



## THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

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#### THE ADA, SECTION 504, AND IDEA: EXHAUSTION OF ADMINISTRATIVE REMEDIES

##### Overview

It is a basic tenet of our legal system that for every wrong done to an individual by government action or by any other individual there should be a remedy. *Remedy* is defined as “the legal means to declare or enforce a right or to redress a wrong.” THE LAW DICTIONARY (Seventh Edition 1997) What is or is not adequate remedy depends on the facts of each case.

Of the many sources available to individuals, *legal remedy* (remedy available in a court of law) and *administrative remedy* (remedy available through an administrative non-court process, e.g., arbitration, settlement conferences, mediation, complaint filings with governmental agencies, due process hearings) are most often relied on by parents and other parties involved in school-related disputes. Resorting to available administrative processes provides parties with viable opportunities to resolve issues without going into litigation.

*Exhaustion Rule.* The general rule is that administrative remedy be exhausted before going into a court of law. Russo (2004) As Professor Mark Weber and his colleagues have stated regarding special education matters, “...courts have enforced the exhaustion requirement strictly, and dismissed many cases despite plausible arguments that exhaustion should have been excused.” Weber, Mawdsley and Redfield (2007)

In situations where remedy available to plaintiffs is found exclusively in a specific statute, “a court of law will not add to or in any way supplement that law.” Vacca and Bosher (2003) *The Individuals with Disabilities Education Act* (IDEA 2004), 20 U.S.C.A 1400, et seq., is a good example of a federal statute containing comprehensive administrative procedures. However, the interface between the *Americans with Disabilities Act* (ADA), 42 U.S.C. 12101, et seq., the *Rehabilitation Act of 1973, Section 504*, 29 U.S.C. 701 et seq., and the *IDEA* (2004) is not so clear. For example, courts have been inconsistent in their requirement that IDEA’s administrative procedures be exhausted in cases taken under other disability statutes.

*Recent Case Law.* As stated above, exhaustion of administrative remedies is required where such remedies are available. Blanchard v. Morton School District (9th Cir. 2005) In Babicz v. Broward County School Board

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(11th Cir. 1998) parents failed to show that they had exhausted administrative remedies under IDEA (1997) More recently, in McQueen ex rel. McQueen v. Colorado Springs School District No. 11 (10th Cir. 2007) the court held, in an IDEA (2004) case, that no judicial review, even a limited review, was allowed before the administrative process was completed. However, as a federal district court in Ohio has clarified, exhaustion of remedies before bringing law suit is required unless “it would be futile or inadequate to protect plaintiff rights.” Jenkins v. Board of Education (S.D. Ohio 2006)

Recently, as a Virginia Department of Education certified special education mediator I received a copy of a case decided by The United States District Court for the Eastern District of Virginia, Alexandria Division. The case, A.W. by Wilson v. Fairfax County School Board and Jack Dale (E.D.Va. 2008), presented the court with an issue directly involving the exhaustion of remedies rule. What makes this case interesting and important is the fact that plaintiffs did not take their case into federal court under IDEA (2004); rather, they cited the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973. Thus, the court was faced with a twofold question. First, whether plaintiff parents are required to exhaust all administrative remedies available under the IDEA, if remedy is available under that statute, despite the fact that their complaint was not brought under that specific statute. The second question involved whether or not, if the exhaustion rule is applicable, plaintiffs had satisfied the exhaustion rule.

The purpose of this commentary is to briefly discuss the A.W. by Wilson decision and to suggest possible implications for local public school board policy. While a decision from one federal district court is not binding on courts in all other jurisdictions, the decision is nonetheless instructive regarding application of the procedural requirements contained in IDEA in cases where parent plaintiffs rely on statutes other than IDEA (e.g., Section 504 and the ADA which, while broad in scope, do not contain comprehensive administrative procedures).

### **A.W. by Wilson v. Fairfax County School Board and Jack Dale (2008)**

*The Facts.* At the time of the situation that spawned this case, A.W. was a high school senior (with a diagnosis of Asperger’s Syndrome). He was suspended from school for ten days and recommended for expulsion for using his cell phone to take multiple pictures up a female classmate’s skirt without the classmate’s knowledge. He shared the pictures with other classmates. It should be noted that at the time of the cell phone incident A.W. was on probation (since 2002) for having sent a death threat to a fellow student via e-mail.

