

PREPARED BY THE COURT

<p>J.L., a minor, and her Parents K.L. and J.L.,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>Kandi Press in her individual and official capacities, Joan Pabisz-Ruberton in her individual and official capacities, Jane Does 1-10 in their individual and official capacities, and Harrison Township Board of Education,</p> <p style="text-align: right;">Defendants</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: GLOUCESTER COUNTY</p> <p>DOCKET NO. GLO-L-1192-16</p> <p>CIVIL ACTION</p> <p>ORDER</p>
---	--

THIS MATTER, on remand from the Appellate Division for findings of fact and analysis of defendants' Motion for Summary Judgment and plaintiffs' Motion for Reconsideration; and the Court having reviewed the submissions and arguments of counsel and for the reasons set forth in the attached opinion,

IT IS ON THIS 25th DAY OF January, 2019, ORDERED as follows:

1. The court's February 3, 2017 order granting summary judgment is vacated. Defendants' Motion for Summary Judgment is denied.
2. The court's April 13, 2017 order denying plaintiff's Motion for Reconsideration is vacated. Defendants' Motion for Reconsideration is granted.
3. Defendants shall file an Answer to plaintiff's Complaint or seek other relief within 20 days.

s/Jean Chetney

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

J.L., a minor, and her Parents K.L. and J.L. v. Press, Docket No. L-1192-16**Opinion on Defendants' Motion for Summary Judgment****Jean S. Chetney, J.S.C.**

In this case the court considers whether the administrative proceedings that took place prior to the filing of plaintiffs' state-court Law Against Discrimination Complaint in this court were sufficient to satisfy the IDEA's exhaustion requirement and confer subject-matter jurisdiction on this court, and whether plaintiff has pleaded sufficient facts to set forth a prima facie claim under the New Jersey Law Against Discrimination. For the reasons set forth below, this court holds that plaintiffs satisfied the exhaustion requirement as a matter of law and have pleaded a prima facie case of violation of the New Jersey Law Against Discrimination. Defendants' Motion for Summary Judgment is therefore denied.

Facts

Plaintiff J.L. was born in 2001. As an infant, she suffered an anoxic event that caused encephalopathy, resulting in cognitive, learning, hearing and vision disorders. She attended Harrison Township School District for kindergarten through sixth grade. According to the Complaint filed in the present case, J.L. needed accommodations for her disabilities from the time she was 3 years old in 2005 until 2013 when she left the district. In February 2011 defendants performed evaluations and established an eligibility plan that denied eligibility for special education. At a time not specified in the Complaint but prior to June 2011, J.L. was classified as speech-language eligible and received speech-language therapy once a week. In August 2012, J.L.'s parents submitted evaluation reports to the school district and requested services based on the findings of J.L.'s pediatric neurologist, a vision evaluation, an occupational therapy assessment, and a neuropsychological evaluation. In response, on September 24, 2012 the school district found J.L. eligible for services and revised her Individualized Education Plan [hereinafter

“IEP”] on November 7, 2012. Plaintiff contends that the revised IEP was insufficient. Plaintiff also contends that the defendant disclosed J.L.’s health and educational records to a third party without J.L.’s parents’ consent. Plaintiffs allege that the school district failed to appropriately assess and accommodate her disabilities and that she was denied a free and appropriate public education [hereinafter “FAPE”] from the year 2005 when she was three years of age through the start of the 2013-2014 school year when she was twelve years of age. J.L. no longer attended a school operated by the defendants beginning with the 2013-2014 school year when she was in seventh grade.

Procedural History

On August 27, 2013 plaintiff filed a Request for Due Process hearing [hereinafter “the petition”] pursuant to the Federal Individuals with Disabilities in Education Act [hereinafter “IDEA”], section 504 of the Federal Rehabilitation Act [hereinafter “RA”], and the Federal Americans with Disabilities Act [hereinafter “ADA”] with the New Jersey Department of Education [hereinafter “NJDOE”]. The petition sought remedies under these statutes and reserved the right to bring all civil actions not within the jurisdiction of the New Jersey Office of Administrative Law [hereinafter “NJOAL”]. Specifically, the petition requested additional evaluations in areas of suspected disabilities; accommodations of her disabilities; an appropriate IEP; appropriate placement and extended school year; compensatory education; reimbursement for out of pocket expenses incurred in obtaining services and evaluations; prohibitions against disclosing medical records without consent; and all other remedies available under the statutes plead with a reservation of the right to bring all civil actions not within the jurisdiction of the NJOAL.

