

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

BRANDON V., ET AL.,	:	CIVIL ACTION
	:	
	:	
Plaintiffs	:	
	:	NO. 06-4687
v.	:	
	:	
	:	
THE CHICHESTER SCHOOL DISTRICT, ET AL.,	:	
	:	
Defendants	:	

MEMORANDUM

Baylson, J.

July 25, 2007

I. Background

Plaintiffs, Brandon V. (a minor child with disabilities) and Debra P. (his parent), filed this action against the Chichester School District and Delaware County Intermediate Unit (“DCIU”),¹ alleging violations of (1) the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 et seq.; (2) Section 504 of the Rehabilitation Act of 1973 (“§ 504”); (3) 42 U.S.C. § 1983 (“§ 1983”); and (4) the due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs assert that Defendants failed to provide Brandon with a safe and appropriate education program and placement from the 2003-2004 school year to the present. (Complaint ¶ 26).

¹ DCIU is the entity that contracted with the Chichester School District to provide special education programs to students like Brandon.

Specifically, they allege that John Volikas, a DCIU employee, physically and mentally abused Brandon and other students on numerous occasions, culminating in a sexual assault on November 11, 2004 for which Volikas was arrested and pleaded nolo contendere. (Id. ¶ 27). The sexual assault, along with the lack of appropriate programming and instruction, has resulted in a significant regression in Brandon’s behavior and skills. (Id. ¶ 36). Plaintiffs seek compensatory damages, attorneys’ fees and costs.

Presently before the Court is Defendants’ motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim under 12(b)(6). The Court permitted the parties to file supplemental briefing on Brandon’s current educational situation, and on the impact of the recent Third Circuit decision, A.W. v. Jersey City Public Schools, 486 F.3d 791 (3d Cir. 2007). For the reasons set forth below, Defendants’ motion is granted in part, and denied in part.

II. Legal Standards

When deciding a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of persuading the Court that subject matter jurisdiction exists. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). The court “may not presume the truthfulness of plaintiff’s allegations, but rather must evaluate for itself the merits of the jurisdictional claims.” Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005) (brackets omitted) (quoting Mortensen v. First Fed. Sav. & Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977)).

When considering a motion to dismiss pursuant to Rule 12(b)(6), the Court may look

only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. Discussion

A. Count I - IDEA, § 504 and § 1983

Count One alleges that “Defendants failed to provide Brandon with a safe, appropriate educational program and placement . . . in violation of IDEA, Section 504 and Section 1983.” (Complaint ¶ 44). Defendants contend this Court does not have subject matter jurisdiction to hear this claim because Plaintiffs have failed to exhaust their administrative remedies.

Additionally, Defendants assert that the claim fails under 12(b)(6) because it is based on alleged criminal or tortious conduct which is not cognizable under the IDEA or § 504.

1. § 1983 Claims Predicated on IDEA and § 504

In W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995), the Third Circuit held that §1983 supplies a private right of action for plaintiffs alleging violations of the IDEA and § 504. Id. at 493-494. Recently, in A.W. v. Jersey City Public Schools, 486 F.3d 791 (3d Cir. 2007), the Third Circuit overruled this aspect of Matula, based on the Supreme Court’s decision in City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) (discussing the availability of § 1983 as a vehicle for

redressing violations of federal statutory rights and concluding that plaintiffs may not enforce the Telecommunications Act through a § 1983 action). Applying the “method of analysis outlined in Rancho Palos Verdes” to IDEA and § 504, the Third Circuit concluded that “**Congress did not intend § 1983 to be available to remedy violations of the IDEA [and Section 504].**” A.W., 486 F.3d at 803-806. Both statutes contain private judicial remedies, and there is no “textual indication” that Congress intended the remedial schemes to “complement, rather than supplant, § 1983.” Id. at 802-04. Because there is no remedy under § 1983 for violations of IDEA and § 504, the Court will **dismiss Plaintiffs’ § 1983 claims with prejudice.**

2. Claims Directly Under IDEA and § 504

Plaintiffs have also asserted claims directly under the IDEA and § 504.² As an initial matter, the Court must determine whether compensatory damages are available under either statute.

