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

J.F. and N.F., in their own behalf and on behalf of their son, D.F., a minor,	:	**CIVIL ACTION**
vs.	:	
SCHOOL DISTRICT OF PHILADELPHIA,	:	
DAVID HORNBECK, Individually and in his official capacity as Superintendent of School District of Philadelphia,	:	
ROBERT SCARCELLE, Individually and in his capacity as Principal of the Forrest School,	:	
JOHN P. GALLAGHER, Individually and in his capacity as Principal of the Loesche School,	:	
JOHN MATTHEWS, Individually and in his official capacity as Principal of the Solis-Cohen School,	:	
PENNSYLVANIA DEPARTMENT OF EDUCATION,	:	
EUGENE HICKOK, Individually and in his official capacity as Pennsylvania Secretary of Education,	:	
Defendants.	:	**No. 98-1793**

ORDER & MEMORANDUM

ORDER

AND NOW, to wit, this 7th day of April, 2000, upon consideration of Plaintiff J.F.'s and N.F.'s Motion for Summary Judgment to Preclude Defendants From Relitigating

Issues Presented to the Due Process Hearing Officer and the Special Education Officer (Doc. No. 14, filed February 5, 1999), School District Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (Doc. No. 15, filed February 16, 1999), Plaintiffs' Reply to Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (Doc. No. 16, filed February 22, 1999), Commonwealth Defendants' Motion for Summary Judgment (Doc. No. 19, filed March 5, 1999), Plaintiffs' Memorandum in Opposition to the Commonwealth Defendants' Motion for Summary Judgment (Doc. No. 21, filed April 19, 1999), Plaintiffs' Supplemental Brief in Opposition to the Commonwealth Defendants' Motion for Summary Judgment (Doc. No. 25, filed June 1, 1999), Defendants' Motion for Summary Judgment (Doc. No. 18, filed March 5, 1999), Plaintiffs Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Doc. No. 22, filed April 21, 1999), Defendants' Reply memorandum in Support of Motion for Summary Judgment (Doc. No. 23, filed May 4, 1999), and Plaintiffs' Supplemental Brief in Opposition to Defendant School District and Its Individual Defendants' Motion for Summary Judgment (Doc. No. 26, filed June 1, 1999), **IT IS ORDERED**, for the reasons set forth in the attached memorandum, that:

1. Plaintiffs' Motion for Summary Judgment to Preclude Defendants From Relitigating Issues Presented to the Due Process Hearing Officer and the Special Education Officer is **DENIED**;

2. Commonwealth Defendants' Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**, as follows:

a. Commonwealth Defendants' Motion for Summary Judgment is **GRANTED** as to Defendant Eugene Hickock in his individual capacity with respect to Count

Three of the Complaint asserting claims under the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400-1491, Count Four of the Complaint, asserting claims under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Count Seven of the Complaint, asserting claims for punitive damages;

b. Commonwealth Defendants' Motion for Summary Judgment is **DENIED** in all other respects;

3. School District Defendants' Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**, as follows:

a. School District Defendants' Motion for Summary Judgment is **GRANTED** as to School District of Philadelphia and to Defendants David Hornbeck, Robert Scarcelle, John Gallagher, and John Matthews in their individual and official capacities with respect to Counts One and Two of the Complaint asserting claims under 42 U.S.C. § 1983 and Count Five of the Complaint which the Court treats as asserting claims under 42 U.S.C. § 1983;

b. School District Defendants' Motion for Summary Judgment is **DENIED** as to School District of Philadelphia and to Defendants David Hornbeck, Robert Scarcelle, John Gallagher, and John Matthews in their official capacities with respect to Count Three of the Complaint asserting claims under the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400-1491, Count Six of the Complaint, treated as asserting claims under the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400-1491, and Count Four of the Complaint asserting a claim under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and as to Count Seven of the Complaint, seeking punitive damages;

c. School District Defendants' Motion for Summary Judgment is **GRANTED** as to Defendants David Hornbeck, Robert Scarcelle, John Gallagher, and John Matthews in their individual capacities with respect to Count Three of the Complaint asserting a claim under the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400-1491, Count Six of the Complaint, treated as asserting claims under the Individuals with Disabilities in Education Act, § 1400-1491, and Count Four of the Complaint asserting a claim under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and as to Count Seven of the Complaint, seeking punitive damages; and

4. A status conference will be **SCHEDULED** in due course.

MEMORANDUM

I. PROCEDURAL HISTORY

J.F. and N.F. ("plaintiffs") filed this action on April 3, 1998, naming as defendants the School District of Philadelphia ("District") and four employees of the District in their individual and official capacities, David Hornbeck, superintendent of schools; John Matthews, principal of the Solis-Cohen School; John Gallagher, principal of the Loesche School; and Robert Scarcelle, principal of the Forrest School (the "individual District defendants", and, together with the District, the "District defendants"), the Pennsylvania Department of Education ("Department of Education") and Eugene Hickok, the Pennsylvania Secretary of Education, in both his official and individual capacities (together with the Department of Education, the "Commonwealth defendants," and, together with District defendants, "defendants").

In their Complaint, plaintiffs assert causes of action under 42 U.S.C. § 1983 (Count One), violation of federal civil rights under "federal statutes" (Count Two),[1] the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400-1491 (Count Three), § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Count Four), plaintiffs' right to equal protection under the Fourteenth Amendment (Count Five)[2], violation of the Pennsylvania Code provisions governing interdistrict transfers of students, 22 Pa. Code § 14.31 (Count Six)[3], and a claim for punitive damages (Count Seven). In this action, plaintiffs seek compensation for injuries that D.F. allegedly suffered as a result of defendants' non-compliance with the free, appropriate public education requirement of IDEA.

Commonwealth defendants filed a motion to dismiss on June 16, 1998. On August 21, 1998, by agreement, the Court issued an Order marking Counts One, Two, Five, and Six against Commonwealth defendants as voluntarily withdrawn, denying as moot those portions

---

[1]In an Order dated August 21, 1998, this Court decided to treat Count II of plaintiffs' Complaint, alleging violations of plaintiffs' civil rights under "federal statutes," as asserting claims under 42 U.S.C. § 1983.

[2]Plaintiffs cannot bring suit against the District defendants directly under the 14th amendment. See Jaffee v. United States, 663 F.2d 1226, 1230-31 (3d Cir. 1981) (en banc) (Congress, if it so intends, can create a statutory remedy to replace a remedy arising directly under the Constitution). Therefore, the Court treats Count Five of plaintiffs' Complaint, asserting causes of action under the equal protection clause of the Fourteenth Amendment, as claims under 42 U.S.C. § 1983.

[3]22 Pa. Code § 14.31, governing interdistrict transfers of students, implements the "child find" duty that IDEA imposes on local educational agencies. See W.B. v. Matula, 67 F.3d 484, 500-01 (3d Cir. 1995) (holding that IDEA's child find duty requires school districts to identify, locate, and evaluate children who qualify under the statute). Therefore, the Court treats Count Six claim as raising claims under IDEA.

of the motion to dismiss that pertained to those four Counts, and denying those portions of the motion to dismiss that pertained to Counts Three and Four of the Complaint.

Plaintiffs filed a Motion for Summary Judgment to Preclude Defendants from Relitigating Issues Presented to the Due Process Hearing Officer and Special Education Officer on February 5, 1999. District defendants filed a response to this motion on February 16, 1999, and plaintiffs filed a reply on February 22, 1999.

District defendants filed a Motion for Summary Judgment on March 5, 1999. In response, plaintiffs filed a Memorandum in Opposition to Defendants' Motion for Summary Judgment on April 21, 1999. On May 4, 1999, the School District defendants filed a Reply Memorandum in Support of their Motion for Summary Judgment. Plaintiffs filed a Supplemental Brief on June 1, 1999.

