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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KATHY S. GARDNER, CLERK
KANAWHA CO. CIRCUIT COURT

THOMAS P. STURM,
Plaintiff,

v.

Civil Action No. 06-C-617
JUDGE TOD J. KAUFMAN

THE BOARD OF EDUCATION OF
KANAWHA COUNTY, WEST VIRGINIA,
Defendant.

ORDER GRANTING DEFENDANT KANAWHA COUNTY BOARD OF EDUCATION'S RENEWED MOTION TO DISMISS - Case dismissed (TK)

Pending before this Court is Defendant, Kanawha County Board of Education's Renewed Motion to Dismiss. For the reasons outlined below, this Court grants Defendant's Renewed Motion to Dismiss as to the remaining state law claims because the plaintiff failed to properly exhaust his administrative remedies.

FINDINGS OF FACT

1. Plaintiff, Thomas Sturm attended the public schools of West Virginia and graduated from Sissonville High School in May 2004. **(Plaintiff's Complaint ¶ 2-6).** The Plaintiff alleges that his IEPs violated Policy 2419 and Individuals with Disabilities Act (IDEA). **(Plaintiff's Complaint ¶ 12).** Plaintiff alleges that the education provided to him was defective for various reasons. **(Plaintiff's Complaint ¶ 11-18).** Notwithstanding these defects, the plaintiff graduated in the spring of 2004. **(Plaintiff's Complaint ¶ 18).** The plaintiff was awarded Social Security Income benefits on July 29, 2005 after finding that he was functionally illiterate, unable to perform activities within a schedule, unable to maintain regular attendance and had no vocationally past relevant work. **(Plaintiff's Complaint ¶ 19).**

2. The plaintiff filed his Complaint on April 4, 2006, after attaining the age of maturity,

alleging violations of the *Individuals with Disabilities Education Act*, Section 504 of the *Rehabilitation Act, Americans with Disabilities Act*, Section 1983 of the *Civil Rights Act, the West Virginia Human Rights Act*, and *West Virginia Code* §18-1-4. The defendant removed this case to the Untied States District Court for the Southern District of West Virginia, Charleston Division, pursuant to 28 U.S.C. § 1452(a) on the grounds that some of the plaintiff's claims were based on the federal statutes and laws. The Defendant filed a Motion to Dismiss based on the fact that the plaintiff failed to exhaust his administrative remedies under Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C. 791 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. United States District Chief Judge David A. Faber dismissed all of the plaintiff's federal law claims without prejudice, finding that the plaintiff failed to exhaust his administrative remedies prior to filing this action, and remanded the remaining claims back to the Kanawha County Circuit Court to assess the validity of the plaintiff's state law claims.

3. Defendant filed a Renewed Motion to Dismiss with this Court, pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*, requesting dismissal of the remaining state law claims. Defendant argued that the plaintiff cannot maintain this action since he failed to exhaust his administrative remedies provided for in the Regulations for the Education of Exceptional Students (Policy Bulletin 2419) 126 C.S.R.§16. The Defendant also requested the Court to dismiss the plaintiff's state law claims for punitive damages, pursuant to *West Virginia Code* §29-12A-7, if the Court permitted the plaintiff to proceed in this action. Further, the Defendant requested this Court to award its attorneys' fees incurred in defending this action based on the fact that even though the federal court dismissed the plaintiff's federal law claims, the plaintiff refused to voluntarily dismiss the remaining state law claims and United States District Chief Judge David A. Faber

statement that "Should the state court dismiss all of the plaintiff's state law claims for procedural reasons, it may want to consider awarding attorneys' fees."

4. The Plaintiff has not responded to Defendant, Kanawha County Board of Education's Renewed Motion to Dismiss and the hearing on this motion was scheduled for March 1, 2007 at 8:30 a.m.

CONCLUSIONS OF LAW

1. This Court must determine whether the plaintiff has stated a claim upon which relief may be granted. "A trial court may dismiss a pleading for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*." *Collia v. McJunkin*, 178 W.Va. 158, 159, 358 S.E.2d 242, 243 (1987). *Collia v. McJunkin*, 178 W.Va. 158, 159, 358 S.E.2d 242, 243 (1987). "The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint." *Id.* (citing *Mandolidis v. Elkins Indus., Inc.*, 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978); *John W. Lodge Dist. Co. v. Texaco, Inc.*, 161 W.Va. 603, 604-05, 245 S.E.2d 157, 158 (1978)). Pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*, dismissal is proper where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which could entitle him to relief." *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104, 110 (1996) (quoting *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1997)) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957)).