a. Availability of Compensatory Damages

I. IDEA

The IDEA provides that in a civil action, the court “shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii). The Third Circuit has yet to decide whether “appropriate relief” under the IDEA includes compensatory damages. See C.M. v. Bd. of Educ. of Union County Reg’l High Sch. Dist., 128 Fed. Appx. 876, 880 (3d Cir. 2005) (NPO) (recognizing that the Third Circuit has “not settled whether damages are recoverable in an action

² See Complaint ¶ 1 (“[Plaintiffs are] seeking compensatory damages and reasonable attorneys['] fees under the IDEA, Section 504, and Section 1983.”); Id. ¶¶ 42-44 (alleging that “Defendants failed to provide Brandon with a safe, appropriate educational program and placement . . . in violation of IDEA, Section 504 and Section 1983.”).

arising solely under IDEA”); Bucks County Dep’t of Mental Health/Mental Retardation v. Pennsylvania, 379 F.3d 61, 68 n.5 (3d Cir. 2004) (same); Hesling v. Avon Grove Sch. Dist., 428 F.Supp.2d 262, 273 (E.D. Pa. 2006) (same). The court did not have occasion to address this issue in A.W. because A.W. did not bring claims directly under IDEA or § 504. A.W., 486 F.3d at 794 n.4.

The Courts of Appeals that have addressed this issue uniformly have held that IDEA (or its predecessor) bars compensatory damages. See, e.g., Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 125 (1st Cir. 2003) (concluding money damages are not available under the IDEA because “IDEA’s primary purpose is to ensure [a free appropriate public education], not to serve as a tort-like mechanism for compensating personal injury”); Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483-86 (2d Cir. 2002) (“We therefore hold that monetary damages are not available under the IDEA.”); Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 526-28 (4th Cir. 1998) (holding that “tort-like damages” are unavailable under the IDEA because they are “inconsistent with IDEA’s statutory scheme” and “present acute problems of measurability”); Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348, 1356-57 (5th Cir. 1983) (“appropriate relief” authorized by EHA (IDEA’s predecessor) includes only prospective relief, and “a damage remedy is not generally consistent with the goals of the statute”); Crocker v. Tenn. Secondary Sch. Athletic Ass’n, 980 F.2d 382, 386-87 (6th Cir. 1992) (“appropriate relief” under EHA includes restitutionary types of relief, but not general damages for emotional injury or injury to a dignitary interest); Charlie F. v. Bd. of Educ. of Skokie Sch. Dist., 98 F.3d 989, 991 (7th Cir. 1996) (“[D]amages are not ‘relief that is available under’ the IDEA.”); Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996) (plaintiffs’ claims that defendants violated IDEA by

tightly wrapping disabled student in a blanket as a form of physical restraint may not be pursued in a § 1983 action because general and punitive damages for this type of alleged injury are not available under the IDEA); Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1275 (9th Cir. 1999) (“Although the IDEA allows courts to grant ‘such relief as the court determines is appropriate,’ ordinarily monetary damages are not available under that statute.”); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983) (recognizing that “[a]s a general rule, compensatory damages are not available under the [EHA]”).

The Court agrees with the overwhelming weight of authority that compensatory damages are generally inconsistent with the purpose and statutory scheme of the IDEA, and until the Third Circuit holds otherwise, will not recognize damages as an available form of relief in IDEA actions. Because Plaintiffs are only seeking monetary damages from Defendants, their IDEA claims are dismissed with prejudice.

ii. § 504

In Matula, the Third Circuit held that “plaintiffs may seek monetary damages directly under § 504,” based on the general presumption that all appropriate remedies are available “unless Congress has expressly indicated otherwise.” Matula, 67 F.3d at 494 (quoting Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66 (1992)). In Franklin, the Supreme Court held that monetary damages are an available remedy in a Title IX action. Because the Rehabilitation Act incorporates Title VI’s remedies, and Title IX is modeled after Title VI, the Third Circuit concluded that the Supreme Court’s “holding on Title IX in Franklin applies equally to Title VI and Section 504 cases.” Matula, 67 F.3d at 494 (quoting Rodgers v. Magnet Cove Pub. Sch., 34

F.3d 642, 645 (8th Cir. 1994)). See Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996) (“We also found in Matula that both injunctive relief and monetary damages are available under section 504.”).