Commonwealth defendants filed a Motion for Summary Judgment on March 5, 1999. In their motion, Commonwealth defendants stated only that plaintiffs' claims present no genuine issues of material fact and that Commonwealth defendants are entitled to judgment as a matter of law; no argument in support of this position was provided in the motion. Plaintiffs filed a Memorandum in Opposition to the Commonwealth's Motion for Summary Judgment on April 19, 1999.

II. BACKGROUND

D.F. is an eleven year-old autistic child. Plaintiffs, J.F. and N.F., are D.F.'s father and mother, respectively. During the 1995-1996 school year, D.F. attended Belmont Hills Elementary School in the Bensalem School District in Bucks County, Pennsylvania. On May 23, 1996, the Bucks County Intermediate Unit and plaintiffs prepared an Individual Evaluation

Program ("IEP") for D.F. to address his educational needs (the "May 1996 IEP"). The May 1996 IEP recommended placing D.F. in a full-time autistic support program which would include one-on-one instruction, placement in an autistic support class, speech therapy, occupational therapy, physical therapy, and adaptive physical education. The IEP also stated that D.F. was eligible for extended school year programming. That summer, in anticipation of moving to Philadelphia, J.F. called the Philadelphia School District ("District"), and was assured that the District could adequately implement the May 1996 IEP.

In September, 1996, D.F. and his family moved to the District. On September 3, 1996, J.F. attempted to register D.F. at the Forrest Elementary School ("Forrest") in the District. Plaintiffs presented officials at Forrest with proof of residency and with the May 1996 IEP. Although the officials at Forrest accepted the May 1996 IEP, the officials refused to accept the proof of residency until J.F. changed the address on his driver's license. However, plaintiffs state that, when they tried to enroll D.F.'s two older sisters at a high school and middle school in the District, the same proof of residency was deemed sufficient. On September 9, 1996, plaintiffs returned to Forrest, and produced supplemental proof of residency.

On September 15, 1996, plaintiffs requested from the District transportation for D.F. The District did not respond to this request, or to plaintiffs' inquiries regarding the May 1996 IEP. On September 26, 1996, the District sent a bus to transport D.F. to school. This bus, however, did not comply with the May 1996 IEP in that it did not have seat belts. As a result, and because plaintiffs had not yet discussed D.F.'s placement with the District, plaintiffs did not send D.F. to school that day. Instead, plaintiffs requested a meeting with the District to discuss D.F.'s education.

On October 4, 1996, plaintiffs had an opportunity to observe an autistic support class at the Loesche Elementary School ("Loesche"). Plaintiffs allege that, during their observation, there was no teacher present in the classroom, only an aide. Plaintiffs also claim that the class was too crowded and too unstructured for D.F. After the observation period, plaintiffs met with a school psychiatrist, a school counselor, and a school nurse. However, there was no autistic support teacher, and no representative from speech, occupational, or physical therapy at the meeting. During this meeting, the District offered to place D.F. in the autistic support classroom that plaintiffs had just observed. Because the classroom did not contain many of the requirements of the May 1996 IEP, plaintiffs objected, and, on October 7, 1996, requested an expedited due process hearing pursuant to IDEA.

The expedited due process hearing took place on October 28, 1996. At the due process hearing, the special education hearing officer concluded that the District failed to offer credible evidence that it could provide the program detailed in the May 1996 IEP. The District was therefore ordered to find and arrange for an appropriate program for D.F. outside of the District, at District expense. The special education hearing officer also directed the District to hold another meeting with plaintiffs to develop an IEP for D.F.

The District filed exceptions to the decision of the special education hearing officer with the special education due process appeals review panel, asserting that it could provide D.F. with an appropriate program within the District. The special education due process appeals review panel upheld that portion of the special education hearing officer's opinion finding that the District had not implemented the May 1996 IEP previously. However, the

appeals panel reversed the decision of the hearing officer to the extent that it required placement outside of the District and ordered the District to immediately implement the May 1996 IEP.

On December 19, 1996, the District offered to place D.F. in an autistic support class at the Solis-Cohen Elementary School ("Solis-Cohen"). On January 22, plaintiffs met with the staff at Solis-Cohen to discuss D.F.'s placement there. Plaintiffs' allege that when they met with the staff at Solis-Cohen, they discovered that the May 1996 IEP was not going to be fully implemented, as required by the hearing officer, and they voiced their concerns at a second meeting held January 28, 1997.

As a result of the two meetings with the staff at Solis-Cohen, plaintiffs proposed an addendum to the May 1996 IEP. The proposed addendum largely implemented the May 1996 IEP, but also proposed changes, including provision of an assistant to aid D.F. until the staff became familiar with D.F.'s program, access to a computer, and an additional 45 minutes of weekly speech therapy. The District objected to providing an assistant for D.F, but agreed to the remainder of the addendum.

On March 16, 1997, the District issued a Notice of Recommended Assignment ("NORA") for D.F., recommending D.F. be placed at Solis-Cohen. Plaintiffs approved this recommendation, and D.F. began school at Solis-Cohen on March 17, 1997. That was the first school that D.F. attended since his enrollment in the District in September, 1996.

Plaintiffs allege that during his absence from school from September, 1996 until March 17, 1997, D.F. regressed in his conduct, losing verbal skills, cognitive skills, sleep, social skills, and other life skills. During D.F.'s tenure at Solis-Cohen, his teacher reported that D.F. began biting himself, and plaintiffs report that he was using his assisted-speech device less

frequently. Plaintiffs also note that, during this time, D.F. was losing cognitive skills, losing sleep, had a shorter attention span, and experienced problems with toileting.

Under the Pennsylvania Code, plaintiffs and the District were required to develop a new IEP for D.F for the 1997-98 school year. On May 9, 1997, D.F. was examined by Dr. Vanitha Vaidya, a pediatrician employed by the District. Also present for this examination were Dianne Lewandowski and Arlene Rubin, D.F.'s occupational and physical therapist, respectively. Plaintiffs state that they cannot remember whether or not they were notified of this examination, or whether they were invited to participate. After consulting with Ms. Lewandowski and Ms. Rubin, and conducting her own, independent medical evaluation of D.F., Dr. Vaidya recommended ten half-hour sessions of physical and occupational therapy for D.F. over the course of the upcoming school year.

On May 27, 1997, a meeting was scheduled between plaintiffs and the staff at Solis-Cohen to discuss D.F.'s IEP for the 1997-1998 school year. Plaintiffs allege that, when they arrived at this meeting, they were presented with a completed IEP for D.F. (the "May 1997 IEP"). Plaintiffs claim that they were not asked for their input in preparing the May 1997 IEP, that D.F.'s teacher was not given the chance to express her thoughts on the May 1997 IEP, and that D.F.'s speech therapist was given D.F.'s records for the first time at this meeting. Plaintiffs concluded that this meeting was rushed because the staff had other IEP meetings scheduled on the same day.

Plaintiffs objected to the May 1997 IEP. Plaintiffs also complained about the District's inability to provide D.F. with summer schooling five days each week, as required by

the May 1996 IEP. Instead, the District offered a program three days each week, and agreed to make other arrangements for D.F. two days each week. Plaintiffs rejected this solution.

Plaintiffs aver that, when they voiced their concerns about the May 1997 IEP, Ms. Lewandowski told them to "fight it." However, rather than relitigating these issues at another due process hearing, plaintiffs negotiated a solution with the District placing D.F. in a private school. On September 17, 1997, D.F. began classes at the Elwyn-Davidson School, at District expense.