On September 26, 2013, the NJDOE transferred the matter to the NJOAL for an initial due process hearing to take place on October 7, 2013. At that hearing, the court conducted a settlement conference. The case did not settle, and the defense made offers of judgment on December 6, 2013 and December 12, 2013.

On December 26, 2013 defendants filed a Motion for Summary Decision on the basis that plaintiff's petition was moot because defendants had offered all of the relief that was sought in the petition. Plaintiffs opposed the motion. On January 28, 2014, the Honorable John Schuster III, ALJ made findings of fact and issued orders as a result of the motion. Judge Schuster compared the relief sought with the relief offered. He found that the relief sought in the petition had been met by the defendants "at least as to the issues over which this court has jurisdiction." His findings of fact specifically included that with respect to compensatory education, the number of sessions offered exceeded those that were demanded, and that the plaintiff's neuropsychological evaluation did not indicate that the plaintiff was entitled to compensatory education. He held that there no longer existed a controversy upon which the court could rule, the petition was therefore moot, and he dismissed the petition. In the Order section of his decision, he ordered that the petition was dismissed; ordered that "respondent shall provide to the petitioner all the relief offered in satisfaction of the demands set forth in the petition"; ordered an IEP meeting to be scheduled "for the purpose of incorporating the offers of services made in this matter"; and ordered the services to commence as soon as practicable. The order stated that the decision was "final pursuant to 20 U.S.C.A. §1415(i)(1)(A) and 34 C.F.R. §300.514 (2012) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States."

On April 27, 2014 plaintiffs filed a Complaint in Federal District Court appealing the January 28, 2014 decision of Judge Shuster; alleging that they were prevailing parties in the IDEA/504/ADA due process proceeding and therefore entitled to attorney's fees; alleging a violation of the New Jersey Law Against Discrimination [hereinafter "LAD"] for the failure to accommodate her disabilities; and alleging a violation of IDEA against the NJDOE for procedural failures involving the due process hearing.

On May 14, 2014 plaintiffs filed a First Amended Complaint in Federal District Court against defendants seeking relief under the IDEA (prevailing party fees), the RA (prevailing party fees), and substantive violations under the LAD. This Amended Complaint did not include a count that appealed the January 28, 2014 decision of Judge Shuster.¹

On August 25, 2015 the district court issued an opinion ruling on Cross-Motions for Summary Judgment with respect to the prevailing party claims. In a thirty-four page opinion, the Honorable Renee Marie Bumb held, inter alia, that the plaintiffs were prevailing parties pursuant to the IDEA and the RA. The court did not retain jurisdiction over the LAD claim.

On September 23, 2016 plaintiffs filed the present Complaint that alleges a violation of the LAD. The Complaint seeks compensatory, consequential and punitive damages, reasonable attorney's fees and costs, enhancement to the attorney fee award, and such other relief as the court deems just. On December 15, 2016 defendants filed a Motion for Summary Judgment in lieu of an Answer. On February 3, 2017 the Honorable Jean McMaster, J.S.C. granted the unopposed motion and denied a subsequent Motion for Reconsideration on April 13, 2017.

¹ At oral argument plaintiff's counsel, Mr. Epstein, asserted that the count was removed from the Complaint so plaintiff would not be exposed to Rule 11 sanctions. He argued that he did not have a basis to appeal findings (as opposed to an Order) of an ALJ as a matter of law.

In an opinion dated June 25, 2018, the Appellate Division reversed the dismissal of plaintiff's claims and remanded the matter for a statement of reasons including an articulation of factual findings and legal analysis. The court also required consideration of five questions raised by the pleadings. Specifically, did the plaintiff make an end-run around the IDEA's exhaustion requirement by dismissing² the administrative claim and repackaging it under the LAD? Was there a reason or basis to appeal the ALJ's decision, as defendants contend was a pre-requisite to pursuing the LAD in state court? Did plaintiff exhaust administrative remedies by bringing a due process action and settling the case?³ If the ALJ was compelled to determine whether plaintiff received a FAPE, would the decision have encompassed the same time frame as that for which plaintiffs seek damages under the LAD or would it be limited to the time the petition was filed? Can defendants avoid LAD liability by settling [here, obtaining the dismissal of] the due process matter and agreeing to provide services not previously supplied, thereby precluding a FAPE determination by the ALJ?

Judge McMaster retired subsequent to her February 3, 2017 and April 13, 2017 orders, and the matter was assigned to this court for a decision. Additional briefing was permitted after remand, and this court heard oral argument on the motion on November 30, 2018.

Arguments of the parties

In support of the Motion for Summary Judgment, defendants argue that plaintiffs cannot prove the third prong of the failure to accommodate claim because there is no prior finding of denial of FAPE due to her failure to exhaust administrative remedies. Defendants also argue that

² The administrative petition was not voluntarily dismissed by the plaintiffs, but plaintiff did not appeal the dismissal.

³ There was not a settlement of the administrative action, but instead an involuntary dismissal.

this court lacks subject matter jurisdiction because plaintiff did not assert a LAD claim in the administrative action. In response to the Appellate Division's questions, defendant argues that plaintiff made an end-run around the exhaustion requirement by repackaging her claim as a LAD claim; plaintiff was required to appeal the ALJ's decision before proceeding with the LAD claim; and the LAD claim would not permit additional damages for a period beyond the petition.

Plaintiffs argue that facts exist that demonstrate a denial of FAPE, thereby making the LAD claim viable; plaintiffs must be permitted to pursue punitive damages under the LAD; the ALJ's administrative order satisfies the exhaustion requirement; and plaintiffs may pursue pre-petition LAD damages.

Summary Judgment Standard

Summary judgment is appropriate "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 challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2. The court must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1985); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

Analysis

1. Plaintiffs were required to exhaust administrative remedies before filing a LAD claim.

The education of children with disabilities is governed by a complex scheme of federal and state statutes and administrative regulations that ensure that all children with disabilities are

provided with a FAPE. J.T. v. Dumont Public Schools, 438 N.J. Super. 241 (App. Div. 2014) (citing 20 U.S.C.A. §1400(d)(1)(A)(B), N.J.S.A. 18A:46-1 to -55, N.J.A.C. 6A:14-1.1 to -9.2, 20 U.S.C.A. §412). The Federal IDEA sets forth the process by which a student may enforce the goals of the statute. A student may request a due process hearing with the Office of Administrative Law in New Jersey, or they may file an administrative complaint with the state education agency, which must investigate and issue a decision within sixty days. 34 C.F.R. § 300.152. A party “aggrieved by” the decision may bring an appeal from the administrative proceedings in any state or federal district court. 20 U.S.C.A. § 1415(i)(2)(A).

To the extent that a student seeks relief in federal court that is available under the IDEA, the administrative procedures in the IDEA must first be exhausted. N.J. Prot. & Advocacy, Inc. v. N.J. Dep’t of Educ., 563 F. Supp. 2d 474, 484 (D.N.J. 2008). This is true even if the plaintiff seeks relief under laws other than the IDEA. Wellman v. Butler Area Sch. Dist., 877 F.3d 125 (2017). “[E]xamination of a plaintiff’s complaint should consider substance, not surface: §1415(l) requires exhaustion when the gravamen of a complaint seeks redress for a school’s failure to provide a FAPE, even if not phrased or framed in precisely that way.” Fry v. Napoleon Cnty. Sch., 137 S. Ct. 743, 747 (2017).

Exhaustion of the IDEA’s administrative process is also required in non-IDEA actions where the plaintiff seeks relief that can be obtained under the IDEA. Batchelor v. Rose Tree Media Sch. Dist., 759 F.3d. 266 (3rd Cir. 2014). This is expressly stated in 20 U.S.C.A. § 1415(l), which states:

[n]othing 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, title V of the Rehabilitation Act of 1973, 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 [IDEA administrative process] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Ibid. Our Appellate Division has construed the NJ LAD coextensively with the IDEA and RA. J.T., supra, at 268. “[W]hen a LAD discrimination claim concerns the special education benefits and related services available to a child under the IDEA, the program or benefit used to determine the prima facie test for disability discrimination is the provision of a FAPE.” Id. at 265.

