of ... 42 U.S.C. 1983 are required to exhaust administrative remedies before commencing separate actions in court *where exhaustion would be required under EHA.*” Id. (quoting House Report, at 7). Delco argues that plaintiffs are attempting to end-run the exhaustion requirement by filing for damages under section 1983. This Court concludes, however, that because nearly all of the claims brought fall under an exhaustion exception, plaintiffs cannot be accused of circumvention. Thus, I conclude that exhaustion is not a bar to plaintiffs’ claim under section 1983.

Delco turns to J.F. ex rel. D.F v. School Dist. of Philadelphia, No. Civ. A. 98-1793, 2000 WL 361866, at *8-9 (E.D.Pa. Apr. 7, 2000) (citing Monell v. Department of Soc. Serv., 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2035-36, 56 L. Ed. 2d 611 (1978)), for the argument that municipalities may only be held liable where the plaintiff identifies a policy, practice or custom that caused the alleged injury. To the extent that J.F. involved a *constitutional* challenge as the basis for the section 1983 claim, Delco prevails on this point. See Black v. Stephens, 662 F.2d 181, 191 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982) (acknowledging that Monell involved suits brought under section 1983 for constitutional deprivations). I note that while plaintiffs alleged a constitutional deprivation in the complaint, they never address this claim in

their motion or response. Thus, this Court is left with the impression that plaintiffs no longer wish to proceed on the constitutional allegations.¹⁸

To the extent that plaintiffs' claim under section 1983 is predicated on the IDEA violation, however, the test cited in J.F. does not apply. Where a section 1983 claim is based on a violation of the IDEA all the plaintiff must show is the statutory violation. See Matula 67 F.3d at 492, 494 (creating section 1983 remedy for claims brought under IDEA and relying on Maine v. Thiboutot, 448 U.S. 1, 5-6, 100 S. Ct. 2502, 2504-05, 65 L. Ed. 2d 555 (1980) for proposition that “[section] 1983 encompasses claims based on purely statutory violations of federal law”); see also Ridgewood, 172 F.3d at 252 (reaffirming Matula holding).

I have already concluded that Delco violated the IDEA by failing to abide by the Cordero court order. Thus, Delco must be held liable under section 1983. As explained, however, Delco is only liable for its inaction over an approximately two month period. The motion filed by plaintiffs requested only a determination on liability and not damages. Thus, this Court makes no ruling regarding what relief should be granted. However, punitive damages may not be awarded against municipalities under section 1983. See Marchese v. Umstead, 110 F. Supp. 2d 361, 373 (E.D. Pa. 2000). Thus, I conclude that plaintiffs claim for punitive damages must be dismissed.

Claim for fees and costs

To the extent that plaintiffs wish to recover for attorney fees incurred in connection with the suit brought in federal court, plaintiffs request is not barred by failure to exhaust. See 20 U.S.C. § 1415 (i) (3) (B). The merits of the issue of attorney fees will be addressed at a later

¹⁸ The complaint also brings forth claims based on an alleged violation of the Rehabilitation Act which the plaintiffs never brief. Thus, this Court is left to believe that plaintiffs have also dropped this claim.

stage, if necessary. However, to the extent that plaintiffs wish to recover for costs incurred in obtaining an independent evaluation at the Child Study Institute at Bryn Mawr College, (Compl. ¶ 16), plaintiffs were required to exhaust that claim below. This Court finds no exhaustion exception which would excuse plaintiffs from first raising that claim at the due process hearing. Thus, plaintiffs' claim for costs for an independent evaluation must be dismissed.

C. The Motion of Plaintiffs to Strike

Finally, plaintiffs bring a motion to strike Defendant's motion for summary judgment on the ground that Delco disclosed exhibits containing confidential information without redaction in violation of the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. 1232(g)-(i); 34 C.F.R. § 99, and the Pennsylvania Juvenile Act, 42 Pa. C.S. § § 6307, 6308. As an interim order, this Court ordered that the motion of defendant for summary judgment be filed under seal. See Joseph M. v. Southeast Delco School District, Civ. A. No. 99-4645, Document No. 16, (E.D. Pa. June 29, 2000). Delco seeks leave to file to resubmit the documents in a redacted form. This Court agrees that the aforementioned statutes are designed to make certain documents pertaining to juveniles not open to the public. See 20 U.S.C. 1232(g)-(i); 34 C.F.R. § 99; 42 Pa. C.S. § § 6307, 6308. I conclude, therefore, that defendant must ensure that *all* exhibits attached with its motion filed under seal are resubmitted in redacted form. It appears to this Court that at least the majority of the exhibits attached to the motion by defendant for summary judgment which was filed under seal are already in redacted form. If the motion filed under seal contains only redacted exhibits, defendant shall follow the orders outlined in the attached order.