2. The *Individuals with Disabilities Education Act* provides that children with disabilities are entitled to a "free and appropriate public education" ("FAPE"). 20 U.S.C.A. §1400, *et seq*. The IDEA requires that a parent, before bringing a suit for violations of the IDEA, must exhaust the administrative remedies and procedural safeguards that have been put into place by the

state's agency. The IDEA also provides that when a child reaches the age of maturity, all rights accorded to the parents transfer to the child. 20 U.S.C.A. §1415(m). The IDEA specifically states that if the administrative procedures that are set forth in the IDEA are not exhausted, then a person aggrieved by the process may not maintain actions under the ADA, the *Rehabilitation Act*, or any other laws protecting the rights of children with disabilities. The provision states:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the *Constitution*, the *Americans with Disabilities Act of 1990* [42 U.S.C.A. § 12101 *et seq.*], Title V of the *Rehabilitation Act of 1973* [29 U.S.C.A. § 791 *et seq.*], or other Federal laws protecting the rights of children with disabilities, ***except that before the filing of a civil action under such laws*** seeking relief that is also available under this subchapter, ***the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter***.

20 U.S.C.A. §1415(l) (emphasis added).

Further, the IDEA allows any party to appeal a decision, by bringing a civil action within 90 days from the date of the decision of the hearing officer. The provision states:

> Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy. The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

20 U.S.C.A. §1415(l)(2)

3. The State of West Virginia has adopted legislative rules relating to the regulation of the Board of Education and the education of disabled students, which parallels the IDEA. West Virginia reaffirms the goals of the IDEA and has specific procedures in place to meet the goals of

the IDEA. 126 CSR 16 provides that:

> The Individuals with Disabilities Education Act Amendments of 1997 require that the State set forth policies and procedures to assure that there is a goal of providing full educational opportunity to all students with disabilities birth through 21 years of age. The State of West Virginia reaffirms the goal to provide full educational opportunities for all students with disabilities, ages birth through 21. The State works toward the realization of this goal through implementation of, and compliance with, the Individuals with Disabilities Education Act Amendments of 1997.

126 C.S.R. §16-1.1

The regulations dictate that any party can initiate an impartial due process hearing by submitting a written request to the WVDE and/or the superintendent of the public agency. 126 C.S.R. §16-8.1.11(a). The decision made in the hearing is final, unless a party appeals the decision through civil action. 126 C.S.R. §16-8.1.11(p). "Any party aggrieved by the findings and decisions made in a hearing has the right to bring a civil action in any state court of competent jurisdiction within 120 days of the date of the issuance of the hearing officer's written decision or in a district court of the United States." 126 C.S.R.§16-8.1.11(q).

4. The West Virginia courts have consistently mandated that relief be first sought from the administrative body and exhausted before a court is permitted to act, if an administrative remedy is available. "Where an administrative remedy is provided by statute, relief must be sought from the administrative body and such relief must be exhausted before the Court will act." *Daurelle v. Traders Federal Savings and Loan Association*, 143 W. Va. 674 (1958), *Cowie v. Roberts*, 173 W. Va. 64 (1984), *State ex rel Miller v. Reed*, 203 W. Va. 673 (1998), and *Expedited Transportation Systems v. Viewig*, 207 W. Va. 90 (2000).

5. The regulations above required the plaintiff to request an impartial due process hearing. Then, and only then, was the plaintiff permitted to file this action in either state or federal

court to appeal the final decision. Once an appeal is made, the plaintiff would have been entitled to the record and to present new evidence. "In any action brought under 8.1.11.q. of this section, the court shall receive the records of the administrative proceedings, hear additional evidence at the request of a party, and grant the relief that the court determines to be appropriate based on the preponderance of the evidence." 126 C.S.R.§16-8.1.11(q)(A). However, the plaintiff chose to not follow the administrative procedures mandated by the West Virginia Regulations when he chose not to file a complaint or request a due process hearing. Ultimately, the plaintiff failed to exhaust his administrative remedies to obtain a free and appropriate public education and is prohibited from maintaining this action.

