

PREPARED BY THE COURT

<p>K.W., individually and o/b/o M.G.,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>Salem City Board of Education,</p> <p style="text-align: right;">Defendants</p>	<p><b>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SALEM COUNTY</b></p> <p><b>DOCKET NO. SLM-L-000097-18</b></p> <p><b>CIVIL ACTION</b></p> <p><b>ORDER</b></p>
--	---

THIS MATTER, having been opened to the Court by Plaintiffs, upon notice to Defendant, by and through counsel, for reconsideration of this Court's September 24, 2018 Order; and the Court having reviewed the submissions and oral arguments of counsel and for the reasons set forth in the attached opinion,

IT IS ON THIS 25<sup>th</sup> DAY OF January, 2019, ORDERED:

1. Plaintiffs request for reconsideration of this Court's September 24, 2018 Order is hereby GRANTED IN PART;
2. Count 1 (LAD discrimination and failure to accommodate) and Count 6 (NJCRA) are reinstated.
3. Count 2 (Intentional Infliction of Emotional Distress); and Count 5 (Negligent Training and Supervision) remain dismissed with prejudice.
4. Count 3 (Fraud) is dismissed without prejudice. If plaintiff intends to pursue this count, plaintiffs shall amend the complaint to plead facts supporting a cause of action for fraud with specificity within thirty days.

s/Jean Chetney

HON. JEAN S. CHETNEY, J.S.C

**K.W., Individually and o/b/o M.G. v. Salem City Board of Education, Docket No. L-97-18  
Opinion on Plaintiffs' Motion for Reconsideration**

**Jean S. Chetney, J.S.C.**

Plaintiffs seek reconsideration of this court's September 24, 2018 Order granting partial summary judgment. For the reasons set forth below, the motion is granted in part. The motion is granted with respect to Counts 1 (LAD) and 6 (NJCRA) but denied with respect to Counts 2 (Intentional Infliction of Emotional Distress) and 5 (Negligent Training and Supervision). Count 3 (Fraud) is dismissed without prejudice. If plaintiff intends to pursue this count, plaintiffs shall amend the complaint to plead facts supporting a cause of action for fraud with specificity within thirty days.

**Standard of Review**

A party may seek reconsideration of an order where the court's decision was based on a "palpably incorrect or irrational" basis or where "it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The party must demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner. It is not an opportunity to attempt to persuade the court a second time based on mere dissatisfaction with the Court's decision. Ibid. Instead, it gives the court an opportunity to correct errors in a prior ruling. Edina v. Pitta, 442 N.J. Super. 1, 18 (App. Div. 2015).

**Arguments of the Parties**

Plaintiffs argue that the court overlooked and/or failed to consider that without holding a R. 4:44 hearing, the dismissal of the civil claims has modified the child's settlement agreement and imposed a new settlement agreement on the parties; that the ALJ did find that the defendant denied the plaintiff FAPE and ordered merits-based relief, and was therefore sufficient to satisfy

the exhaustion requirement; Salem failed to appeal the ALJ's orders and therefore waived its right to appeal; the plaintiffs cannot obtain compensatory or punitive damages under the IDEA and therefore must be able to pursue them in this court; the court failed to consider the Appellate Division's comments in the matter of J.L. v. Press, 2018 N.J. Super. Unpub. LEXIS 1489 (NJAD 2018); and in the alternative, the dismissals should have been ordered without prejudice.

Defendants argue that plaintiffs have not met the standard for reconsideration; that the court's order was based on a determination that plaintiff did not exhaust administrative remedies because it settled the claim alleging a denial of FAPE before a finding of denial of FAPE occurred, and therefore the arguments raised in the motion merely re-hash arguments already made; the ALJ's decision did not address the question of FAPE; and dismissal with prejudice was required because plaintiff is now foreclosed from exhausting administrative remedies due to the settlement.