III. STANDARD OF REVIEW

"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 [,]" summary judgment shall be granted. Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). The Supreme Court has explained that Rule 56(c) requires "the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc.; 477 U.S. 242, 250 (1986). Therefore, "a motion for summary judgment must be granted unless the party opposing the motion can adduce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 618 (3d Cir. 1987) (citing Anderson and Celotex Corp.).

In considering a motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party. Adickes v. S.H. Kress and Co., 398 U.S.

144, 159 (1970) (quoting United States v. Diebold, 369 U.S. 654, 655 (1962). However, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Therefore, "[i]f the evidence [offered by the non-moving party] is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted). On the other hand, if reasonable minds can differ as to the import of the proffered evidence that speaks to an issue of material fact, summary judgment should not be granted.

IV. DISCUSSION

A. District defendants' motion for summary judgment

1. Exhaustion requirement

District defendants argue that plaintiffs may not proceed with their suit because they have not exhausted their administrative remedies under IDEA. They argue that the issue of compensation should have been raised at an administrative hearing in May, 1997.[4] To support this point, District defendants point to 20 U.S.C. § 1415(f), which states, in relevant part, "before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) 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(f). Subsections (b)(2) and (c) of the section, to which the above provision refers, require a state agency to conduct administrative hearings in the face of complaints under the

[4]Although the only due process hearing in this case was held in October, 1996, plaintiffs requested a second due process hearing in May, 1997. The need for the second hearing was obviated by the settlement between plaintiffs and the District.

statute. See 20 U.S.C. § 1415(b)(2)-(c). Thus, under IDEA, defendants argue that a plaintiff must pursue administrative remedies under IDEA before proceeding to federal court. Finally, defendants point to caselaw which states that this exhaustion requirement shall not be circumvented by casting the action as a § 1983 action. See W.B. v. Matula, 67 F.3d 484, 495 (3d Cir. 1995).

The Court concludes that District defendants' reliance on Matula, and on § 1415(f), is misplaced in this case. The Third Circuit has ruled that where "recourse to IDEA administrative proceedings would be futile or inadequate ...the exhaustion requirement is excused." Id. In the instant suit, plaintiffs are seeking damages to compensate them for the time that D.F. was not in school. Damages are available to plaintiffs under § 1983 in an action premised upon violation of IDEA. See id. at 494-95. However, under § 1415(f), hearing examiners do not have the power to award damages, making plaintiffs' pursuit of damages before an examiner futile. See id. at 496. In Matula, the Third Circuit held that "where the relief sought in a civil action is not available in an IDEA administrative proceeding, recourse to such proceedings would be futile and the exhaustion requirement is excused." Id. at 496. In this case, as in Matula, recourse to the administrative process to assess a damage claim would have been futile for plaintiffs because the hearing examiner did not have the authority to award damages.

Defendants rely upon the Third Circuit's holding in Matula that an IDEA action should not be recast as a § 1983 action to avoid the exhaustion requirements of IDEA. However, the court in Matula made clear that, by recasting an IDEA action as a § 1983 action, a plaintiff would be "limited to actions seeking relief 'also available' under IDEA." Id. at 496. In this case, plaintiffs are not attempting to recast an IDEA claim as a § 1983 claim. Instead, the plaintiffs are

seeking relief that IDEA does not afford them for injuries that IDEA is not designed to redress, i.e., the backward looking injuries for the time that D.F. was not in school. IDEA is concerned with the forward-looking remedies that school districts must provide in the educational system.

The Court concludes it would have been futile for plaintiffs to have pursued further administrative remedies in this case because the IDEA proceedings do not involve compensatory damages such as plaintiffs are seeking. Thus, the exhaustion requirement is appropriately excused in this case.

2. § 1983 liability

District defendants argue that this case is appropriate for summary judgment because plaintiffs have not provided evidence establishing liability under 42 U.S.C. § 1983. 42 U.S.C. § 1983 provides, in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

To establish a claim under § 1983, a plaintiff must show that "(1) the defendants acted under color of law; and (2) their actions deprived him of rights secured by the Constitution or federal statutes." Anderson v. Davila, 125 F.3d 148, 159 (3d Cir. 1997). In this case, plaintiffs allege a violation of the rights secured to them by a federal statute, IDEA, and the equal protection clause of the 14th amendment.

IDEA was passed "to assure that all children with disabilities have available to them ... a free appropriate education which emphasizes special education and related services designed to meet their unique needs." Matula, 67 F.3d at 491. The Supreme Court has held that, in passing IDEA, "Congress sought primarily to identify and evaluate handicapped children, and to provide them with a free public education." Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 200 (1982). In order to receive funds under IDEA, a state must demonstrate that all disabled children living in the state, regardless of the severity of the disability, are identified and evaluated to receive special education. See id. at 492. Pennsylvania fulfills this requirement through a regulatory scheme which is codified at 22 Pa. Code § 14 et seq.

In addition to the District, plaintiffs named as defendants the individual District defendants in their official and individual capacities. The Supreme Court has held that an official capacity suit is not a suit against an official personally, but rather against the government entity which that party represents. See Kentucky v. Graham, 473 U.S. 159 (1985). Thus, in these official capacity suits against individual District defendants, the District is the real party in interest. Accordingly, the Court's analysis of the School District's liability will also apply to the official capacity claims.

a. School District of Philadelphia and individual District defendants in their official capacities

In Monell v. Department of Social Services, 436 U.S. 658 (1978), the Supreme Court held that § 1983 liability attaches to a municipality only when a municipal official, acting with the necessary policy-making authority and with deliberate indifference to the rights of

individuals establishes or knows of and acquiesces in a policy, practice or custom which deprives individuals of constitutional or statutory rights. See Bryan County v. Brown, 520 U.S. 397, 404-05 (1997); Canton v. Harris, 489 U.S. 378, 388 (1989); Montgomery v. DeSimone, 159 F.3d 120, 126-27 (3d Cir. 1998). For purposes of § 1983, a school district is treated the same as a municipality. See Collins v. Chichester School Dist., Civ. No. 96-6039, 1997 WL 411205, at *2 (E.D.Pa. July 22, 1997).

To establish municipal liability under Monell, a plaintiff must "'identify the challenged policy, [practice or custom], attribute it to the city itself, and show a causal link between the execution of the policy, [practice or custom] and the injury suffered.'" Fullman v. Philadelphia Int'l Airport, 49 F. Supp.2d 434, 445 (E.D.Pa. 1999) (quoting Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984)). "In order to establish a claim based on a policy of inaction... plaintiffs must allege facts tending to establish a prior pattern of similar violations, contemporaneous knowledge of improper conduct, or failure to remedy continuing constitutional deprivations." Boemer v. Patterson, No. Civ. A. 86-2902, 1987 WL 13741, at *4 (E.D.Pa. July 14, 1987).

In rare instances, the Supreme Court has recognized municipal liability under § 1983 based on a single decision attributable to a municipality. See, e.g., Owen v. Independence, 445 U.S. 622 (1980); Newport v. Fact Concerts Inc., 453 U.S. 247 (1981). The Supreme Court has noted, however, that in such cases, "the evidence that the municipality had acted and that the plaintiff suffered a deprivation of federal rights also proved fault and causation." Bryan County, 520 U.S. at 405. In Owen and Fact Concerts formal decisions of municipal legislative bodies were at issue. See id. at 406. The Supreme Court concluded that the

municipal legislative body in each case had adopted a policy which injured a single individual--in Owen a hiring decision regarding the city's former police chief and in Fact Concerts a licensing decision involving a concert promoter. In those cases the Court ruled that, despite the fact that the policy in question applied only to a single plaintiff, and not to the public at large, it could nonetheless subject the municipalities to liability under Monell. These cases were not cited by the parties in this case and this Court finds them inapposite because plaintiffs have adduced no evidence of comparable action.