Plaintiffs, however, seek additional relief. Without any citation, plaintiffs ask this Court to allow for recovery under section 1983 and impose sanctions on defendant. I conclude that

plaintiffs have failed to meet their burden in showing this Court that non-equitable relief is mandated here. See Grundlach v. Reinstein, 924 F.Supp. 684, 691 (E.D. Pa. 1996) (denying section 1983 claim under FERPA) (citing Suter v. Artist M., 503 U.S. 347, 357, 112 S. Ct. 1360, 1367, 118 L. Ed. 2d 1 (1982)). This Court has been more than generous in guiding both parties as to the applicable law they did not cite; any additional assistance is in fairness, not required.

IV. Conclusion

To summarize, this Court concludes that plaintiffs did not need to exhaust at the administrative level their claim that Delco violated the IDEA by failing to implement the IEP in accordance with the Cordero court order. I further conclude that no reasonable jury could find that Delco met its obligations under the IDEA in light of its failure to file a timely Cordero Report. Moreover, because plaintiffs have established that Delco violated the IDEA, plaintiffs have established liability and demonstrated their right to recovery under section 1983. However, Delco is only liable for an approximately two month period.

Plaintiffs may not recover based on their argument that Delco violated the IDEA by reporting Joseph M. to the authorities because Delco had the authority to refer crimes committed by disabled students under the 1997 Amendments to the IDEA. Plaintiffs also may not recover for costs incurred by the outside evaluation because plaintiffs failed to exhaust that claim.

This Court makes only one determination with respect to damages as plaintiffs have not moved for such a determination. Specifically, plaintiffs may not recover for punitive damages because neither the IDEA nor section 1983 allow for such recovery against municipalities.

Finally, the motion by defendant to strike will be denied for lack of demonstrated prejudice. The motion of plaintiffs will be granted as far as it moves this Court to grant equitable

relief in the form of a resubmission by defendant of documents in a redacted form. However, the motion of plaintiffs will be denied as far as it moves this Court to grant non-equitable relief because plaintiffs have failed to meet their burden.

An appropriate order follows.

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

JOSEPH M., by and through his natural parent	:	CIVIL ACTION
and next friend, KIMBERLY F.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SOUTHEAST DELCO SCHOOL DISTRICT,	:	
	:	
Defendant.	:	
	:	
	:	NO. 99-4645

ORDER

AND NOW, this 19th day of March, 2001, upon consideration of the cross-motions of plaintiffs Joseph M. and Kimberly F. for partial summary judgment (Document No. 13) and of Defendant Southeast Delco School District (“Delco”) for summary judgment (Document No. 21), pursuant to Federal Rule of Civil Procedure 56, on the claims of plaintiffs that Delco violated Joseph M.’s rights under the Individuals with Disabilities Education Act (“IDEA”), 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.*, and 42 U.S.C. § 1983 (“section 1983”), and upon consideration of the motion by defendant to strike the motion of plaintiffs for partial summary judgment (Document No. 19) and the motion of plaintiffs to strike the motion of defendant for summary judgment (Document No. 14), and the responses thereto, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion of plaintiffs for partial summary is **GRANTED** in part and **DENIED** in part, and the motion of defendant for summary judgment is **GRANTED** in part and **DENIED** in part:

1. It is hereby **DECLARED** that Delco violated the IDEA by failing to implement the IEP

of Joseph M. in accordance with the Cordero court order and that such violation demonstrates the right to be granted appropriate relief under both the IDEA and section 1983. It is further **DECLARED** that the period of liability is the approximately two month period outlined in the accompanying memorandum and that the amount and type of appropriate relief will be determined at a later date.

2. It is hereby **DECLARED** that Delco did not violate the IDEA when it reported Joseph M. to the authorities after Joseph M. started a fire.
3. It is hereby **DECLARED** that plaintiffs may not recover punitive damages for Delco's violation of the IDEA or for costs incurred by the outside evaluation.

IT IS FURTHER ORDERED that the motion of defendant to strike the motion of plaintiffs for partial summary judgment is **DENIED** for failure to show prejudice.

IT IS FURTHER ORDERED that the motion of plaintiffs to strike the motion of defendant for summary judgment is **DENIED** in part and **GRANTED** in part:

1. It is hereby **DECLARED** that plaintiffs may not recover for non-equitable relief under the Family Educational Rights and Privacy Act, 20 U.S.C. 1232(g)-(i); 34 C.F.R. § 99, and the Pennsylvania Juvenile Act, 42 Pa. C.S. § § 6307, 6308.
2. It is hereby **ORDERED** that if all the exhibits in the motion filed under seal are not in redacted form, defendant shall resubmit the motion with all exhibits in redacted form by **April 2, 2001 at 4:00 p.m.**; if all the exhibits in the motion filed under seal are already in redacted form, defendant shall notify this Court by letter by **April 2, 2001 at 4:00 p.m.** of such circumstance, and this Court will then issue an order providing that the motion filed under seal become open to the public.

IT IS FURTHER ORDERED that parties shall consult with each other and jointly report by letter to the Court by **April 2, 2001 at 4:00 p.m.** as to the feasibility of reaching an agreement with or without court assistance as to the remaining issues.

LOWELL A. REED, JR., S.J.