**Counts 1 (LAD), 3 (Fraud) and 6 (NJCRA)**

There has been no change to the facts or procedural history in the case aside from this motion for reconsideration. There was a typographical error in the court's opinion at page three where it stated that plaintiff waived her civil claims as part of the March 29, 2018 settlement agreement. The opinion should have stated that plaintiff reserved her civil claims. The court's prior opinion considered and discussed the fact of her reservation of claims, not a waiver of her claims, and the error did not affect the court's analysis.

The court hereby overturns the September 24, 2018 dismissal of Counts 1 and 6 on the basis that the court failed to fully consider the purposes behind the exhaustion requirement and also failed to consider the legislative mandate of liberal construction of the LAD in furtherance of the strong New Jersey public policy of preventing discrimination. This court's first analysis

did not take into account a weighing of the various purposes of the exhaustion requirement and apply them to the facts of this case. On reconsideration, this court finds that plaintiffs' involvement in the administrative forum fulfilled the exhaustion requirement and gave this court subject matter jurisdiction as a matter of law.

**1. Plaintiffs fulfilled the exhaustion requirement and therefore this court has subject matter jurisdiction.**

The exhaustion requirement is grounded in Federal law that has interpreted the IDEA's requirements. Consideration of the many purposes behind the exhaustion requirement is important. Primarily, exhaustion is required for the IDEA to grant subject matter jurisdiction to the district court, as the statute affords "[a]ny party aggrieved by the findings and decisions" made during or pursuant to the impartial due process hearing an opportunity for judicial review. 20 U.S.C. § 1415(i)(2)(A); Komminos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 780 (3d. Cir. 1994). After examining the administrative record and hearing additional evidence at the request of either party, the reviewing court is authorized to grant "such relief as [it] determines is appropriate". 20 U.S.C. § 1415(i)(2)(C)(i)-(iii).

In addition, exhaustion permits "agencies to exercise discretion and apply their expertise, to allow the complete development of the record before judicial review, to prevent parties from circumventing the procedures established by Congress, and to avoid unnecessary judicial decisions by giving the agency an opportunity to correct errors." Urban v. Jefferson Cnty. Sch. Dist., 89 F.3d. 720, 724 (10<sup>th</sup> Cir. 1996) (citation omitted). "Exhaustion serves the purpose of developing the record for review on appeal . . . encouraging parents and the local school district to work together to formulate an IEP for a child's education, . . . and allowing the education agencies to apply their expertise and correct their own errors." Batchelor v. Rose Tree Media Sch. Dist., 759 F.3d 266, 275 (3<sup>rd</sup> Cir. 2014) (citations omitted). "When awaiting the outcome of

agency proceedings does not jeopardize the child's future progress to any substantial degree, courts should be wary of foregoing the benefits to be derived from a thorough development of the issues in the administrative proceeding." Komminos, supra, at 780 (3d. Cir. 1994).

There is no question that plaintiffs first filed in the administrative forum for relief. Plaintiffs on January 5, 2018 timely filed for emergent relief and for a due process hearing. As a result, they obtained emergent relief in the form of Judge Buolo's January 12, 2018 final decision that ordered a return of the child to the 5<sup>th</sup> grade program at the school; an independent Functional Behavioral Assessment; and that the relief continue until a substantive decision on the merits occurs at a due process hearing. The administrative process continued, and pursuant to statute, the parties engaged in settlement discussions and by way of a settlement agreement approved by the court on April 20, 2018, plaintiffs obtained additional relief for the child in the form of a one-on-one aide with specific training; compensatory education for two one and one half hour sessions per week for 52 weeks with specific requirements; independent educational evaluations; and a procedure going forward for suspensions.