. Plaintiffs identified six occurrences, each of which, they argue, gives rise to municipal liability under Monell as a violation of IDEA's guarantee of a free, appropriate public education: (1) violation of the Pennsylvania Code with respect to interdistrict transfers; (2) violation of the Pennsylvania Code with respect to the composition of an IEP team on October 4, 1996; (3) violation of the Pennsylvania Code with respect to the composition of an IEP team on May 24, 1997; (4) failure to provide D.F.'s parents with notice that he would be evaluated by a pediatrician; (5) failing to consider D.F.'s individual needs; and, (6) failure to implement D.F.'s IEP. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Plaintiffs's Memorandum"), at 16. To survive summary judgment, plaintiffs must demonstrate that at least one of these occurrences is the manifestation of a policy, practice, or custom of the District, established intentionally or with deliberate indifference, which caused a violation of D.F.'s right to a free appropriate public education under IDEA. For the reasons that follow, the Court concludes plaintiffs have not presented any evidence of municipal liability under Monell for any of their § 1983 claims, and the Court grants District defendants' motion for

summary judgment as to plaintiffs' § 1983 claims against the District and the individual District defendants in their official capacities.

(1) Violation of the Pennsylvania Code with respect to interdistrict transfers

Section 14.31(c) of the Pennsylvania Code ("Code") provides:

> If an exceptional student moves from one school district in this Commonwealth to another, the new district shall implement the existing IEP to the extent possible or shall provide the services and programs specified in an interim IEP agreed to by the parents until a new IEP is developed in accordance with this section ... 22 Pa. Code § 14.31(c).

Plaintiffs argue that, in waiting a month at the beginning of the 1996-1997 school year to schedule a meeting to discuss D.F.'s IEP, District defendants violated this provision. "Contrary to the established policy [of the Department of Education], the District never scheduled a meeting with the parents to discuss D.F.'s IEP." Plaintiffs' Memorandum, at 17.

The failure to schedule such a meeting at an earlier date may or may not constitute a violation of the Code. However, plaintiffs have presented no evidence that such a violation, if it occurred, was an outgrowth of a policy, practice, or custom of the District. Plaintiffs do not point to any prior complaints received by the District regarding its interdistrict transfer policies, nor to any studies that conclude that the District is deficient in the way it handles interdistrict transfers. To the contrary, plaintiffs contend that the established policy of the District is to meet with parents to discuss implementation or development of an IEPs. Thus, the claim relating to interdistrict transfers cannot be the basis of municipal liability under Monell.

(2) Violation of Pennsylvania Code with respect to composition of the IEP team

Section 14.32(c) of the Pennsylvania Code details who must be on an IEP team to evaluate the student and develop an IEP.[5] See 22 Pa. Code § 14.32. Plaintiffs argue that, on two separate occasions in preparing D.F.'s IEPs, the District violated their rights under IDEA with regard to the composition of the IEP team. The first of these violations allegedly occurred at the October 4, 1996 IEP meeting, the second allegedly occurring at the May 27, 1997 meeting.

(a) The October 4, 1996 IEP meeting

Plaintiffs allege that the IEP team at the IEP meeting on October 4, 1996, at Loesche consisted of only the school nurse, a school psychiatrist and a school counselor. They argue that, because an autistic support teacher was not at the meeting, the District violated plaintiffs' rights under IDEA.

The Court concludes that even if plaintiffs have alleged a violation of their rights under IDEA, they have presented no evidence of a policy, practice, or custom of such violations by the District. To establish that the District has been deliberately indifferent to the rights of special education children in selecting members of an IEP team, plaintiffs point to the results of

---

[5]This team must include one or both of the student's parents; the student, if he is 18 years of age or if the parents wish him to participate; a representative of the district other than the student's teacher; one or more of the student's current teachers or, if the student is newly enrolled, a regular education teacher who provides instruction to students of the same age; the persons who initiated the screening process; a person who is familiar with the placement options in the district; a member of the multi-disciplinary evaluation team ("MDT") for the student; a member of the instructional support team ("IST"); a person qualified to conduct a diagnostic examination of the student; and, other individuals at the discretion of the parents or the district. See 22 Pa. Code §14.32(c). A single member of the team may fill more than one of the above rolls, provided that, other than the parents, there are at least two people on the IEP team. See 22 Pa. Code § 14.32(d).

target monitoring of the District by the Department of Education. Although that target monitoring disclosed that the District needed to correct a number of procedures regarding IEP conferences, the District was not criticized for not including a teacher on the IEP team. Indeed, on the forms that the Department of Education used to conduct its evaluation of the District, the space for critiquing a school district for not including teachers in an IEP conference was left blank. Thus, the target monitoring does not support this claim.

Plaintiffs adduced no other evidence that the failure to include a special education teacher on an IEP team is a policy, practice, or custom of the District. To the contrary, plaintiffs point out that any "failure to include the teacher as part of the IEP team was a violation of the policy adopted by the School District." Plaintiffs' Memorandum, at 18. Moreover, there is no evidence that the District's practice or custom was at odds with this policy. Under the evidence presented, the District cannot be held liable under Monell if an employee violates the District's own policies. Thus, plaintiffs have failed to present any evidence of municipal liability under Monell as to this claim.

(b) The May 27, 1997 IEP meeting

Plaintiffs allege that the District violated their right to a free, appropriate public education in preparing the May 1997 IEP. On May 27, 1997, plaintiffs were scheduled to have an IEP conference to discuss D.F.'s IEP for the 1997-1998 school year. They claim that, upon arriving at the meeting, they were presented with a completed IEP for D.F. for the upcoming school year, and that they had no opportunity to provide their input. Plaintiffs further state that, upon questioning some aspects of the IEP, including the amount of occupational and physical

therapy that D.F. was to receive, they were told that they had to contest the IEP if they disagreed with it.

The Court concludes that such actions cannot serve as the basis of municipal liability under Monell. In order to establish municipal liability under Monell, plaintiffs must demonstrate, among other things, that the complained-of actions caused the deprivation of their rights under IDEA. "To establish the necessary causation, a plaintiff must demonstrate a 'plausible nexus' or 'affirmative link' between the municipality's [policy,] custom [or practice] and the specific deprivation of constitutional [or statutory] right at issue." Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990).

Plaintiffs have presented no evidence that the District's actions on May 27, 1997 caused a violation of D.F.'s rights under IDEA. After negotiating about the May 1997 IEP, the District acceded to plaintiffs' wishes, and placed D.F. in a private school beginning in September, 1997. As such, the failure to include D.F.'s parents in the initial IEP conference did not result in D.F.'s being deprived of a free, appropriate public education, and plaintiffs cannot therefore establish causation.

In dealing with a similar set of facts, one other district court reached the same conclusion. See Jonathan G. v. Caddo Parish School Board, 875 F. Supp. 352 (W.D.La. 1994). In Jonathan G., the court considered the case of a special education student who had been disciplined by school authorities. See id. at 356. In response to such discipline, the student's parents sued, claiming that the discipline had violated Louisiana's regulations implementing IDEA. See id. The Court found that the school violated the regulations, but refused to hold the school district liable, because the school board's "failure to adhere to the requirements of § 458

[of the Louisiana regulations] did not cause injury to Jonathan or impede his right to receive a free appropriate education." Id. at 367. In the instant case, as in Jonathan G., any violation of the Commonwealth's regulations did not cause a violation of plaintiff's right to a free, appropriate public education as required under IDEA. Therefore, plaintiffs cannot demonstrate municipal liability under Monell on this basis.