6. The plaintiff cannot proceed on the remaining state law claims due to his failure to comply with the Regulations for the Education of Exceptional Students. Because Policy Bulletin 2419 is the West Virginia counterpart to the federal IDEA, this Court adopts the holding of United States District Court Judge Charles Haden's decision in *Doe v. Alfred,* 906 F. Supp. 1092 (1995). The Court in *Doe* had the opportunity to compare Policy Bulletin 2419 with that of the Individuals with Disability Act. The court found that the due process rights afforded by the State of West Virginia comply with that of the federal laws and regulations. Therefore, the plaintiff cannot bypass the federal law requirement that the administrative remedies must first be exhausted before a party files claims under state or federal law. Even though the trial court has concurrent jurisdiction with the federal court when a party appeals a hearing examiner's decision (assuming that a party invoked his or her due process rights), the party must still comply with the federal law and regulations in exhausting the administrative procedures provided under the IDEA and Policy Bulletin 2419, before the plaintiff may proceed under any other theories of law. Essentially, a plaintiff cannot supercede the requirements of the IDEA by requesting relief under other West Virginia statutes or regulations. Thus, *Doe v. Alfred* is controlling and this Court follows Judge Haden's decision that parties must

first exhaust their administrative remedies under IDEA before bringing § 1983 claim based on IDEA and constitutional violations. Judge Haden specifically cited to 20 U.S.C § 1415(f):

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities, *except that before filing a civil action under such laws seeking relief that is also available under this subchapter*, the procedures under subsection (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.

Id. at 1098.

Due to the plaintiff's failure to comply with the IDEA and Policy Bulletin 2419, the plaintiff is also precluded from asserting any claims, including claims under the *West Virginia Human Rights Act* and *West Virginia Code* §18-1-4, as well as compensatory and punitive damages for negligence and negligent infliction of emotional distress. Because the Plaintiff failed to exhaust his administrative remedies prior to bringing this suit, the remaining state law claims against Defendant Kanawha County Board of Education are, as a matter of law, dismissed from this action.

7. The IDEA provides that a court may award attorneys' fees to the prevailing party. The provision states:

> In any action or proceeding brought under this section, the court, in its discretion, ***may award reasonable attorneys' fees*** as part of the costs– (I) to a prevailing party who is the parent of a child with a disability; (II) ***to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation***; or (III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

20 U.S.C.A. §1415(I)(3) (***emphasis*** added).

8. Defendant alleges that the plaintiff and his attorney, were not only aware of the requirements under the IDEA, ADA, and the West Virginia regulations which mandated that the plaintiff exhaust his administrative remedies before filing suit, but also insisted on maintaining this action even after the federal court dismissed the plaintiff's federal claims. The federal court denied the defendant's request for attorneys' fees but specifically stated "Should the state court dismiss all of the plaintiff's state law claims for procedural reasons, it may want to consider awarding attorneys' fees." Even though the provisions of the IDEA, ADA and the West Virginia regulations are clearly set forth and the plaintiff attempted to avoid these provisions in filing the Complaint and continued to proceed with this action, this Court finds that the Defendant is not entitled to recover its incurred attorneys' fees in filing its Renewed Motion to Dismiss.

WHEREFORE, upon the Defendant, Kanawha County Board of Education's Memorandum of Law in Support of Its Renewed Motion to Dismiss, this Honorable Court is of the opinion that the Plaintiff has not stated a claim upon which relief may be granted against Defendant, due to his failure to exhaust his administrative remedies, pursuant to the Regulations for the Education of Exceptional Students. Therefore, the Kanawha County Board of Education's Renewed Motion to Dismiss is **GRANTED**. This Court **DENIES** the Defendant's request for attorney's fees incurred in filing its Renewed Motion to Dismiss.

It is further **ORDERED** that this civil action be **dismissed, with prejudice**, as to all parties and any claims they may have. It is further **ORDERED** that this civil action be removed from the Court's docket. It is further **ORDERED** that the Clerk mail a certified copy of this Order to Michael T. Clifford, 408 ½ Fourth Avenue, Montgomery, WV 25136 and Charles R. Bailey, Esquire, at Bailey and Wyant, P.L.L.C., Post Office Box 3710, Charleston, West Virginia 25337-3710.

ENTERED: This 3rd day of April, 2007.

HONORABLE TOD J. KAUFMAN

PREPARED BY:

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 4 DAY OF April 2007
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA