

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

NESHAMINY SCHOOL DISTRICT	:	CIVIL ACTION
	:	
v.	:	
	:	
KARLA B., individually and as	:	
parent and natural guardian of	:	
BLAKE B.	:	NO. 96-3865
	:	
Newcomer, J.	:	August , 1997

M E M O R A N D U M

Presently before this Court are plaintiff Neshaminy School District's ("Neshaminy") Motion for Summary Judgment, and defendants' Cross-Motion for Summary Judgment, and defendants' response to Neshaminy's motion for summary judgement, and a certified copy of the administrative record. For the following reasons, plaintiff's motion will be granted and defendants' cross-motion will be denied. Judgment shall be entered in favor of plaintiff and against defendants.

I. Background

This case arises under the Individual with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1485 (1990).¹ The

¹I note that the IDEA was recently amended by Congress. See Individuals with Disabilities Education Act Amendments of 1997 ("Amendments"), P.L. No. 105-17, June 4, 1997, 111 Stat. 37. Although the Amendments make significant substantive changes to many parts of the IDEA, the Amendments, for the purposes of the instant action, make no real significant changes to the IDEA. Rather, the Amendments only real effect on this action is that some of the subsections of the statutes which are implicated herein are going to be renumbered when they are codified in the United States Code. For example, § 1415(e)(2), which provides for this Court's standard of review in this action, will be renumbered as § 1415(i)(2)(A)-(B) when it is codified in the United States Code. Because the Amendments have not as of yet been codified, and because the parties refer to the pre-amendment sections and subsections, this Court will also refer to the pre-

underlying administrative proceeding against Neshaminy was commenced by Blake B., an exceptional child as defined by IDEA, through his parent and natural guardian, Karla B., on the grounds that the school district had not fulfilled its statutory obligations to Blake B. under IDEA. The parent and Neshaminy timely requested a special education due process hearing so that Karla B. could challenge the appropriateness of the Individual Education Program ("IEP") for Blake B. and the placement of Blake B. in the school district. The parent requested the hearing to dispute the proposed placement of Blake B. in an approved private school, due to increasingly severe behavioral problems and a perceived need by Neshaminy for therapeutic interventions which Neshaminy claimed it could not provide within the public schools of the district.

On August 9, 1995, the due process hearing commenced. The parent and Blake B., collectively, and Neshaminy were represented by counsel. The due process hearing was held over seven separate sessions between August 9, 1995 and February 8, 1996, and Special Education Hearing Officer, Mark G. Drenning, presided over the hearing. During these due process hearings, specifically on November 3, 1995, the parties agreed that the due process hearing would be limited to the following issues: (1) what should Blake B.'s current, as of November 1995, IEP consist of; and

amendment sections and subsections throughout this memorandum opinion.

(2) what should his placement be. (AR at 451-453).² Testimony was presented to, and evidence was received by, the hearing officer at the due process hearing on October 3 and 17, 1995; November 1 and 3, 1995; January 31, 1996; and February 8, 1996.

On March 8, 1996, the hearing officer issued a written decision and order. This decision includes 20 specific findings of fact, and three pages of written discussion as to the testimony and evidence presented and various conclusions of law. In the decision, the hearing officer concluded that the contents of the November 16, 1995 IEP, including a behavioral management plan, with two exceptions, was supported by a preponderance of the evidence. Neshaminy was ordered to modify the IEP to include annual goals and short-term objectives in the limited areas of study skill needs and interpersonal skill needs. The hearing officer further concluded that Blake B. required "a structured educational program with a therapeutic component capable of providing an immediate response to behavioral incidents," and that the programming necessary for the student's needs could only be provided at an approved private school. The hearing officer also ordered that a psychiatric reevaluation of the student should occur as soon as possible in order to verify that the previous psychiatric observations and recommendations remained current. By correspondence dated March 20, 1996, the parent filed three pages of exceptions to the hearing officer's decision, not one of the exceptions discussed the hearing

²Throughout this opinion the Court will refer to certain pages of the administrative record, using the abbreviation "AR".

officer's failure to award, or even mention, compensatory education. Neshaminy timely responded to each exception.

On April 22, 1996, the Appeals Review Panel ("Review Panel") issued Special Education Opinion No. 711, which reversed the hearing officer's decision and order dated March 8, 1996. In sum, the Review Panel concluded that the evidence, presented at the due process hearing, clearly indicated that Neshaminy failed to comply with the procedural requirements of IDEA and failed to develop an IEP reasonably calculated to enable Blake B. to receive educational benefits. The Review Panel ordered: (1) that Neshaminy develop an IEP which includes an appropriate behavior management program and other services; (2) that Neshaminy engage a private consultant not associated in any way with Neshaminy to provide the administrators and teachers at Blake's school with a 3-5 day program of in-service training with respect to certain areas relevant to Blake B.'s IEP; and (3) that Neshaminy shall provide compensatory education to Blake B. for a period of 250 days in any areas contained in Blake B.'s IEP.

On May 21, 1996, Neshaminy filed a complaint with this Court, pursuant to 20 U.S.C. § 1415(e)(2) and 28 U.S.C. §§ 2201-2202, requesting this Court to review and reverse Special Education Opinion No. 711 of the Review Panel and affirm the decision and order of the hearing officer. Subsequent to the filing of the complaint, Karla B. and Blake B. moved out of the Neshaminy School District. They currently reside in another school district.

After the filing of the complaint and numerous

conferences with the Court to discuss the status of this case, Neshaminy filed a motion for summary judgment. Neshaminy argued that summary judgment should be granted in its favor because (1) the case was moot, and thus non-justiciable, because defendants no longer resided in the Neshaminy school district and (2) with respect to only the compensatory education issue, the defendants failed to exhaust administrative remedies. Defendants generally opposed the grant of summary judgment.

After carefully considering the parties' respective positions, this Court granted in part and denied in part plaintiff's motion for summary judgment. The Court granted the motion to the extent that defendants' claim for prospective relief was denied as moot and denied the motion to the extent that plaintiff argued that defendants' claim for compensatory education was moot and/or barred for failure to exhaust administrative remedies. With respect to the exhaustion argument, the Court found that it could not address this issue on the merits because the parties failed to provide the Court with a complete copy of the administrative record. Thus, the parties were ordered to provide the Court with a complete certified copy of the administrative record.

Presently before the Court are the parties' cross-motions for summary judgment. In its motion, plaintiff argues that it is entitled to summary judgment because (1) defendants failed to exhaust administrative remedies with respect to the compensatory education issue and (2) even if defendants did exhaust

administrative remedies, the administrative record contains no factual evidence which in turn would support an award of compensatory education by the Review Panel. Defendants rejoin that they exhausted administrative remedies with respect to the issue of compensatory education and that the administrative record supports the award of compensatory education.

II. Summary Judgment Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. at 59.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the non-moving party, who must go beyond its pleading and designate specific facts by use of

affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Id. at 324. Moreover, when the non-moving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322).

Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322). The non-movant must specifically identify evidence of record, as opposed to general averments, which supports his claim and upon which a reasonable jury could base a verdict in his favor. Celotex, 477 U.S. at 322. The non-movant cannot avoid summary judgment by substituting "conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." Lujan v. National Wildlife Found., 497 U.S. 871, 888 (1990). The motion must be denied only when "facts specifically averred by [the non-movant] contradict "facts specifically averred by the movant." Id.

III. Discussion

A. Scope of Review under IDEA

As noted above, the defendants commenced the administrative action by requesting an administrative due process hearing before a hearing officer to satisfy the requirements of the

IDEA. See 20 U.S.C. §§ 1415(b)(1)(E), 1415(b)(2). After the hearing officer issued his decision, defendants appealed his decision to the Pennsylvania Special Education Appeals Panel, which ruled in favor of defendants. Subsequent to this decision of the Review Panel, plaintiff filed suit in this Court pursuant to 20 U.S.C. § 1415(e)(2).

The IDEA grants the parties the right to limited judicial review of the administrative proceedings below. 20 U.S.C. § 1415(e)(2). Section 1415(e)(2), which governs the scope of our review, provides in relevant part:

In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence³ 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.⁴

20 U.S.C. § 1415(e)(2).

In determining the scope of a district court's review under the IDEA, "the Supreme Court has stated that the statute's language instructing the district court, 'basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate,' does not mean that courts are free to substitute their own notions of sound education policy for

³The parties in this case have informed the Court that they do not wish to introduce additional evidence; therefore, this Court's decision will be based solely on an independent review of the administrative record and the parties' arguments as reflected in their briefs.

⁴The Amendments to the IDEA have not made any substantive changes to this section.

those of the educational agencies they review, but rather they should give 'due weight' to the administrative proceedings." Susan N. v. Wilson School District, 70 F.3d 751, 757 (3d Cir. 1995) (citing and quoting Board of Educ. v. Rowley, 458 U.S. 176, 205-06, 102 S. Ct. 3034, 3050-51, 73 L. Ed. 2d 690 (1982)). Thus, the district courts are charged with giving due weight to the administrative proceedings below.

The United States Court of Appeals for the Third Circuit, our appeals court, has noted that district courts have struggled with the issue of how much weight is "due" under the amorphous "due weight" standard. Susan N., 70 F.3d at 757. Although the Third Circuit has declined, for at least the time being, to speak "definitively on what constitutes 'due weight'", the Circuit has approvingly quoted the following definition from the Court of Appeals for the First Circuit:

[T]he question of the weight due the administrative findings of facts must be left to the discretion of the trial court. The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.

Id. at 758 (quoting Town of Burlington v. Dep't of Educ., 736 F.2d 773, 791-92 (1st Cir. 1984), aff'd on other grounds, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985)). Under this standard, thus, this Court must carefully consider each finding that the hearing officer makes, but after so doing, this Court can either

accept or reject these findings.

In conducting a review of state IDEA proceedings, the Supreme Court has instructed district courts to focus on two issues. First, the Court must ask whether the state complied with the procedural requirements of the IDEA. Second, it must ask whether the state's determinations are "reasonably calculated" to enable the subject of the proceedings to receive educational benefits. Rowley, 458 U.S. at 206-07, 102 S. Ct. 3050-51. This standard provides two benefits. First, it properly recognizes that federal district courts rarely have the expertise to arrive at a better result than the administrative process. Id. at 206, 102 S. Ct. at 1350. Second, it prohibits federal courts from placing more requirements on the state than Congress has required. Id. at 207, 102 S. Ct. at 1351.

B. Exhaustion of Administrative Remedies

Plaintiff argues that summary judgment is appropriate with respect to the sole remaining issue of compensatory education because defendants have failed to exhaust administrative remedies. Plaintiff argues that although the issue of compensatory education was initially raised at the outset of the due process hearing, the parties subsequently agreed to limit the due process hearing to two specific issues that did not include the issue of compensatory education; plaintiff contends that the issue of compensatory education was thus no longer before the hearing officer; and as such, the issue of compensatory education was not litigated by the parties nor did the hearing officer decide this issue. Thus,

plaintiff argues that the Review Panel should not have ruled on the issue of compensatory education.

Defendants generally rejoin that they never waived the issue of compensatory education and that they exhausted all administrative remedies with respect to this issue. Additionally, defendants, in one sentence, argue that it would have been futile to resort to and rely on the administrative procedures provided by plaintiff. The Court notes that nowhere in defendants' briefing do defendants specifically refute plaintiff's waiver/exhaustion argument by referring to the actual administrative record.