Plaintiff in this case alleges the school district failed to appropriately assess and accommodate her disabilities and that she was denied a FAPE from the year 2005 when she was three years of age through the start of the 2013-2014 school year when she was twelve years of age. Plaintiff also contends that the defendant disclosed J.L.’s health and educational records to a third party without J.L.’s parents’ consent. There is no dispute that not just the gravamen of plaintiff’s complaint, but the specific allegations in plaintiffs’ complaint are grounded in the denial of FAPE. It is not disputed that exhaustion is required. What is disputed is whether the plaintiff’s involvement in the administrative procedures prior to bringing the claim satisfied the exhaustion requirement.

2. Plaintiffs fulfilled the exhaustion requirement.

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 (10th 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 (3rd 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 recognized the exhaustion requirement and sought to comply with it. On August 27, 2013, plaintiff filed a Request for Due Process hearing pursuant to IDEA, the RA, and the ADA with the NJDOE. The petition sought remedies under these statutes and reserved the right to bring all civil actions not within the jurisdiction of the NJOAL. Specifically, the petition requested additional evaluations in areas of suspected disabilities; accommodations for her disabilities; an appropriate IEP; appropriate placement and extended school year; compensatory education; reimbursement for out of pocket expenses incurred in obtaining services and evaluations; prohibitions against disclosing medical records without

consent; and all other remedies available under the statutes plead with a reservation of the right to bring all civil actions not within the jurisdiction of the NJOAL.

On September 26, 2013, the NJDOE transferred the matter to the NJOAL for an initial due process hearing to take place on October 7, 2013. At that hearing, the court conducted a settlement conference. The case did not settle, and the defense made offers of judgment on December 6, 2013 and December 12, 2013.

On December 26, 2013 defendants filed a Motion for Summary Decision on the basis that plaintiff's petition was moot because defendants had offered all of the relief that was sought in the petition. Plaintiffs opposed the motion. On January 28, 2014, the Honorable John Schuster III, ALJ made findings of fact and issued orders as a result of the motion. Judge Schuster compared the relief sought with the relief offered. He found that the relief sought in the petition had been met by the defendants "at least as to the issues over which this court has jurisdiction." His findings of fact specifically included that with respect to compensatory education, the number of sessions offered exceeded those that were demanded, and that the plaintiff's neuropsychological evaluation did not indicate that the plaintiff was entitled to compensatory education. He held that there no longer existed a controversy upon which the court could rule, was therefore moot, and he dismissed the petition. In the Order section of his decision, he ordered that the petition was dismissed; ordered that "respondent shall provide to the petitioner all the relief offered in satisfaction of the demands set forth in the petition"; ordered an IEP meeting to be scheduled "for the purpose of incorporating the offers of services made in this matter"; and ordered the services to commence as soon as practicable. The order stated that the decision was "final pursuant to 20 U.S.C.A. §1415(i)(1)(A) and 34 C.F.R. § 300.514 (2012) and is appealable by filing a complaint and

bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States.”

a. The administrative proceedings satisfied the purposes behind the exhaustion requirement.

The court first considers whether this administrative action fulfilled the purposes of the exhaustion requirement. 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, the record reflects that in support of their petition, plaintiffs submitted evaluation reports to the school district and requested services based on the findings of J.L.’s pediatric neurologist, a vision evaluation, an occupational therapy assessment, and a neuropsychological evaluation. In response, the school district, in consultation with counsel and presumably their own staff and/or expert consultants, offered the services that were demanded. Ultimately, the ALJ considered the demands and the offered services, and issued an order ordering that the services be provided. That he considered the proofs before issuing a decision on the motion to dismiss is evident in the findings section of his decision in which he specifically stated that the number of compensatory education sessions offered exceeded those that were demanded, and that the plaintiff’s neuropsychological evaluation did not indicate that the plaintiff was entitled to compensatory education. There clearly was an evaluation of the needs of this child by those with specialized knowledge within the administrative agency. The administrative process resulted in an order to provide educational services for this child that both the plaintiffs and the school district agreed should be provided.

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 an 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.

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 offered to provide the services requested and those services were in fact ordered. 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 plaintiffs' petition that the plaintiffs intended to pursue civil litigation after the exhaustion of the administrative remedy. The petition specifically stated that petitioners "reserve[d] the right to bring all civil actions not within the jurisdiction of the NJOAL." 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.

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 over their opposition, their petition was dismissed. This is clearly not a case where the plaintiff attempted to avoid the administrative procedures or attempted to artfully plead their 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, specifically asserted an intent to pursue all other civil claims not within the jurisdiction of that court, and requested but were denied a due process hearing as a result of the school board's motion to dismiss.

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 dismissed over their opposition with an order for services.

In Batchelor, 759 F.3d 266 (3rd 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 asserted 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.

Exhaustion is required to confer subject matter jurisdiction on the federal district court or this court. Judge Schuster’s January 28, 2014 Order specifically stated that it was final and appealable. Although the relief sought in the motion precipitating the order was for a dismissal due to mootness, the order not only dismissed the petition, but ordered affirmative, substantive

relief in the form of an IEP meeting incorporating the services that were offered, and a deadline for services to commence.

Although not binding on this court, it is of note that the district court, in determining the question of whether the administrative proceeding was sufficient to confer “prevailing party” status on the plaintiff, found it significant to its decision granting that status that the order “(1) contained mandatory language ..., (2) contained a subheading “Order”, (3) bore Judge Schuster’s signature, and (4) directed the parties to comply with certain terms.” Decision of the Honorable Renee Marie Bumb dated August 25, 2015 at 24 (citation omitted). Indeed, defendants did not assert in district court, and have not asserted here, that plaintiff did not have the standing to appeal that order; on the contrary, the defense argues that plaintiff’s failure to appeal the order precludes the satisfaction of the exhaustion requirement.

The court further finds that plaintiffs were “aggrieved by” the order in that it ordered dismissal of the case over the objection of the plaintiffs without satisfaction of the due process hearing that was requested. The reason the petition was not moot was because, although *offered* in response to the petition, the services had not been *provided*, and that is why the order had to provide affirmative relief ordering the services. In addition, the ability of the petitioners to obtain an order for substantive relief was important to the petitioners’ ability to pursue counsel fees as a prevailing party, and the petitioners’ ability to pursue civil claims that could not be pursued before exhaustion. The order conflictingly ordered dismissal of the claims due to mootness but also ordered substantive relief in the form of services that had merely been *offered* by the school district and was therefore in error. The order of dismissal could have been appealed on the basis that it denied plaintiffs the due process right to a hearing. The ALJ should not have granted the motion. A school district cannot avoid a finding of FAPE (and therefore LAD liability) by offering to

provide the requested services after a petition has been filed but before an adjudication of the petition. The offer to provide services does not make the administrative case moot. In this case, the district had not provided the services prior to the filing of the administrative petition and therefore the administrative action required an adjudication resulting in either a settlement between the parties or an administrative order. In this case, had the ALJ merely dismissed the petition as moot and not ordered substantive relief, plaintiffs would have been required to appeal that decision and continue to pursue and exhaust their administrative remedies prior to filing a LAD complaint. The fact that the ALJ's order evidences the administrative court's consideration of the demands in the petition, the services that were offered by the district, an evaluation of the propriety of the services to be given to the child, and the court's order enforcing the provision of those services to the child satisfies the purposes behind the exhaustion requirement and was sufficient to permit the subsequent LAD filing in state court.

Plaintiffs' failure to appeal in this case did not preclude their filing of the present LAD claim because the purposes of the exhaustion requirement were minimally met. What is clear to this court is that the purposes behind the exhaustion requirement focus on prioritizing and addressing the needs of the child in the most qualified, expedient manner. When viewed in this context, plaintiff fulfilled the purposes of the exhaustion requirement by first filing in the administrative forum and obtaining an order for services, despite the fact that it was obtained without a hearing.

b. The public policy behind the NJLAD statute supports a finding of exhaustion.

The 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.

The Appellate Division asked this court to consider whether the ALJ’s decision would have encompassed the same time frame as that for which plaintiffs seek damages under the LAD or instead have been limited to the time the petition was filed. This is a complicated question due to the procedural history of this case. The answer is that it could have encompassed the same timeframe. Plaintiff J.L. was born in 2001. According to the facts alleged, as an infant, she suffered an anoxic event that caused encephalopathy, resulting in cognitive, learning, hearing and vision disorders. She attended Harrison Township School District for kindergarten through sixth grade. In August 2012, J.L.’s parents submitted evaluation reports to the school district and requested services based on the findings of J.L.’s pediatric neurologist, a vision evaluation, an occupational therapy assessment, and a neuropsychological evaluation. In response, on September 24, 2012 the school district found J.L. eligible for services and revised her IEP on November 7, 2012. In the present LAD action she alleges that the school district failed to appropriately assess and accommodate her disabilities and that she was denied a FAPE from the year 2005, when she was three years of age, through the start of the 2013-2014 school year when she was twelve years of age and seeks damages for the entire period of alleged discrimination.

At the time J.L.’s due process petition was filed, she was eleven years old. In addition to reserved civil remedies, the petition requested additional evaluations in areas of suspected

disabilities; accommodations of her disabilities; an appropriate IEP; appropriate placement and extended school year; compensatory education; reimbursement for out of pocket expenses incurred in obtaining services and evaluations; and prohibitions against disclosing medical records without consent. In the administrative forum, a due process hearing may be requested for students age three through 21 years when there is a disagreement regarding identification, evaluation, reevaluation, classification, educational placement the provision of FAPE, or disciplinary action. For students above the age of 21, a due process hearing may be requested while the student is receiving compensatory educational or related services. N.J.A.C. 6A:14-2.7(a). A request for a due process hearing must be filed within two years of the date the party knew or should have known about the alleged action that forms the basis for the due process petition. N.J.A.C. 6A:14-2.7(a)(1).

On the basis of the time limitations above, defendants argue that the ALJ's review would be limited to the time period of two years prior to the filing of the due process petition⁴. However, the limitations in the statutory provisions in the paragraph above do not limit the timeframe for which damages may be provided, but instead the deadline for requesting a hearing on violations. This is further supported by case law interpreting the relief possible. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3rd. Cir. 2015). In G.L., the court was called upon to interpret what was argued to be a two-year limitation on the pre-filing damages in 20 U.S.C. 1415(b)(6)(B). G.L. at 604. It held that there was not a two-year limitation, and the child was entitled to compensatory education for a period equal to the period of the deprivation, if proven. Id. at 626. In coming to

⁴ Defendants have not argued, and did not assert in the administrative forum, that the plaintiffs knew or should have known about the alleged violation at a time earlier than two years prior to the administrative filing. Discovery has not begun in this case because defendants' Motion for Summary Judgment was filed in lieu of an Answer. The court does not consider at this time what impact those facts, if found, would have on the ability to continue to pursue this LAD complaint, if any.

that conclusion, the court found it significant, inter alia, that the IDEA granted the courts broad discretion to remedy a deprivation of the right to a FAPE, and that the statute conferred upon the district court the authority to grant such relief as the court determines is appropriate, including attorneys' fees, reimbursement for private educational placement and compensatory education. Id. at 608 (citations omitted).

If the due process petition had gone to a hearing, the hearing officer would have considered whether J.L. was entitled to the relief sought in the petition: additional evaluations in areas of suspected disabilities; accommodations of her disabilities; an appropriate IEP; appropriate placement and extended school year; compensatory education; reimbursement for out of pocket expenses incurred in obtaining services and evaluations; prohibitions against disclosing medical records without consent; and "all other remedies available under the statutes plead". This begs the question, what other remedies were available under the statutes plead?

Plaintiffs plead for relief pursuant to the IDEA, RA, and the ADA and the petition stated that they reserved the right to bring other civil claims. Compensatory and punitive damages are generally not obtainable through the IDEA. Chambers v. Sch. Dist. of Phila. Bd. Of Educ., 587 F.3d 176, 185-86 (Third Cir. 2009). The remedies available under the RA and the ADA are similar to those afforded by the NJLAD. The question of remedies has been addressed by the federal courts in conjunction with the question of exhaustion. Federal courts have considered and found unpersuasive a plaintiff's argument that exhaustion is not required because the ADA or RA provides for remedies not available in the administrative forum. Batchelor, 759 F.3d 266 at 271, 276. In Batchelor, the plaintiffs argued that their claims were exempt from the IDEA's exhaustion requirement because the remedies that they sought, compensatory and punitive damages, were not available under the IDEA and could not be awarded in the context of a due process hearing. Id. at

276. The court found it significant that the plaintiffs did not exclusively seek compensatory and punitive damages; some of the relief sought was relief that was available under the IDEA; and with respect to the IDEA-related claims, the district court was not constrained in the relief it is authorized to grant by the remedies sought in the plaintiffs' complaint. The IDEA authorizes the district court to grant "such relief as [it] determines is appropriate". *Id.* at 277, *citing* 20 U.S.C. 1415(i)(2)(C)(iii). Further, "even though a monetary award is not available to Appellants during the IDEA administrative process as compensatory and punitive damages, such an award may nevertheless be granted as reimbursement for certain expenses incurred." *Batchelor* at 277. It is important to consider that the court in *Batchelor* considered the remedy question within its larger analysis of whether exhaustion was required, and in that case, plaintiffs had not made any previous administrative filing. The court explained:

Holding that Appellants must exhaust the IDEA's administrative process before seeking judicial relief *ensures that the purpose of the IDEA remains intact*. In response to a school district's alleged bad behavior, *the educational harms suffered by children with disabilities will be addressed first and foremost during the IDEA's administrative process. Once these educational deficiencies have been addressed, 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 (emphasis added). We see again here that the primary concern of the courts is to have the educational needs addressed properly and efficiently, with the understanding that other relief may be pursued at a later time.

Accordingly, the answer to the question of whether the ALJ's decision would have encompassed the same time frame as that for which plaintiffs seek damages under the LAD instead have been limited to the time the petition was filed, is that it could have encompassed relief for out-of-pocket expenses and compensatory education for the same time period as alleged in the LAD claim, and could have encompassed additional monetary damages if incorporated into a

settlement agreement with the school district (for example, in exchange for a waiver of the right to pursue a LAD or other civil claim). However, if plaintiffs wanted to pursue the full range of compensatory, punitive and other damages permitted under the NJLAD, including damages from the year 2005, that range of damages could not have been provided in the administrative forum absent a settlement agreement with the district, which would be unlikely if plaintiffs insisted upon punitive damages.

As described above, this court has found that the plaintiffs' administrative process in this case has fulfilled the purposes of the exhaustion requirement. In the present case, due to the ALJ's dismissal of the case prior to a hearing, the ALJ did not give the plaintiffs the opportunity to present facts that might convince the court that a monetary award was appropriate or the opportunity to complete settlement negotiations that might have addressed these issues. However, the ALJ's decision indicated the judge's finding was that "the relief sought in the petition has been met by the respondents *at least as to the issues over which this court has jurisdiction.*" January 28, 2014 decision of the Honorable John Schuster III, ALJ at 3 (emphasis added). The wording of the finding indicates that the judge considered and anticipated that the plaintiffs would or at least could seek other civil relief that he did not order. That is what the plaintiffs seek here, and what the law permits after the administrative adjudication of the educational needs.

The administrative process in this case did not occur as the statutory framework intended. That was the result of what this court finds was the ALJ's dismissal of the administrative petition prior to the provision of the full due process required by IDEA, and plaintiffs' decision not to appeal that dismissal. The defense asks this court to bar the pursuit of the LAD remedies as a result. However, when the court considers the specific facts and procedural history of this case, and the strong legislative policy in this state's LAD requiring broad interpretation to promote the

goals of the statute, this court is not convinced that a dismissal of the LAD complaint is what New Jersey law requires.

3. The fact that plaintiffs did not specifically plead the LAD claims in the administrative petition does not preclude them from pursuing the present LAD action.

As discussed above, the Appellate Division has held that the LAD and the RA and the ADA are coextensive. J.T., 438 N.J. Super. at 263-65. The defense seeks to apply this argument to its benefit to require dismissal where an LAD claim is really an IDEA claim in disguise and requires exhaustion. It also argues that where the LAD claim is not specifically plead in the administrative forum, even though it is based on the same facts as were alleged in the administrative action, it is barred because it was not specifically plead. The defense cannot have it both ways.