(3) Failure to provide D.F.'s parents with notice that he would be evaluated by a physician

On May 9, 1997, D.F. was evaluated by Dr. Vaidya while he was at school. Plaintiffs argue that this evaluation was a violation of D.F.'s right to a free, appropriate public education, because they should have been notified before such an examination was to take place. Plaintiffs cannot remember being notified of this examination, but they cannot unequivocally say that they were not told about it. The purpose of such notification, according to plaintiffs, is to allow the parents to be present for such an examination, as well as to allow the doctor to obtain the child's medical records. Because this procedure was not followed, argue plaintiffs, Dr. Vaidya did not have a clear understanding of D.F.'s history, and therefore she could not properly evaluate D.F.

Plaintiffs have not presented any evidence that the District's failure to include them in such an examination caused a violation of their rights under IDEA. Dr. Vaidya's recommendations were considered and included in the May 1997 IEP. As discussed above, the May 1997 IEP was never implemented, because plaintiffs and the District agreed to place D.F. in a private school. Therefore, even if plaintiffs were not notified of Dr. Vadiya's examination, they

suffered no injury as a result, and the examination cannot be the basis of municipal liability under § 1983.

(4) Failure to provide for D.F.'s needs

As a result of her examination of D.F., Dr. Vaidya recommended reducing D.F.'s therapy sessions. Under the May 1996 IEP, D.F. was to receive 30 minutes of individual sessions and 30 minutes of group sessions for both physical and occupational therapy. In the May 1997 IEP, Dr. Vaidya recommended reducing these sessions to ten occupational therapy sessions and ten physical therapy sessions over the course of an academic year. Plaintiffs argue that such a decision was not in D.F.'s best interests, and caused him to regress, and that the decision to reduce D.F.'s therapy was not a decision based on individual need, but rather on group needs in looking at the district's resources.

As discussed above, Dr. Vaidya's recommendations became moot when plaintiffs and the District reached an agreement placing D.F. in a private school for the 1997-1998 school year. Because Dr. Vaidya's recommendations were never implemented, plaintiffs have not alleged a violation of their rights under IDEA. Accordingly, such a claim cannot serve as the basis of the District's liability under § 1983.

(5) Failure to implement D.F.'s IEP

Plaintiffs contend that the District violated their right to a free, appropriate public education by failing to implement the May 1996 IEP. They point to the fact that D.F. received only 14 sessions of occupational therapy between March 18, 1997 and June 6, 1997, as opposed to the 22 prescribed by the IEP. Similarly, plaintiffs point to the fact that D.F. received only 9 sessions of physical therapy during the same period, also fewer than the IEP prescribes.

On this issue, plaintiffs rely on the testimony of Isadore Harris, the Supervisor of Special Education for the Chain Cluster in which D.F. was located, that, in the past, the District received complaints about underproviding occupational and physical therapy. Through the following testimony, plaintiffs seek to establish that the District has a policy, practice, or custom of underproviding occupational and physical therapy to special education students:

Q. Is there any policy or memorandum dealing from your department as to the amount of PT [physical therapy] or OT [occupational therapy] that individual students would get, special ed. students?

A. No, not that I know of.

Q. Do you know how much PT or OT people would be getting in the Loesche School, the autistic children?

A. It's stated on their IEPs.

* * *

Q. Prior to '96, '97, did you ever receive any complaints from any parents with respect to IEPs relating to PT and OT?

A. Sure.

Q. What do you do with respect to those complaints?

A. Meet with the parents to see what the problem is.

Q. Did you ever have a case where the parent was complaining there was too little OT and PT, that their child needed more?

A. Sure.

Q. Do you know what happened as a result of those meetings?

A. Yes.

Q. What happened?

A. We would first meet with the parent and the therapist and discuss what the doctor recommended and what the therapist recommended, was there a need for anymore and if I felt there might be some discrepancies I would ask that the doctor do another evaluation of the child to see if we should increase the amount of therapy and usually that's the only way you can tell whether a child needs to have an increase in therapy is to have a reevaluation. After reevaluation was done we have another IEP conference with the parent, we write a report, first a CER and ask the parent for input and all that kind of stuff that goes along with it and we invite the parent in for an IEP conference.

Plaintiff's Memorandum, Exhibit P, pp. 31-2.

This testimony fails to establish the existence of a policy, practice, or custom on the part of the District regarding underprovision of occupational or physical therapy. The mere existence of prior parental complaints is insufficient to establish such a policy, practice, or custom, because Harris' testimony discloses that the District does not deliberately ignore parental complaints. Accordingly, any violation of plaintiffs' rights under IDEA in underproviding occupational or physical therapy is not the result of deliberate indifference on the part of the District, and plaintiffs cannot establish District liability under § 1983 on this ground.

b. Individual District defendants in their individual capacities

"A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior." Rode v. Dellarciprete, 845 F. 2d 1195, 1207 (3d Cir. 1988); see Parratt v. Taylor, 451 U.S. 527, 537 n.3 (1981). To show personal involvement, a plaintiff must prove participation in, personal direction of, or knowledge of and acquiescence in the alleged violation. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1293 (3d Cir. 1997); Baker v. Monroe Twp, 50 F.3d 1186, 1190-91 (3d Cir. 1995). Thus, to demonstrate liability against any of the individual District defendants in their individual capacities, plaintiffs must do more than show that those defendants were in a

supervisory position; plaintiffs must demonstrate participation, personal direction of the complained-of conduct or knowledge of and acquiescence in the complained-of conduct for each defendant.

District defendants argue that the individual District defendants are immune from suit under the doctrine of qualified immunity. Qualified immunity shields officials, acting in an individual capacity, from suit. See Matula, 67 F.3d at 499. The Supreme Court has held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "Before determining whether defendants enjoy qualified immunity in their individual capacities, [a court] must determine whether plaintiffs have alleged a constitutional or statutory violation. If so, defendants will nevertheless not be liable if their conduct does not violate clearly established constitutional rights of which a reasonable person would have known" Matula, 67 F.3d at 499 (internal citations omitted).

The first step in a qualified immunity claim involving multiple defendants is to address

> the specific conduct of each of the individual defendants in determining whether that particular defendant acted in an 'objectively unreasonable' manner. ...[T]he determination of whether a government official has acted in an objectively reasonable manner demands a highly individualized inquiry.... '[T]he question is whether a reasonable public official would know that his or her specific conduct violated clearly established rights.... Thus, crucial to the resolution of any assertion of qualified immunity is a careful examination of the record ... to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant.' Rouse v. Plantier, 182 F.3d 192, 200 (3d Cir. 1999) (quoting Grant v. City of Pittsburgh, 98 F.3d 116, 121-22 (3d Cir. 1996).

Thus, this Court must examine the conduct of each of the individual District defendants to determine whether he has acted in an objectively unreasonable manner.

"[T]o defeat a qualified immunity defense in an IDEA action, a plaintiff must show more than that he or she was denied a free, appropriate public education in a general sense; rather, a plaintiff must demonstrate 'that the particular actions taken by defendants were impermissible under law established at that time.'" Id. at 499-500 (quoting P.C. v. McLaughlin, 913 F.2d 1033, 1040 (2d Cir. 1990). With these standards in mind, the Court will turn to each of the individual District defendants.