The Third Circuit did not address this aspect of Matula in A.W. because, as noted above, plaintiff did not bring a claim directly under § 504. A.W., 486 F.3d at 794 n.4.³ Accordingly, **the Court** will continue to treat Matula’s holding regarding the availability of compensatory damages under the Rehabilitation Act as authoritative.

b. Failure to Exhaust Administrative Remedies

Both parties agree that Plaintiffs have failed to exhaust their administrative remedies for their IDEA and Section 504 claims.⁴ Plaintiffs claim, however, that exhaustion would be futile because they are only seeking compensatory damages which cannot be awarded in an administrative proceeding. The IDEA requires plaintiffs to exhaust all available administrative remedies before suing in federal court. 20 U.S.C. § 1415(f). Administrative exhaustion is required for Section 504 claims to the extent the claims seek relief that is also available under IDEA. 20 U.S.C. § 1415(l). See M.M. v. Tredyffrin/Easttown Sch. Dist., Civ.A.No. 06-1966,

³ Notably, in discussing the means of redress available under the Rehabilitation Act, the Third Circuit stated:

The remedies for violation of Section 504 “are coextensive with the remedies available in a private cause of action brought under Title VI. . . .” These remedies include compensatory damages, injunctive relief, and other forms of relief traditionally available in suits for breach of contract.

A.W., 486 F.3d at 804 (quoting Barnes v. Gorman, 536 U.S. 181, 185 (2002)) (emphasis added).

⁴ Because the Court is dismissing Plaintiffs’ IDEA claims with prejudice (see supra pp. 4-6), this exhaustion discussion relates only to Plaintiffs’ claims under Section 504.

2006 WL 2561242, at *8 (E.D. Pa. Sept. 1, 2006) (“Plaintiffs’ Section 504 claim requires exhaustion because the IDEA administrative process offers potential relief for the injuries that M. allegedly suffered as a result of Defendants’ discrimination.”).

The Third Circuit has held that exhaustion is excused where recourse to the administrative proceedings would be futile or inadequate, the issue presented is purely a legal question, or the administrative agency cannot grant the requested relief. Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778 (3d Cir. 1994). In Matula, the court excused plaintiffs’ failure to exhaust because they only sought compensatory damages for the school district’s refusal to evaluate, classify and provide necessary educational services for their son.⁵ The court reasoned that the “plain language” of the IDEA requires exhaustion only in “actions seeking relief ‘also available’ under IDEA,” and the “IDEA itself makes no mention” of damages as a form of relief. Id. at 496. The court also cited a “second rationale” for excusing exhaustion: the plaintiffs had already participated in several administrative hearings dealing with the disabled student’s classification and placement, and so a factual record was fully developed. Id.⁶ The only remaining issue to be resolved was damages and, therefore, further recourse to the administrative proceedings would have been futile.

⁵ Although A.W. overruled Matula with respect to a plaintiff’s ability to bring a § 1983 action to enforce IDEA and § 504, the court did not discuss Matula’s holding regarding exhaustion, and we will continue to rely on it.

⁶ In April 1993, W.B. and the school board had reached a settlement agreement, incorporating an Individual Education Plan (“IEP”) for the 1993-94 school year. Shortly thereafter, W.B. requested certain modifications to the IEP, and asked that her son, E.J., be placed in a private school. After several more administrative proceedings, the ALJ ordered the school board to pay for E.J.’s private education and sessions with a private therapist, reimburse W.B. for the cost of an independent learning disability evaluation, and provide a supplemental occupational therapy evaluation. Id. at 490.

A few courts have broadly interpreted Matula to mean that whenever a plaintiff sues under the IDEA and only requests monetary damages, exhaustion is excused. See, e.g., Colon v. Colonial Intermediate Unit 20, 443 F.Supp.2d 659, 668 (M.D. Pa. 2006) (excusing exhaustion under Matula because plaintiffs sought compensatory damages); Irene B. v. Philadelphia Acad. Charter, No.Civ.A. 02-1716, 2003 WL 24052009, at *7 (E.D. Pa. Jan. 29, 2003) (when plaintiffs have “restricted their claims . . . to compensatory and punitive damages . . . the rule of Matula dictates [that] the futility exception applies to excuse [their] failure to exhaust”); McCachren v. Blacklick Valley Sch. Dist., 217 F.Supp.2d 594, 597 (W.D. Pa. 2002) (despite defendants’ “various protestations about the propriety of first seeking administrative relief under the IDEA,” Matula “conclusively” establishes that IDEA’s exhaustion requirement does not apply to actions seeking monetary damages); Jeffery Y. v. St. Marys Area Sch. Dist., 967 F.Supp. 852 (W.D. Pa. 1997) (Matula is “dispositive” where plaintiff only seeks damages and not injunctive relief).