Prior to the school’s disciplinary action A.W.’s IEP Team met and conducted a manifestation determination review. The Team concluded that his cell phone behavior “was not a manifestation of his disability.” Subsequently he received a hearing before the Superintendent’s designated hearing officer who issued a written decision to suspend A.W. from school for 18 days and to reassign him to a different school. Parents next took an appeal of the hearing officer’s decision to the local school board. The board unanimously upheld the suspension decision and offered A.W. interim educational services following the 10th day of his suspension. A.W.’s parents refused the offer.

A.W.’s parents filed suit in federal district court (under the ADA and Section 504) seeking a declaratory judgment, injunctive relief, and monetary damages. In their complaint they alleged disparate discipline of students with disabilities by the school board.

*Decision and Rationale.* On the issue of exhaustion of administrative remedies under IDEA parents had argued that: (1) their claims are directly under the United States Constitution, and (2) the compensatory damages that they seek are not available under IDEA. Thus, they were not subject to the exhaustion requirements. Regarding

the first argument the district court opined that because IDEA “specifically names the Constitution in the provision that claims brought under other federal laws and statutes, with remedies available under IDEA, are still subject to the exhaustion provisions of the IDEA.” On parents’ compensatory damages argument, after citing a long history of court decisions, both pro and con, the district court declined to find an exemption from the exhaustion rule.

The district court granted defendant’s motion to dismiss the plaintiff’s claims for lack of subject matter jurisdiction. In the court’s opinion the relief sought by plaintiff parents is available under IDEA (2004). As such, even though they requested relief from their son’s suspension under different statutes, they must first exhaust their administrative remedies, including a due process hearing, available under IDEA (2004), before bringing their case to court. In the court’s view, “...Plaintiffs have an unsatisfied obligation under the IDEA to exhaust all of their administrative remedies. This obligation is unsatisfied because Plaintiffs have failed to participate in a due process hearing and because at the time their complaint was filed they had not even exhausted all of their remedies within the School Board. Plaintiffs do not qualify for any of the narrowly drawn exceptions to the exhaustion requirement, and their claims of exemption are without merit.” Thus, the district court held that it did not have subject matter jurisdiction because “no final administrative process hearing has been issued.”

The court made it clear that IDEA does not prevent parents of children with disabilities from filing suit under other statutes. However, IDEA requires that where relief sought is also available under another provision, “plaintiff must first exhaust all administrative remedies available under IDEA.... Parents may not circumvent the exhaustion requirement of the IDEA simply by filing suit under another statute.”

### **Policy Implications**

A major intent of Congress in putting comprehensive administrative procedures in the *Individuals with Disabilities Act* was not to foreclose the right of parents to file law suits; rather, it was to (1) lesson the need for parents to immediately seek appropriate remedy in a court of law rather than try to settle their issues through non-adversarial means (e.g., mediation), and, at the same time, (2) lesson the burden on judges to add a growing number of special education controversies to their already crowded court dockets.

At a time when several non-litigious dispute resolution channels are available in which to seek immediate and fair resolution to special education controversies, the A.W. decision reviewed above, while not binding in all jurisdictions, is nonetheless very instructive. What follow are suggested policy implications for local public school boards gleaned from the district court’s rationale. Local school board policy must be clear that:

- Every effort will be made by the Board, administration, teachers, and staff to carry out the substantive and procedural mandates of federal and state statutes covering students with disabilities.
- Procedural rights and safeguards provided parents and students by federal and state statutes covering students with educational disabilities will be implemented in a timely fashion.
- Procedural requirements and steps provided under the IDEA (2004) will serve as the model for resolving all special education disputes whether or not the disputes are specifically and substantively grounded in that statute.
- Open and sustained communication channels will be maintained between parents, the Board, administration, teachers, and staff, and parents are strongly encouraged to take full advantage of these communication channels.

- Parents are encouraged to work with and through appropriate administrators, teachers, and staff to resolve all disputes by utilizing appropriate non-adversarial administrative processes (e.g., resolution sessions, mediation), in a timely fashion.

It is important to remind the reader that requiring parents to pursue and exhaust administrative remedies as a first option in achieving resolution of their dispute does not preclude them from litigating at some later date, if the matter leads them in that direction.

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