(1) David Hornbeck

David Hornbeck was, at all times relevant to this matter, the Superintendent of the Philadelphia School District. In such a role, he had the responsibility to implement and/or execute the policy of the School Board. Plaintiffs argue that, because he is responsible for implementation of District policies regarding disabled children, Hornbeck is responsible for any violations of these policies. However, plaintiffs have offered no evidence that Hornbeck participated in, personally directed or knew about and acquiesced in such violations. Instead, plaintiffs seek to hold Hornbeck liable for violations committed by officials of the District operating under his auspices. This amounts to respondeat superior liability, which cannot be the basis of liability under § 1983.

Plaintiffs specifically allege that Hornbeck violated IDEA by not having enough autistic support classrooms and teachers in the District. However, plaintiffs have presented no evidence to support this position. Instead, they point only to Hornbeck's deposition in which he acknowledges that a shortage of autistic classrooms and teachers was brought to his attention. In

response to this shortage, he said he requested increased funding for additional autistic teachers in the next year. Although IDEA requires the Commonwealth and the District to provide a free, appropriate public education, it does not require the Commonwealth or the District to provide a perfect education. Accordingly, as long as Hornbeck attempted to correct the shortage and provide appropriate autistic classrooms and teachers, he has not violated his responsibilities under IDEA. As such, the Court grants District defendants' motion for summary judgment as to the § 1983 claims against Hornbeck in his individual capacity.

(2) Robert Scarcelle

Robert Scarcelle was the principal at Forrest when plaintiffs unsuccessfully attempted to enroll D.F. on September 3, 1996. Plaintiffs contend that the staff at Forrest had an obligation which they violated to place D.F. in a suitable classroom, and that Scarcelle, as principal, is liable for such a violation.

In Matula, the Third Circuit held that "children [covered by IDEA] must be located and evaluated within a reasonable time, and ... a school official who failed to carry out his or her ... duty within a reasonable time would understand that what he is doing violates that duty.'" 67 F.3d at 501. However, plaintiffs have offered no evidence that Scarcelle participated in, personally directed or knew of and acquiesced in the violation. Therefore, the Court grants District defendants' motion for summary judgment as to plaintiffs' § 1983 claims against Scarcelle in his individual capacity.

(3) John Gallagher

John Gallagher was, at all times relevant to this matter, the principal at the Loesche School, at which D.F. was originally placed. Plaintiffs allege that Gallagher violated

their right to a free, appropriate public education for D.F. by not having an autistic support teacher present at the IEP meeting on October 4, 1996. District defendants argue that there is no evidence that Gallagher had any knowledge of the October 4th meeting, and that Gallagher is therefore entitled to summary judgment on the § 1983 claims against him.

The Court concludes that Gallagher is entitled to summary judgment on the § 1983 claims against him in his individual capacity. First, the Court will address the question of whether the October 4th meeting was an IEP conference. An IEP is "a written plan for the appropriate education of an exceptional student." 22 Pa. Code § 14.31(b). An IEP conference is one at which the IEP team must "develop an IEP for a student ..., and arrive at a determination of educational placement or continuation of educational placement for a student ...." 22 Pa. Code. § 14.32(b). Not every meeting between an exceptional child's parents and District officials constitutes an IEP conference; only those meetings which the Code mandates for development of a new IEP are IEP conferences. See 22 Pa. Code § 14.31.

Barry Cardonick, the school counselor at the Loesche School in the fall of 1996, testified during his deposition in this case that the October 4th meeting was not an IEP conference, because it was not called to develop a new IEP for D.F; the purpose of the October 4th meeting was to discuss the implementation of the May 1996 IEP in the District, a process permitted by 22 Pa. Code. § 14.31(c). Based on the evidence presented, the Court concludes that the October 4th meeting was not an IEP conference under the Code, and therefore the composition of the team at the meeting did not have to comply with § 14.32.[6]

[6]22 Pa. Code. § 14.32 governs the composition of an IEP team. The requirements are set forth in footnote 4 above.

In addition, plaintiffs have offered no evidence that Gallagher either personally selected the members of the team for the October 4th meeting or that he knew of and acquiesced in the composition of the team at that meeting. Because the Court concludes that the October 4th meeting was not an IEP meeting within the meaning of the Code, and because plaintiffs have offered no evidence that Gallagher was responsible for any violation that might have occurred, the Court grants District defendants' motion for summary judgment as to the § 1983 claims against Gallagher in his individual capacity.

(4) John Matthews

John Matthews was, at all times relevant to this matter, principal of Solis-Cohen, which D.F. attended. Plaintiffs allege that defendant Matthews has violated D.F.'s right to a free, appropriate public education by failing to implement the May 1996 IEP in that D.F did not receive the required sessions of physical and occupational therapy.

To the extent that such a violation occurred, plaintiffs have not pointed to any evidence that Matthews participated in, personally directed or knew of and acquiesced in the violation. Therefore, the Court grants District defendants' motion for summary judgment as to the § 1983 claims against Matthews in his individual capacity.

3. Rehabilitation Act, § 504

Plaintiffs also assert claims against District defendants for violations of § 504 of the Rehabilitation Act. Section 504 of the Rehabilitation Act provides, in relevant part: "No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in,

be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance." 29 U.S.C. § 794(a) ("§ 504").

District defendants argue that the Court should grant summary judgment as to plaintiffs' § 504 claims because the exhaustion requirements applicable to claims under IDEA are also applicable to § 504. This statement of the law is plainly incorrect. The Third Circuit recently held that, where a § 504 claim is asserted against any party other than a federal employer, there is no exhaustion requirement. See Freed v. Consolidated Rail Corporation, 201 F.3d 188, 194 (3d Cir. 2000); Jeremy H. v. Mount Lebanon School Dist., 95 F.3d 272, 281 (3d Cir. 1996). Therefore, plaintiffs were not required to exhaust their administrative remedies before bringing suit under § 504.

The Court will next address the substance of plaintiffs'§ 504 claims. The federal regulations implementing § 504 require schools receiving federal financial assistance to provide a free appropriate public education for any qualified, handicapped individual residing in that school district. See Matula, 67 F.3d at 493; 34 C.F.R. § 104.33(a). The Third Circuit has held that "[t]here appear to be few differences, if any, between IDEA's affirmative duty and § 504's negative prohibition." Matula, 67 F.3d at 492-93.

District defendants argue that there must be something more than a substantive error in the creation of an IEP for liability under § 504 to attach; according to District defendants, plaintiffs must show that a defendant acted with bad faith or gross misjudgment for liability under § 504 to be appropriate. The Supreme Court has held that the discrimination that § 504 is designed to prevent is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference--of benign neglect." Alexander v. Choate, 469 U.S. 287, 295

(1985). As a result of this stated purpose, the Third Circuit has held that "a plaintiff need not establish that there has been an intent to discriminate in order to prevail under § 504." Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368 (3d Cir. 1991); see Ridgewood Board of Ed. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999).

To establish a violation of § 504 as it relates to IDEA, a plaintiff must prove that: "(1) he is disabled as defined by the Act; (2) he is otherwise qualified to participate in school activities; (3) the school or the board of education receives federal financial assistance; and, (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school." Ridgewood, 172 F.3d at 253. In addition, the plaintiff must demonstrate the defendants knew or should reasonably have been expected to know of plaintiff's disability. See id.

In the instant case, there is little question that the first three criteria set forth in Ridgewood are satisfied: both sides admit that D.F. is disabled under the Act, that he is otherwise qualified to participate in school activities, and that the District receives federal financial assistance. In addition, there is no question that the District knew or reasonably should have known of D.F.'s disability, as D.F.'s parents made the District aware of that disability before, and again upon, moving into the District.

The question that remains is whether D.F. was excluded from participation in, denied the benefits of, or subject to discrimination at, school by the District. Unlike § 1983, there is no prohibition on respondeat superior liability under § 504. See Bonner v. Lewis, 857 F.2d 559, 566 (9th Cir. 1988); Woolfolk v. Duncan, 872 F. Supp. 1381, 1393 n.23 (E.D.Pa.

1995); Patton v. Dumpson, 498 F. Supp. 933, 941-43 (S.D.N.Y. 1980). Therefore, the District can be liable for acts of its employees.

Viewed in the light most favorable to plaintiffs, the record reveals genuine issues of material fact as to whether the District violated plaintiffs' rights under § 504. For instance, plaintiffs presented evidence that, at the beginning of the 1996-97 school year, the District enrolled D.F.'s sisters, but demanded further proof of residency for D.F., delayed scheduling a meeting with D.F.'s parents to discuss implementing D.F.'s IEP in September, 1996, and failed to provide D.F. with the hours of occupational and physical therapy specified in the May 1996 IEP. Moreover, plaintiffs have presented evidence that these events caused D.F. to regress in his cognitive skills, social skills, and verbal skills, including using his assisted speech device and biting himself.

All of this evidence, viewed in the light most favorable to plaintiffs, raises genuine issues of material fact as to whether D.F. was excluded from participation in, denied the benefits of, or suffered discrimination at, school by the District in violation of § 504. Thus, the Court denies District defendants' motion for summary judgment as to plaintiffs' claims under § 504 against the District and the individual District defendants in their official capacities.

Unlike the District, the individual District defendants cannot be liable under § 504 for violations of IDEA. The growing consensus among courts considering the issue is that § 504 does not allow for individual liability. See Fitzpatrick v. Commonwealth of Pa. Dep't. of Transp., 40 F. Supp.2d 631, 636-38 (E.D.Pa. 1999) (collecting cases nationwide which hold that § 504 does not create individual liability); Salisbury Twp. School Dist. v. Jared M., No. Civ. A. 98-6396, 1999 WL 562753, at *4 (E.D.Pa. July 22, 1999). This Court agrees with the reasoning

of the courts in Fitzpatrick and Salisbury Twp., and concludes that the individual District defendants cannot be liable under § 504. Therefore, the Court grants District defendants' motion for summary judgment as to plaintiffs' § 504 claims against the individual District defendants in their individual capacities.

4. IDEA

IDEA secures to covered students the right to a free, appropriate public education. See Matula, 67 F.3d at 491. The threshold question raised by District defendants' motion with respect to IDEA is whether a private cause of action exists against the District or the individual District defendants under that statute. The Fourth Circuit has held that local educational agencies, such as the District, can be liable under IDEA. See Gadsby v. Grasmick, 109 F.3d 940, 955 (4th Cir. 1997). The Third Circuit has not directly addressed this question, but in Beth V. v. Caroll, 87 F.3d 80 (3d Cir. 1996), the court held that a private cause of action exists against the Commonwealth of Pennsylvania under IDEA. See id. at 87-88. The Beth V. court also noted that "Congress' reliance on a private action as one of the principal enforcement mechanisms of the rights guaranteed under IDEA is demonstrated by its prompt enactment of a 1989 amendment to IDEA which makes express its abrogation of the states' Eleventh Amendment immunity from suit." Id. at 88. Thus, the Court concludes that IDEA creates a private cause of action and that the District and the individual district defendants in their official capacities can be liable for violations of IDEA.

The Court must next turn to the question of whether plaintiffs presented evidence sufficient to raise genuine issues of material fact under IDEA. "There appear to be few differences, if any, between IDEA's affirmative duty and § 504's negative prohibition." Matula,

67 F.3d at 492-93. The Court has already ruled that plaintiffs have raised genuine issues of material fact as to violations of § 504. See IV.A.4., supra. This same evidence raises genuine issues of material fact as to violations of IDEA. Accordingly, the Court denies District defendants' motion for summary judgment as to the District and the individual District defendants in their official capacities.

IDEA also provides for individual liability of officials in their individual capacities for substantive violations of IDEA. See Padilla v. School Dist. No. 1 in the City and County of Denver, Colo., 35 F. Supp.2d 1260, 1269 (D. Colo. 1999); Salisbury Twp. School Dist., 1999 WL 562753, at *4. However, plaintiffs have directed this Court to no authority, nor can the Court find any authority, holding that individual liability under IDEA can be supervisory in nature. Given this lack of authority, the Court declines to extend IDEA's individual liability to supervisory settings without some evidence of participation, personal direction, or knowledge of and acquiescence in such violations, and there is no such evidence in this case. In considering plaintiffs' § 1983 claims, the Court has already concluded that plaintiffs cannot meet such a standard with respect to any of the individual District defendants in their individual capacities. Accordingly, the Court grants District defendants' motion for summary judgment as to plaintiffs' IDEA claims against the individual District defendants in their individual capacities.

5. Punitive damages

Defendants also move for summary judgment as to Count Seven of the Complaint seeking punitive damages. The Court concludes that punitive damages are permitted under § 504 of the Rehabilitation Act. See Saylor v. Ridge, 989 F. Supp. 680, 690 (E.D.Pa. 1998); Merchant v. Kring, 50 F. Supp.2d 433, 436 (W.D.Pa. 1999). Such damages may be awarded if the

complaining party demonstrates that a defendant engaged in a discriminatory practice with malice or with reckless indifference to the rights of a protected individual. See Doe v. Shapiro, 852 F. Supp. 1246, 1255 (E.D.Pa. 1994).

Plaintiffs presented no evidence that the District acted with malice toward D.F. However, plaintiffs have adduced evidence that raises genuine issues of material fact with respect to the issue of reckless indifference. The Third Circuit has noted that, although ill-defined, the concept of reckless indifference falls somewhere between intent, which includes proceeding with knowledge that the harm is substantially certain to occur, and negligence, which involves the mere unreasonable risk of harm to another. See Morse v. Lower Merion School Dist., 132 F.3d 902, 910 n.10 (3d Cir. 1997).

Plaintiffs presented evidence that the District refused to enroll D.F. in the District despite knowing about D.F.'s disability, that the District delayed in scheduling a meeting with plaintiffs about D.F.'s placement, and that the District underprovided the therapy to which D.F. was entitled under the May 1996 IEP. The Court concludes that such conduct could rise to more than negligence as the Morse court defined it. Therefore, the Court denies District defendants' motion for summary judgment as to Count Seven of the Complaint seeking punitive damages as to the District and the individual District defendants in their official capacities.

Because the Court has granted summary judgment on the Rehabilitation Act and IDEA claims as to the individual District defendants in their individual capacities, the Court grants District defendants' motion for summary judgment on Count Seven of the Complaint as to those defendants in their individual capacities.

B. Commonwealth defendants' motion for summary judgment

1. IDEA claims

Plaintiffs allege that the Commonwealth and Secretary Hickock--the Commonwealth defendants--violated their duties under IDEA by not monitoring the District to ensure that the District was in compliance with IDEA. IDEA places the responsibility for monitoring local school districts for compliance on the participating states. See 20 U.S.C. § 1412(6). The Commonwealth, under IDEA,

> shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children within the state, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet education standards of the State educational agency. Id.

In Beth V., the Third Circuit held that a private right of action exists under this provision for the failure of the Commonwealth to investigate and timely resolve complaints under this provision. See 87 F.3d at 88.

Commonwealth defendants argue that plaintiffs' IDEA claims are appropriate for summary judgment because there are no genuine issues of material fact. However, Commonwealth defendants have not briefed the issue or provided any other support for this argument. Plaintiffs have presented evidence that the Department of Education began target monitoring of the Philadelphia School District's compliance with IDEA in 1994, but failed to pursue the violations that were found. Yet § 1412(6), quoted above, places the burden of pursuing and correcting such violations squarely on the Commonwealth defendants. As such, the Court concludes that plaintiffs have raised genuine issues of material fact as to the liability of the

Commonwealth and Hickock in his official capacity, and the Court therefore denies Commonwealth defendants' motion for summary judgment as to plaintiffs' IDEA claims against them.