Other courts have narrowly read Matula as not excusing exhaustion if the factual record is undeveloped, and there are outstanding issues that could be addressed in an administrative proceeding, regardless of the type of relief sought by the plaintiff. See, e.g., Gutin v. Washington Twp. Bd. of Educ., 467 F.Supp.2d 414, 428 (D.N.J. 2006) (Matula did not mandate that “all suits for money damages are excused from the exhaustion requirement”); Blanck v. Exeter Sch. Dist., No.Civ.A. 01-1402, 2002 WL 31247983 (E.D. Pa. Oct. 2, 2002) (although plaintiff only sought monetary damages, exhaustion was not futile because the factual record was not fully developed and there were still evidentiary disputes to be resolved); Lindsley v. Girard Sch. Dist., 213 F.Supp.2d 523, 534 (W.D. Pa. 2002) (Matula did not “stand for the proposition” that exhaustion

is excused whenever a plaintiff seeks monetary damages “regardless of the factual backdrop against which that request is made”).⁷ In the absence of more precise guidance from the Third Circuit, the Court will follow this line of cases, and not excuse exhaustion if the administrative process is capable of providing Plaintiffs some form of relief, even though they have only requested compensatory damages.

In this case, the Court finds that resort to the administrative process would not be futile, and Plaintiffs are required to exhaust their § 504 claims before bringing an action in this Court. Plaintiffs have alleged that Brandon’s behavior and skills significantly regressed as a result of the abuse he suffered in the DCIU classroom during the 2003-2004 school year, and the lack of appropriate programming and instruction. (Complaint ¶¶ 36-41). The problems Plaintiffs describe in their Complaint have both an educational source and educational consequences, and are most appropriately addressed in the first instance by IDEA’s comprehensive administrative

⁷ A number of other courts have recognized that the “fact that the parties [in Matula] had already participated in various administrative proceedings . . . and the only unresolved issue was whether damages should be awarded,” was “central to the [Third Circuit’s] decision” to excuse exhaustion. Hesling v. Avon Grove Sch. Dist., 428 F.Supp.2d 262, 275 (E.D. Pa. 2006). See also M.M. v. Tredyffrin/Easttown Sch. Dist., Civ.A.No. 06-1966, 2006 WL 2561242, at *7 (E.D. Pa. Sept. 1, 2006) (distinguishing Matula because in that case, plaintiffs had undergone extensive administrative proceedings, the factual record was fully developed, and all substantive issues had been resolved); Falzett v. Pocono Mountain Sch. Dist., 150 F.Supp.2d 699, 704 (M.D. Pa. 2001) (“Two additional considerations were central to the [Matula] court’s holding. First, the parties . . . had participated in an extended series of administrative proceedings . . . which resulted in the development of an extensive factual record. . . . Second, all issues . . . other than the damages issue had been resolved by prior administrative proceedings.”).

In each of these cases, however, the plaintiffs sought relief in addition to damages, and the courts ultimately rested their decision to excuse exhaustion on these grounds. See M.M., 2006 WL 2561242, at *7 (plaintiffs sought “equitable relief in addition to damages”); Hesling, 428 F.Supp.2d at 275 (Matula was not controlling because “at least part of the relief sought by [plaintiff] - declaratory relief for violation of her rights under the IDEA - is available through the statute’s administrative proceedings”); Falzett, 150 F.Supp.2d at 705 (plaintiffs sought tuition reimbursement as well as damages).

process. Allowing Plaintiffs to “forego remedies available under IDEA that might compensate [them] for [their] alleged loss . . . is contrary [to] IDEA’s scheme, under which ‘educational professionals are supposed to have at least the first crack at formulating a plan to overcome the consequences of educational shortfalls.’” Lindsley, 213 F.Supp.2d at 537 (quoting Charlie F. v. Bd. of Educ. of Skokie Sch. Dist., 98 F.3d 989, 993 (7th Cir. 1996)). Although Plaintiffs claim they are “satisfied” with Brandon’s current educational programming (see Plaintiffs’ Letter to the Court, May 11, 2007), the administrative process is still valuable, as the IDEA and its implementing regulations provide a wide range of services that may enable Brandon to overcome the adverse effects of the abuse he suffered during the 2003-2004 school year. As the Seventh Circuit observed in Charlie F.:

Charlie’s parents believe that his current educational program is apt. . . . [I]f he is doing fine in school today, then it is hard to see what this case is about. . . . Perhaps Charlie’s adverse reaction to the events of fourth grade cannot be overcome by services available under the IDEA and the regulations, so that in the end money is the only balm. But parents cannot know that without asking, any more than we can.

98 F.3d 993. Exhaustion will also provide this Court with “a valuable record” on appeal.

Lindsley, 213 F.Supp.2d at 538. See Falzett v. Pocono Mountain Sch. Dist., 150 F.Supp.2d 699, 702 (M.D. Pa. 2001) (“[E]xhaustion . . . enables the agency to develop a factual record, to apply its expertise to the problem, to exercise its discretion, and to correct its own mistakes, and is credited with promoting accuracy, efficiency, agency autonomy, and judicial economy.”).

Accordingly, the Court concludes exhaustion would not be futile, and Plaintiffs’ § 504 claims are dismissed without prejudice.

c. Failure to State a Claim

Defendants also contend that Plaintiffs' IDEA and § 504 claims fail because tortious and criminal conduct is not within the purview of either statute. Defendants cite no authority for this proposition, nor were we able to find any. Cf. M.M. v. Tredyffrin/Easttown Sch. Dist., Civ.A.No. 06-1966, 2006 WL 2561242 (E.D. Pa. Sept. 1, 2006) (IDEA and § 504 claims predicated on teacher's severe harassment of disabled child, which culminated in the teacher deliberately stepping on his finger); Witte v. Clark County Sch. Dist., 197 F.3d 1271 (9th Cir. 1999) (IDEA claim predicated on severe physical and emotional abuse of disabled student by teachers). Accordingly, Defendants' motion to dismiss Count I pursuant to Rule 12(b)(6) is denied.

B. Remaining Counts

1. Due Process Claims (Counts II and III)

Plaintiffs also allege that Defendants violated Brandon's Fourteenth Amendment due process right to bodily integrity, based on three separate theories of municipal liability: (1) the state created a danger that resulted in a violation of Plaintiffs' constitutional rights ("state-created danger") (Count II); (2) a special relationship existed between the state and Brandon, which gave rise to an affirmative duty to protect him from harm (Count II); and (3) the Defendants established and maintained a custom, practice or policy of deliberate or reckless indifference to Plaintiffs' constitutional rights (Count III).⁸

⁸ Plaintiffs separate their due process allegations into two counts in the Complaint. Count II claims Defendants are liable under § 1983 based on the state-created danger and special relationship theories, and Count III asserts that Defendants violated Brandon's due process right to bodily integrity under § 1983. This division is analytically incorrect. The substantive due

Defendants contend that Plaintiffs' due process claims must be dismissed because Plaintiffs have not alleged that the school district acted pursuant to a custom, practice or policy. Maintaining an unconstitutional custom, practice or policy, however, is only one basis for municipal liability: "special relationship" and "state-created danger" are separate theories of constitutional liability which Plaintiffs have pled and are entitled to prove. See Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989) ("Liability of municipal policymakers for policies or customs chosen or recklessly maintained is not dependent upon the existence of a 'special relationship' between the municipal officials and the individuals harmed."); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1376 (3d Cir. 1992) ("custom, practice or policy" is a separate "theory of constitutional liability that is viable even in the absence of a special relationship duty").