It is well established that “[w]hile the IDEA concerns the affirmative duty to provide a public education to disabled students, the RA and the ADA ‘embody the negative prohibition against depriving disabled students of public education.’” J.T., 438 N.J. Super. at 262 (citations omitted). In an LAD action based on denial of educational benefits due to a disability, our courts apply the standards developed under the ADA. Lasky v. Moorestown Twp, 425 N.J. Super. 530, 538 (App. Div. 2011). To establish a prima facie case, the plaintiff must demonstrate that he (1) had a disability; (2) was otherwise qualified to participate in the program at issue; and (3) was denied the benefits of the program or otherwise discriminated against because of his disability. J.T., 438 N.J. Super. At 264. In their administrative petition, plaintiffs alleged violations of the IDEA, the RA, and the ADA. The petition sought remedies under these statutes (that have been determined to be coextensive with the NJ LAD) and reserved the right to bring all civil actions not within the jurisdiction of the NJOAL. Specifically, the petition requested additional evaluations in areas of suspected disabilities; accommodations of her disabilities; an appropriate IEP;

appropriate placement and extended school year; compensatory education; reimbursement for out of pocket expenses incurred in obtaining services and evaluations; prohibitions against disclosing medical records without consent; and all other remedies available under the statutes plead *with a reservation of the right to bring all civil actions not within the jurisdiction of the NJOAL*. It is disingenuous for the defense to argue at this time that the LAD filing was a surprise or that the LAD filing seeks relief that should have been addressed in the administrative forum, where it was the defendant that moved to dismiss the administrative complaint on the basis of mootness before a hearing was held.

4. The plaintiff has plead facts sufficient to proceed on a LAD claim.

The defense contends that the fact that Judge Schuster did not find a denial of FAPE in the administrative proceeding requires dismissal of plaintiff's LAD claim because a finding of FAPE is required under the third prong of a LAD claim. Indeed, the "benefit" that a child alleges is denied in a LAD claim is a FAPE. J.T., 438 N.J. Super. at 264. However, this court has not found any requirement in the law for a plaintiff to submit an order from an ALJ declaring or finding a denial of FAPE. What is required is administrative exhaustion and facts sufficient to prove a denial of FAPE.

The court in J.T. evaluated the facts of the case and ultimately dismissed the case not because there was a failure to exhaust, but instead based on a holding that the facts alleged did not support a finding of denial of FAPE. Id. at 268-69. The court did not decide that it required the findings and decision of an administrative law judge before it could evaluate whether there was a denial of FAPE. In the present case, the plaintiff alleges a denial of FAPE in that she was not properly evaluated in areas of her suspected disabilities and the school district failed to accommodate her disabilities. It is asserted that medical evaluations were submitted in support of

requests for services. The Complaint alleges facts that if proven could support a factfinder's decision that FAPE was denied.

Judge Schuster's January 28, 2014 order also supports this court's finding that plaintiff has sufficiently plead a cause of action under the LAD. In his order, the Honorable John Schuster III, ALJ ordered that the petition was dismissed; ordered that "respondent shall provide to the petitioner all the relief offered in satisfaction of the demands set forth in the petition"; ordered an IEP meeting to be scheduled "for the purpose of incorporating the offers of services made in this matter"; and ordered the services to commence as soon as practicable. The order stated that the decision was "final pursuant to 20 U.S.C.A. §1415(i)(1)(A) and 34 C.F.R. § 300.514 (2012) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States." This court finds it significant that the decision reflects that the judge considered the allegations of the petition, the services demanded, the services offered, and *incorporated the offered services into an enforceable order for those services*. It is also significant that this order was sufficient for the district court to conclude that plaintiffs were prevailing parties and therefore entitled to a determination of an award of legal fees. This court does not, however, equate a prevailing party finding with a finding of denial of FAPE.

This court's decision that the plaintiffs exhausted administrative remedies and the finding that sufficient facts have been alleged to set forth a denial of FAPE and a cause of action under the LAD require a denial of defendants' Motion for Summary Judgment.

For the reasons stated above, the court's February 3, 2017 order granting summary judgment is vacated. Defendants' Motion for Summary Judgment is denied. The court's April 13, 2017 order denying plaintiff's Motion for Reconsideration is vacated. Defendants' Motion for Reconsideration is granted. Defendants shall file an Answer to plaintiff's Complaint or seek other relief within 20 days.

So ordered.

s/Jean Chetney
JSC