A significant purpose of exhaustion is to have the important issues of education for children with disabilities addressed by a tribunal and administrative procedure that has specialized knowledge and expertise with respect to the proper provision of such educational services. In this case, there is no dispute that plaintiffs' educational requests were brought to the administrative forum, and through those administrative procedures, the plaintiffs' claims were evaluated by the district, and the district agreed to provide educational relief that was acceptable to the plaintiffs. The proposed settlement was considered by the administrative law judge not only in his determination that emergent relief was necessary as a result of procedural violations, but also that the substantive relief set forth in the settlement agreement was acceptable to the

court. In a hearing on March 29, 2018, the Honorable Jeffrey R. Wilson, A.L.J. was presented with the settlement agreement between the parties and the settlement was approved by the court. On April 20, 2018 Judge Wilson ordered the parties to comply with the settlement terms. That order indicated that the decision was final pursuant to 20 U.S.C.A. § 1415(i)(1)(A). The educational needs of the child were addressed by the administrative body after professional evaluations were considered by the parties, the parties were given an opportunity for exchange and evaluation of the educational needs of the child, the school district applied its expertise, and the settlement terms were considered and approved by the court. Therefore, this purpose of the exhaustion requirement was met.

Another purpose of administrative exhaustion is the development of a record to facilitate judicial review. This purpose is important when the basis of an appeal of the administrative order is the failure to order educational services that the plaintiff contends was necessary. A district court or state court reviewing an ALJ's decision is better able to decide whether the ALJ abused its discretion or failed to properly apply the law if there is a record of a hearing with testimony and an obtainable explanation of the ALJ's factual findings and application of the law. When applied to a LAD action that seeks damages based on the district's failure to provide a FAPE, the court adjudicating the LAD action (this court) is not required to review the testimony from the hearing below, and is not called upon to review the ALJ's legal determination. Although the testimony from the hearing in the administrative hearings might be helpful to the attorneys in expediting discovery or preparing for trial, this court would not in any other way benefit from the development of a record below. Accordingly, the application of this purpose in the adjudication of an LAD complaint is not as important as other purposes.

Important to the court's determination is the question of whether the damages that plaintiffs seek in the LAD action are damages that could have been obtained administratively. In the present action, plaintiffs seek compensatory and punitive damages. It is not disputed that compensatory and punitive damages are not obtainable under the IDEA and cannot be awarded at a due process hearing. Batchelor at 276. In Batchelor, 759 F.3d 266 (3<sup>rd</sup> Cir. 2014), plaintiffs filed claims in federal court alleging violation of the IDEA, RA and ADA without first filing an administrative petition. Id. at 268. Plaintiffs claimed that their claims were not subject to the exhaustion requirement because they sought monetary damages under the RA and ADA which are unavailable under the IDEA, and that two exceptions to the exhaustion requirement applied to their case. Id. at 271. The court disagreed. It held that the claims were related to the provision of FAPE, and therefore could not be repackaged in the form of non-IDEA claims to avoid the exhaustion requirement. Id. at 272-74. The present case is distinguishable in that plaintiffs here did file administratively. The court in Batchelor specifically explained and acknowledged that once the educational harms are addressed during the IDEA's administrative process, "victims may seek further remedy in court pursuant to statutory schemes allowing for compensatory and punitive damages, such as Section 504 and the ADA provide." Id. at 278. The court's primary concern was the need to address the child's educational needs. In Batchelor, the child did not first receive the benefit of the educational expertise of the administrative process, and the court held that the fact that the administrative forum could not award compensatory or punitive damages should not take precedence over the need to address the educational concerns. Ibid. It is significant to note that the plaintiffs in Batchelor did not attempt to exhaust administrative remedies. That distinguishes it from the present case.

A third purpose of the exhaustion requirement is to avoid unnecessary judicial decisions by giving the agency an opportunity to correct errors before litigation. This purpose was achieved in this case in that the school district agreed by way of settlement agreement to provide the services requested and those services were in fact ordered by Judge Wilson's April 20, 2018 decision approving the settlement. Again, the child benefited from the provision of services as a result of the administrative proceedings. To the extent that the purpose seeks to avoid unnecessary litigation, it is evident from the settlement agreement itself that the plaintiffs intended to pursue civil litigation after the exhaustion of the administrative remedy. The settlement agreement specifically reserved civil claims, clarified at the settlement hearing as "claims that this, the Office of the Administrative Law doesn't handle." The claims reserved were described as any other claims except for the administrative claims in this case. The court is not persuaded by the school board's argument that the reserved claims could have been a slip and fall or some claim not related to the facts considered in the settlement. That the civil claims intended were LAD claims should not have been a surprise to the school board. It is clear to the court that at the time of settlement, the defendants were aware of the potential, if not the likelihood that plaintiffs would pursue LAD claims. Litigation was intended regardless of the administrative outcome, as is permitted after exhaustion. Batchelor, 759 F.3d at 278. ("[A]fter exhaustion, Appellants may very well file a complaint containing virtually identical claims as asserted in the Complaint before us today.") Id. at n. 15. The parties could have negotiated a settlement that incorporated LAD remedies not obtainable in the administrative forum, but did not. It could not have been a surprise to the school board, in light of the clear reservation of rights, when it was served with this LAD complaint. Accordingly, the school board was afforded an opportunity to correct errors before litigation, and the school board entered into a settlement



agreement that did not persuade or require plaintiffs to forgo additional litigation. The opportunity to avoid unnecessary litigation was afforded, and this purpose of exhaustion was met.

A fourth purpose of the exhaustion requirement is to prevent parties from circumventing the procedures established to address the provision of FAPE. In this case, the plaintiffs did seek remedies available in the administrative forum, and as a result, obtained educational relief for the child. This is clearly not a case where the plaintiff attempted to avoid the administrative procedures or attempted to artfully plead the case to avoid the exhaustion requirement. This court does not find that plaintiffs attempted to make an end run around the IDEA's exhaustion requirements where they filed an administrative petition alleging a denial of FAPE under the IDEA administrative procedures, and specifically asserted an intent to pursue all other civil claims not within the jurisdiction of that court.

This finding is also supported by the fact that the administrative procedures include specifically codified procedures that encourage settlement. Prior to an impartial due process hearing, the IDEA requires that the local educational agency shall, unless waived by the parties, convene a resolution session with the parents and the relevant members of the IEP team in an effort to resolve the complaint. 20 U.S.C. §1415(f)(1)(B).

Courts that have dismissed complaints for failure to exhaust have involved plaintiffs who made no effort to file administratively, who filed but then withdrew the petition, or who artfully plead claims in an effort to make an "end run" around the exhaustion requirement. In J.T. v. Dumont, 438 N.J. Super. 241 (App. Div. 2014), plaintiff filed a due process petition with the NJDOE in June 2009 challenging the appropriateness of the IEP's inclusion placement at one school as opposed to another. Id. at 251. In September, 2009 plaintiffs filed a class action

complaint in federal court alleging violations of the IDEA, the RA, and the LAD. Ibid. In November 2009, they withdrew their due process petition. Ibid. The district court dismissed plaintiff's complaint because, inter alia, the plaintiffs voluntarily failed to pursue their administrative remedies, and therefore the court lacked supplemental jurisdiction. Id. at 253. Subsequent to the dismissal, plaintiffs filed a civil complaint in the Chancery Division alleging violations of the LAD. Ibid. That complaint alleged discrimination in that disabled children were required to attend a school other than their neighborhood school; placements and transportation were not considered on an individual basis; and the class members were segregated due to their special education needs. Ibid. With respect to the exhaustion argument, the court found that "plaintiffs seek to make an end run around the IDEA by dismissing the due process petition and repackaging the claim as a class action under the LAD." Id. at 267. The court held that "where the facts concern the provision of special education and related services, the program or benefit measured under the third element is the provision of a FAPE." The holding of the case focused more on plaintiffs' failure to satisfy an essential element of a LAD claim, failure to provide a FAPE, rather than the failure to exhaust administrative remedies. Id. at 268-69. However, to the extent that the court did find an impermissible end run, the facts of J.T. are different from our case in that in the present case, the plaintiffs did not withdraw their administrative complaint; it was settled with an order for services.

In Batchelor, 759 F.3d 266 (3<sup>rd</sup> Cir. 2014), plaintiffs filed claims in federal court alleging violation of the IDEA, RA and ADA without first filing an administrative petition. Id. at 268. Plaintiffs claimed that their claims were not subject to the exhaustion requirement because they sought monetary damages under the RA and ADA which are unavailable under the IDEA, and that two exceptions to the exhaustion requirement applied to their case. Id. at 271. The court

disagreed. It held that the claims were related to the provision of FAPE, and therefore could not be repackaged in the form of non-IDEA claims to avoid the exhaustion requirement. Id. at 272-74. Again, the present case is distinguishable in that plaintiffs here did file administratively.

In this court's first opinion it failed to consider our state's strong legislative policy requiring a liberal interpretation and strong enforcement of the LAD. Our state's legislature has required that the LAD "shall be liberally construed in combination with other protections available under the laws of this State." N.J.S.A. 10:5-3. This statutory mandate has been enforced by our courts, which have described the statute's goal as the eradication of the "cancer of discrimination[.]" Ellison v. Creative Learning Ctr., 383 N.J. Super. 581, 588 (App. Div. 2006) (citing Dale v. Boy Scouts of Am., 160 N.J. 562, 584-85 (1999), rev'd and remanded on other gr., 530 U.S. 640 (2000)). The emphasis on the purpose of eradicating discrimination is evidenced by the statute's provision for legal remedies that include monetary penalties, attorney fees, compensatory and punitive damages. N.J.S.A. 10:5-3; N.J.S.A. 10:5-27.1; N.J.S.A. 10:5-14.1a. Permitting the plaintiffs to pursue a cause of action under the LAD under these facts, where the purposes of exhaustion have been met, and facts exist that if proven, set forth a cause of action under the LAD, furthers the legislative mandate for liberal interpretation of the LAD. With this legislative mandate, the defendants should not be permitted to avoid LAD liability by settling the case administratively.

The court holds that the plaintiffs exhausted administrative remedies as a matter of law for the reasons stated above. The court is not persuaded by plaintiffs' argument that a dismissal would re-write the settlement agreement between the parties or that a dismissal would run afoul of this court's *parens patriae* duty or the requirement of the court to hold a R. 4:44 hearing. The decision is based on this court's holding that the exhaustion requirement has been met. If the

exhaustion requirement had not been met, this court would have held, as it originally did, that the parties did not have the ability to enter into a settlement agreement that conferred subject matter jurisdiction where that jurisdiction was not present as a matter of law.

**2. Plaintiff has pleaded sufficient facts to set forth a prima facie claim under the LAD and the NJCRA.**

In determining a motion to dismiss for failure to state a claim under R. 4:6-2(e), the court examines the legal sufficiency of the facts alleged on the face of the complaint. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). The search is performed with a generous and hospitable approach to determine whether a cause of action is suggested by the facts. Ibid.

To establish a prima facie case under the LAD, a plaintiff must show that he “(1) had a disability; (2) was otherwise qualified to participate in the activity or program at issue; and (3) was denied the benefits of the program or otherwise discriminated against because of his disability.” J.T. v. Dumont, 438 N.J. Super. 241, 268 (App. Div. 2014). “[W]here the facts concern the provision of special education and related services, the program or benefit measured under the third element is the provision of a FAPE.” Ibid.

Plaintiffs allege a violation of the NJCRA at Count 6 of the complaint. The NJCRA permits a civil action for damages by “[a]ny person who has been deprived of any substantive due process of equal protection rights, privileges or immunities secured by the . . . Constitution or law of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities have been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law.” N.J.S.A. 10:6-2. It also ensures “[e]qual rights and privileges of all persons in public places; All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges

of any places of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons” N.J.S.A. 10:1-2. The bases for the NJCRA claims are essentially the same as plaintiffs’ bases for the LAD claims.