As discussed above, IDEA allows for individual liability of officials in their individual capacities for substantive violations of IDEA. See Padilla, 35 F. Supp.2d at 1269. However, the Court declines to extend IDEA's individual liability to supervisory settings without some evidence of participation, personal direction, or knowledge of and acquiescence in such violations, and there is no such evidence in this case. Plaintiffs have offered no evidence that Hickock participated in, personally directed, or knew of and acquiesced in the Department of Education's claimed failure to monitor the District. Accordingly, the Court grants Commonwealth defendants' motion for summary judgment as to plaintiffs' IDEA claims against Hickock in his individual capacity.

2. Rehabilitation Act, § 504

There is little difference between the affirmative duties of IDEA and the negative prohibitions of § 504. See Matula, 67 F.3d at 492-93. Thus, in raising genuine issues of material fact as to violations of IDEA, plaintiffs have also alleged genuine issues of material fact as to violations of § 504, and the Court denies Commonwealth defendants' motion for summary judgment as to plaintiffs' § 504 claims against the Commonwealth and Hickock in his official capacity.[7]

[7]The Court notes that, in light of the Supreme Court's recent decision in Kimel v. Florida Board of Regents, 120 S.Ct. 631 (2000), there is a question whether § 504 applies to the Commonwealth. However, because the Commonwealth did not raise this argument, and it is not covered in the briefs, the Court will not decide it at this time.

As discussed above, § 504 does not provide for individual liability. See Fitzpatrick, 40 F. Supp.2d at 636-638. Therefore, the Court grants Commonwealth defendants' motion for summary judgment on plaintiffs' § 504 claims against Hickock in his individual capacity.

C. Plaintiffs' motion for summary judgment

Plaintiffs argue that this Court should preclude District defendants from relitigating the findings of fact contained in the special education hearing officer's decision dated November 2, 1996 and the following three conclusions of law of both the special education hearing officer and the special education due process review panel: (1) that the School District was not prepared to implement the May 1996 IEP at the Loesche School; (2) that the Loesche School violated Basic Education Circular 12-89, and 22 Pa. Code § 14.32(c)(4) causing D.F. to regress in his toileting skills, self-abuse and social skills, disrupting D.F.'s sleep patterns, and causing D.F.'s increased reliance on family members; and, (3) that the School District of Philadelphia did not dispute any components of the prior IEP. The Court notes that even though the issues in question in this case were decided by administrative hearing officers rather than a court of law, issue preclusion may apply if the applicable criteria are met.

The Supreme Court has explained that giving preclusive effect to the findings of an administrative agency serves the underlying purposes of issue preclusion which include "both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources." University of Tenn. v. Elliott, 478 U.S. 788, 798 (1986). The Court further held that "'[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an

adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966)). In the present case, it is clear that the hearing officer was acting in a judicial capacity to resolve issues which were properly before him. It is also clear that the parties had an adequate opportunity to litigate at the hearing since they were given the right to representation by an attorney, the ability to present witnesses, and the right to cross-examine witnesses. However, there are other conditions that must be met in order to apply issue preclusion in this case.

Federal courts must give a state administrative decision the same preclusive effect as would the courts of the state. Edmundson v. Borough of Kennet Square, 4 F.3d 186, 189 (3d Cir. 1993) (citing Kremer v. Chemical Constr. Corp., 456 U.S. 461, 479-85 (1982); see 28 U.S.C. § 1738 (1988) (implementing the Full Faith and Credit Clause). For unreviewed state agency decisions, Pennsylvania courts apply issue preclusion when four conditions are met: (1) the issue determined in the prior action is the same as that in a subsequent action; (2) the party against whom the defense is invoked is identical to or in privity with the party in the first action; (3) the previous judgment is final on the merits; and, (4) the party had a full and fair opportunity to litigate on the merits. Swineford, 15 F. 3d 1258, 1267 (3d Cir. 1994) (citing Safeguard Mut. Ins. Co. v. Williams, 463 Pa. 567, 345 A.2d 664, 668 (Pa. 1975)). The main question that arises in the instant case is whether the first condition--that the issue determined in the prior action is the same as the issue before the Court in the present action--is satisfied.

The Third Circuit has explained that in considering whether issue preclusion is appropriate in a Pennsylvania case, "reviewing courts must look beyond the superficial similarities between the two issues to the policies behind the two actions. Only where the two

actions promote similar policies will the two issues be identical for purposes of issue preclusion." Id. at 1267-68 (citing Ogders v. Commonwealth Unemployment Compensation Bd. of Review, 525 A.2d 359, 364 (Pa. 1987)) (internal citations omitted). This Court must therefore determine whether the policies promoted by the due process hearings were similar to those underlying the present damages action.

Turning to this case, the purpose of the expedited due process hearing was to determine whether the School District of Philadelphia could provide the program outlined in the May 23, 1996 IEP. The expedited due process hearing was requested by plaintiffs with the goal of placing D.F. in an adequate educational program. Although the special education hearing officer made factual findings related to the consequences of the school board's inaction, they were made for the purpose of reaching a forward-looking decision about D.F.'s future education. IDEA's primary concern is with the education that a student is going to receive in the future. On the other hand, the focus of the present action is the determination of damages for alleged statutory violations by the District--that is, the backward-looking past provision of education to D.F, as opposed to the forward-looking concerns of IDEA. Therefore, the two actions deal with separate issues, and applying issue preclusion would be inappropriate.

Moreover, in this case, the District faces claims for damages, whereas in the administrative proceeding it faced only the decision of the hearing examiner adjusting upward or downward its responsibilities to D.F. As such, the District has a greater monetary stake in the outcome of the instant proceeding that with respect to the administrative proceeding. See Sewall v. Taylor, 672 F. Supp. 542, 544 (D. Me. 1987) ("Defendant's potential liability in the state administrative proceeding is far less than it is in a suit for unlawful discharge pursuant to 42

U.S.C. § 1983."). Because the policies underlying the Special Education Hearing and this civil action are sufficiently different, the Court concludes that Pennsylvania courts would not apply issue preclusion in the instant case.

In order to apply issue preclusion in the instant case, all four conditions outlined in Swineford must be met. Because plaintiffs failed to establish the first condition, the Court denies plaintiffs' motion for summary judgment.

V. CONCLUSION

Plaintiffs' motion for summary judgment is denied.

District defendants' motion for summary judgment is granted as to plaintiffs' § 1983 claims against the District and the individual District defendants in their individual and official capacities, denied as to plaintiffs'§ 504 claims against the District and the individual District defendants in their official capacities, granted as to plaintiffs' § 504 claims against the individual District defendants in their individual capacities, denied as to plaintiffs' IDEA claims against the District and the individual District defendants in their official capacities, granted as to plaintiffs' IDEA claims against the individual District defendants in their individual capacities, denied as to plaintiffs' claims for punitive damages against the District and the individual District defendants in their official capacities, and granted as to plaintiffs' claims for punitive damages against the individual District defendants in their individual capacities.

Commonwealth defendants' motion for summary judgment is denied as to plaintiffs' claims under IDEA and § 504 against the Commonwealth and Hickock in his official capacity, and granted as to plaintiffs' IDEA and § 504 claims against Hickock in his individual capacity.

BY THE COURT:

_____

JAN E. DUBOIS, J.