Voluminous authority exists for the proposition that exhaustion of administrative remedies is required before a state or federal court assumes jurisdiction pursuant to the IDEA. See, e.g., Hampton School Dist. v. Dobrowolski, 976 F.2d 48, 53 (1st Cir. 1992); Association for Retarded Citizens of Alabama, Inc. v. Teague, 830 F.2d 158, 160 (11th Cir. 1987) (applying the exhaustion requirement to the predecessor Act to the IDEA); Drinker v. Colonial School Dist., 888 F. Supp. 674, 679 (E.D. Pa. 1995) (finding that the rules of exhaustion and issue preservation apply in the judicial review of IDEA proceedings). This exhaustion rule serves a number of important purposes, including:

- (1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics;
- (2) allowing the full development of technical issues and a factual record prior to court review;
- (3) preventing deliberate disregard and circumvention of agency procedures established by Congress; and
- (4) avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any error.

Teague, 830 F.2d at 160 (citations omitted). To effectuate these important purposes, courts must enforce the rules of exhaustion where the facts of the case so dictate.

In this case, the Court finds that the rules of exhaustion should be applied to preclude defendants from raising the issue of compensatory education in this Court. Although defendants initially raised the issue of compensatory education at the due process hearing, (AR at 244, 254), defendants waived this issue when they agreed to limit the issues of the due process hearing at a subsequent session.⁵

At the November 3, 1995 session, the hearing officer, by agreement of the parties, ordered that the taking of testimony be discontinued. At that time, the hearing recessed, but the hearing officer retained jurisdiction and a discussion was held between the hearing officer and the parties' counsel off the record. Upon conclusion of the parties' off-the-record conversation, the hearing officer made the following comments on the record:

The parties have agreed, and I am ordering, that the parties will, within the next five working days, convene an IEP team to meet and discuss the development of an appropriate program for Blake B. as his needs currently dictate

* * *

The outcome of this IEP team meeting will be an IEP for

⁵Although it is clear that defendants' counsel requested compensatory education for Blake B. during her opening statement and subsequently reiterated this demand, the record does indicate that there was a discussion between the hearing officer and the parties' representatives as to whether the issue of compensatory education was actually in controversy.

Blake B. If the parties agree to that document, any future need to return to this hearing will be limited to the issue of what should be Blake's placement based upon the IEP.

* * *

If the parties cannot agree at the IEP meeting within the next five days on what should constitute an IEP, then the hearing will be limited to the two issues of what should Blake's current IEP consist of; subsequently, what should Blake's placement be.

(AR at 451-53). Both representatives were then questioned on the record as to their understanding of the issues in controversy. Both representatives agreed that the issues now in controversy were those issues that were articulated on the record by the hearing officer.

Thus, it is clear from the record that the issue of compensatory education was no longer before the hearing officer for his consideration. Indeed, defendants never raised the issue of compensatory education after the parties agreed to limit the issues before the hearing officer. For example, during defendants' closing argument, defendants never discussed nor requested compensatory education for Blake B. In light of the fact that the parties agreed to limit the issues, and these issues did not include compensatory education, it makes complete sense that defendants did not raise this issue during closing arguments.

Because the issue of compensatory education was withdrawn from the hearing officer's consideration, the Court concludes that this issue cannot be raised here because of failure to exhaust administrative remedies. The purposes behind the rules of

exhaustion require this result. First and foremost, the hearing officer did not exercise his discretion and expertise on the issue of compensatory education because, simply put, the issue was not before him. Second, this issue was not fully developed during the due process hearing, nor was a full factual record created with respect to this issue. Third, a decision to allow this issue to be considered here would promote a deliberate disregard and circumvention of agency procedures established by Congress. Finally, the local education agency was deprived of the first opportunity to correct any error. For these reasons, the Court finds that the rule of exhaustion should be applied in this case to preclude defendants from raising the issue of compensatory education.

It is also of no moment for the purposes of this decision that the Review Panel awarded compensatory education to defendants in its opinion. Indeed, this Court finds that the Review Panel overstepped its authority by addressing an issue which was not properly before it. See Slack v. State of Delaware Dep't of Public Instruction, 826 F. Supp. 115, 122 (D. Del. 1993); Hiller v. Board of Educ., 674 F. Supp. 73, 77 (N.D.N.Y. 1987). Because the issue was not before the hearing officer at the time the hearing officer reached his decision, and because the defendants never raised the issue of compensatory education before the Review Panel, the Review Panel was without authority to address this issue.

This result is dictated by the nature of administrative proceedings. Administrative agencies, in many different areas, are

given the first opportunity to address issues raised in a dispute between parties because Congress believes that these matters will be more efficiently and correctly resolved due to the agency's expertise. However, in order for the administrative review system to function properly, issues in dispute must be squarely placed before the agency for its consideration. If the issues are not raised and fully argued before the agency, then the agency cannot properly decide the issue. Applying this reasoning in this case, it becomes obvious that the Review Panel could not simply raise the issue of compensatory education sua sponte without providing the parties with an opportunity to address this issue. Therefore, for the purposes of deciding whether the issue of compensatory education was exhausted, it is irrelevant that the Review Panel unilaterally addressed this issue.

This exhaustion rule, however, should not be applied too rigidly. Indeed, the IDEA does not require exhaustion in certain situations. Ciresoli v. M.S.A.D. No. 22, 901 F. Supp. 378, 385 (D. Me. 1995) (citing Pihl v. Massachusetts Dept. of Educ., 9 F.3d 184, 190 (1st Cir. 1993) and Honiq v. Doe, 484 U.S. 305, 311-12, 108 S. Ct. 592, 597-98, 98 L. Ed. 2d 686 (1988)). "Exhaustion may not be required where the pursuit of administrative remedies would be futile or inadequate; waste resources, and work severe or irreparable harm on the litigant; or when the issues raised involve purely legal questions." Pihl, 9 F.3d at 190. The party raising these exceptions bears the burden of demonstrating their existence. Gardner v. School Bd. of Caddo Parish, 958 F.2d 108, 112 (5th Cir.

1992).

In this case, defendants fail to satisfy their burden with respect to establishing the existence of these exceptions. Defendants merely argue it was futile for them to proceed in the administrative proceedings. However, defendants do not attempt to demonstrate how it was futile for them to continue in the administrative proceedings. In contrast, the Court finds that the record demonstrates that it was not futile for defendants to participate in the administrative proceedings. Admittedly, the hearing officer addressed all of the issues which the parties agreed were in controversy. The only reason that the hearing officer did not address the issue of compensatory education was because the parties themselves excluded this issue from his review. Defendants simply cannot argue that it was futile to proceed with the administrative proceedings based on administrative record in this case. The Court also finds that none of the other exceptions to the rule of exhaustion are applicable on the facts of the administrative record.

The Court thus finds that defendants cannot raise the issue of compensatory education in this action for failure to exhaust administrative remedies.⁶

IV. Conclusion

Accordingly, based on the foregoing reasons, plaintiff's

⁶To the extent that this Court may be required to issue findings of fact and conclusions of law, this Memorandum will constitute the Rule 52(a) factual findings and legal conclusions.

motion for summary judgment is granted and defendants' cross-motion for summary judgment is denied. Judgment is entered in favor of plaintiff and against defendants.

An appropriate Order follows.

Clarence C. Newcomer, J.

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

NESHAMINY SCHOOL DISTRICT	:	CIVIL ACTION
	:	
v.	:	
	:	
KARLA B., individually and as	:	
parent and natural guardian of	:	
BLAKE B.	:	NO. 96-3865

O R D E R

AND NOW, this day of August, 1997, upon consideration of plaintiff's Motion for Summary Judgment, and defendants' Cross-Motion for Summary Judgment, and defendants' response to plaintiff's motion for summary judgment thereto, and a certified copy of the administrative record, and consistent with the foregoing Memorandum Opinion, it is hereby ORDERED that plaintiff's Motion is GRANTED and defendants' cross-motion is DENIED.

IT IS FURTHER ORDERED that JUDGMENT is ENTERED in favor of plaintiff and against defendants. The Clerk of the Court shall CLOSE this case for statistical purposes.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.