Plaintiff argues that the ALJ’s April 20, 2018 order approving the settlement agreement is the equivalent of a finding of denial of FAPE because pursuant to 20 U.S.C. §1415(f)(3)(E)(i), “[with the exception of matters alleging procedural violations] a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” Ibid. Section 1415 of the U.S.C. governs “procedural safeguards”. Subsection (f) addresses impartial due process hearings. It sets forth certain requirements of a hearing officer with respect to knowledge of the law and lack of conflicts; it addresses the subject matter of the due process hearing and the timeline for requesting a hearing; and establishes that with respect to substantive complaints, the decision of the hearing officer at the due process hearing shall be based on whether a child received a FAPE. Citing this provision, the court in Frye stated that “[a]ny decision of the officer granting substantive relief must be ‘based on a determination of whether the child received a [FAPE].’” Frye, 137 S. Ct. at 749 (citing 20 U.S.C. §1415(f)(3)(E)(i)). However, the Frye court did not discuss this provision in determining whether an order approving a settlement agreement constituted a finding of denial of FAPE. When the subsection is considered in the context of the larger statute that it is in, a more reasonable interpretation is that the statute applies to a hearing officer’s decision after considering testimony and other evidence and making findings and orders based on that evidence. Nothing in the plain meaning of the statute would indicate that a hearing officer’s approval of a settlement equates to a finding of denial of FAPE.

The defense contends that plaintiff has not plead a prima facie case because there is no record, no finding of a denial of FAPE, and the complaint lacks specificity. This court disagrees. There is no requirement that a plaintiff receive a judicial determination from the administrative proceeding that there was a denial of FAPE before proceeding with other civil remedies. What is required is exhaustion of the administrative remedies. As discussed above, this court finds that plaintiffs exhausted administrative remedies. In the complaint, plaintiffs allege that M.G. has a disability that has resulted in the classification by the defendant as being health impaired and eligible for receipt of special education services. (Complaint at ¶¶8, 21). The complaint alleges that the school failed to provide an appropriate plan to address the disability, resulting in numerous suspensions and the denial of FAPE. (Complaint at ¶¶9, 21). The complaint alleges procedural violations that were performed with the intent to prevent K.W.'s participation in the decision-making process. (Complaint at ¶¶ 10-14). The complaint alleges facts that if proven, set forth a prima facie claim for violation of the LAD and the NJCRA.

**Counts 2 (Intentional Infliction of Emotional Distress) and  
5 (Negligent Training and Supervision)**

Plaintiffs did not argue any basis for reconsideration of this court's September 24, 2018 Order dismissing these two counts, and the court finds that the bases of dismissal was appropriate. Accordingly, these two counts remain dismissed for the reasons set forth in the court's September 24, 2018 opinion.

**Count 3 (Fraud)**

Count 3 of the Complaint was dismissed with prejudice by this court's September 24, 2018 order for reasons that have now been reconsidered and reversed. However, the complaint at Count 3 is unintelligible due to what appear to be typographical errors in the drafting of the complaint. The complaint as written does not set forth a cause of action with specificity as

required by the rules. Therefore, this count is dismissed, but plaintiffs are granted thirty days to amend the complaint to correct the typographical errors and set forth the facts that establish the cause of action of fraud.

For the foregoing reasons, Plaintiffs request for reconsideration of this Court's September 24, 2018 Order is hereby GRANTED IN PART. Count 1 LAD (discrimination and failure to accommodate) and Count 6 NJCRA are reinstated. Count 2 (Intentional Infliction of Emotional Distress); and Count 5 (Negligent Training and Supervision) remain dismissed with prejudice. Count 3 is dismissed without prejudice. If plaintiff intends to pursue this count, plaintiffs shall amend the complaint to plead facts supporting a cause of action for fraud with specificity within thirty days.

So ordered.

s/Jean Chetney

JSC