Moreover, the Court concludes that Plaintiffs have sufficiently identified an unconstitutional practice, custom or policy for 12(b)(6) purposes. In their complaint, Plaintiffs allege that between October 22, 2004 and November 3, 2004, "there were at least three prior incident reports of John Volikas physically or mentally assaulting Brandon." (Complaint ¶¶ 28-32). Despite these reports, Volikas remained in Brandon's classroom, and was allowed to be alone with him in a locked bathroom stall on November 11, 2004, when the sexual assault took

process right to bodily integrity is the constitutional right at issue. "State-created danger", "special relationship", and "custom, practice or policy" are three independent theories of municipal liability for alleged violations of this constitutional right.

Count II clearly asserts the "state-created danger" and "special relationship" theories of liability, and the Court will interpret Count III as pleading the "custom, practice or policy" theory. See Complaint ¶ 51 (alleging a due process violation under § 1983, and citing Third Circuit cases that treat a "state-established policy, custom or practice" as an independent basis for liability).

place. (Id. ¶ 33). Prior to Brandon’s assault, a “wraparound coordinator” who regularly visited Brandon’s classroom reported that the “children [were] falling apart,” and Volikas was “sabotaging” Brandon’s behavioral program. (Id. ¶¶ 34-35). The coordinator also expressed concerns about the “appropriateness of the teacher’s interventions,” and his ability to “understand the specific needs of multi-handicapped children.” (Id. ¶ 34). Plaintiffs further claim that during the 2003-2004 school year, Brandon witnessed the physical abuse of another student by the classroom teacher. (Id. ¶ 34).

At this stage of the proceedings, Plaintiffs’ allegations that the school district and DCIU were deliberately indifferent to the misconduct of teachers are sufficient to satisfy the terms of Monell. Accordingly, the Court will not dismiss Plaintiffs’ due process claim based on the “special relationship”, “state-created danger”, or “custom, policy or practice” theories of municipal liability.

2. Equal Protection Claim (Count IV)

Plaintiffs also allege that Defendants purposefully treated Brandon differently from his similarly situated peers in violation of his equal protection rights under the Fourteenth Amendment. (Complaint ¶ 53). For the reasons discussed above, the Court concludes that Plaintiffs have sufficiently pled municipal liability under Monell, and therefore may proceed with this claim.

3. Loss of Consortium Claim (Count V)

Finally, Brandon’s mother, Debra P., has brought a claim for the denial of her right to the “comfort, companionship and society” of her son as a result of the abuse Brandon suffered, and “Defendants’ continual failures” to provide him with a free appropriate public education

(“FAPE”). (Complaint ¶ 56). The Court has found no authoritative precedent that would preclude such a claim, and will therefore allow Plaintiffs to pursue it.

IV. Conclusion

For the reasons stated above, Plaintiffs’ claims are disposed of as follows:

1. Plaintiffs’ § 1983 claims, alleging violations of IDEA and § 504, are dismissed with prejudice in light of A.W. v. Jersey City Public Schools, 486 F.3d 791 (3d Cir. 2007).
2. Plaintiffs’ direct IDEA claims are dismissed with prejudice because the Court concludes that compensatory damages are not an available remedy under the IDEA, and this is the only form of relief Plaintiffs seek.
3. Plaintiffs’ direct § 504 claims are dismissed without prejudice, pending Plaintiffs’ exhaustion of their administrative remedies.
4. Plaintiffs’ due process, equal protection and consortium claims will not be dismissed.

An appropriate Order follows.

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

BRANDON V., ET AL.,	:	CIVIL ACTION
	:	
	:	
Plaintiffs	:	
	:	NO. 06-4687
v.	:	
	:	
THE CHICHESTER SCHOOL DISTRICT, ET AL.,	:	
	:	
	:	
Defendants	:	

ORDER

AND NOW, this 25th day of July, 2007, it is hereby ORDERED that Defendants' Motion to Dismiss (Doc. No. 12) is disposed of as follows:

1. Plaintiffs' § 1983 claims predicated on IDEA and § 504 are dismissed with prejudice. (Count I)
2. Plaintiffs' claims brought directly under the IDEA are dismissed with prejudice. (Count I).
3. Plaintiffs' claims brought directly under § 504 are dismissed without prejudice, pending exhaustion of administrative remedies. (Count I).
4. Plaintiffs' due process, equal protection, and loss of consortium claims are not dismissed. (Counts II, III and IV).

The Court will promptly schedule a telephone conference with all parties to discuss how to proceed from this point.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.