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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PAT OMAN,)	
)	
Plaintiff,)	Case No. CV05-558-HU
)	(Lead Case)
vs.)	
)	Case No. CV05-1715-HU
PORTLAND PUBLIC SCHOOLS,)	
Multnomah School District No. 1,)	
et al.)	
)	
Defendants.)	

OPINION AND
ORDER

PAT OMAN,)
)
Plaintiff,)
)
vs.)
)
PORTLAND PUBLIC SCHOOLS, et al.)
)
Defendants.)

Pat Oman
4015 NE Multnomah Street
Portland, Oregon 97232
Pro se

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J. Michael Porter
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6 HUBEL, Magistrate Judge:

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8 Upon further review of the court's previous orders in light of
9 the issues raised by the defendants' most recent filings, and the
10 legal authority from this jurisdiction on the issues presented by
11 this case, I have concluded as follows.

12 In the Second Amended Complaint for CV 05-558-HU, filed on
13 January 23, 2006, Ms. Oman asserted claims for retaliation against
14 her in violation of IDEA and 42 U.S.C. § 1983. Second Amended
15 Complaint ¶¶ 22-25, 29, 58-63. On November 7, 2006, I entered an
16 Opinion and Order holding that money damages were not recoverable
17 under the IDEA, see, e.g., Robb v. Bethel Sch. Dist. # 403, 308
18 F.3d 1047, 1049 (9th Cir. 2002), and that Ms. Oman could not assert
19 a claim for monetary relief under 42 U.S.C. § 1983 for alleged
20 violations of the IDEA. (Doc. #76). In Blanchard v. Morton Sch.
21 Dist., 509 F.3d 934, 937-38 (9th Cir. 2007) (Blanchard II) the Ninth
22 Circuit reached the same conclusion.

23 In so holding, I considered Smith v. Robinson, 468 U.S. 992,
24 1009 (1984), School District of Hawaii v. Katherine D., 727 F.2d
25 809, 820 (9th Cir. 1983), Alex G. v. Board of Trustees of Davis
26 Joint Unified Sch. Dist., 332 F. Supp. 1315 (E.D. Calif. 2004), and
27 Emma C. v. Eastin, 985 F. Supp. 940, 945 (N.D. Cal. 1997), among

1 other cases. I agreed with the Alex G. court that Congress did not
2 intend IDEA to include compensatory damages as a remedy and that §
3 1983 could not be used to evade that Congressional intent. But as
4 the Emma C. court noted, absent a clear direction to the contrary
5 from Congress, federal courts are empowered to award any
6 appropriate relief in a cognizable cause of action brought pursuant
7 to a federal statute. While I continue to believe Congress
8 expressed its intent that there be no compensatory damages under
9 IDEA (and thus under § 1983 for violations of of IDEA), a nominal
10 damages award under either IDEA or § 1983 is within the court's
11 power and not contrary to Congress's intent. Thus, Ms. Oman may
12 proceed with her attempt to establish her entitlement to such an
13 award.

14 The Opinion and Order of November 2006, in addressing Ms.
15 Oman's § 1983 claim, did not mention, nor did any party raise the
16 issue, of a potential award of nominal damages. A claim for
17 violation of civil rights can be redressed through an award of
18 nominal damages when compensatory damages are not available, and
19 there is authority that nominal damages are available for
20 violations of implied federal rights as well, such as the right of
21 parents not to be retaliated against for attempting to exercise
22 their procedural rights under IDEA. See Bernhardt v. County of Los
23 Angeles, 279 F.3d 862, (9th Cir. 2002) (plaintiff potentially
24 entitled to nominal damages "on the basis that defendant's policy
25 interfered with an implied federal right to obtain counsel in a
26 civil rights action"); Rivera v. NIBCO, Inc., 364 F.3d 1057, 1069

1 (9th Cir. 2004) (nominal damages for Title VII violation); Draper v.
2 Coombs, 792 F.2d 915, 921-22 (9th Cir. 1986) (permitting nominal
3 damages in § 1983 action for violations of both statutory and
4 constitutional rights); City of Riverside v. Rivera, 477 U.S. 561,
5 574 (1986) (“Unlike most private tort litigants, a civil rights
6 plaintiff seeks to vindicate important civil and constitutional
7 rights that cannot be valued solely in monetary terms”); Carey v.
8 Piphus, 435 U.S. 247, 266 (1978) (“By making the deprivation of such
9 rights actionable for nominal damages without proof of actual
10 injury, the law recognizes the importance to organized society that
11 those rights be scrupulously observed”). See also OAR 581-015-
12 2030(19) (“No person may be subject to retaliation or
13 discrimination” for having filed a complaint about violation of the
14 IDEA or regulations under IDEA) and N.B. v. Hellgate Elementary
15 Sch. Dist., 541 F.3d 1202, 1208 (9th Cir. 2008) (state standards that
16 are not inconsistent with federal standards under the IDEA are
17 enforceable in federal court).

18 The fact that Oman is not entitled to recover monetary damages
19 under IDEA does not mean she cannot recover nominal damages.
20 Nominal damages are not compensation for loss or injury, but rather
21 recognition of a violation of rights. Cummings v. Connell, 402 F.3d
22 936, 945 (9th Cir. 2005). An award of nominal damages is intended
23 to serve as a symbol that defendant’s conduct resulted in a
24 technical, as opposed to injurious, violation of plaintiff’s
25 rights. Id., citing Carey, 435 U.S. at 266-67. The relief afforded
26 by nominal damages is two-fold: 1) the moral satisfaction of
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1 knowing that a federal court concluded that plaintiff's rights had
2 been violated, and 2) an enforceable judgment requiring the
3 alteration of defendant's behavior to plaintiff's benefit. Id. at
4 945-46, citing Hewitt v. Helms, 482 U.S. 755, 761-62 (1987).

5 In Rivera, 364 F.3d at 1069, the court noted the "distinction
6 between a violation and the availability of remedies," and held
7 that a plaintiff's lack of eligibility for certain forms of relief
8 merely "goes to the issue of damages, not liability." Id.

9 The questions of statutory violation and appropriate
10 statutory remedy are conceptually distinct. An illegal
11 act of discrimination--whether based on race or some
12 other factor such as a motive of reprisal--is a wrong in
itself under Title VII, regardless of whether that wrong
would warrant an award of remedies.

13 Id. at 1070.

14 A live claim for nominal damages will prevent dismissal for
15 mootness. Bernhardt, 279 F.3d at 872; Lokey v. Richardson, 600 F.2d
16 1265, 1266 (9th Cir. 1979) (per curiam) (although claims for
17 prospective relief was moot, case not moot because plaintiff prayed
18 for damages and, regardless of actual damages, plaintiff could be
entitled to nominal damages).

19 An award of nominal damages in this case would not defeat
20 IDEA's comprehensive enforcement scheme, and, if warranted, would
21 further the goal of parent involvement. "[A] state must comply both
22 procedurally and substantively with the IDEA." N.B., 541 F.3d at
23 1207, quoting M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 644 (9th
24 Cir. 2005). Compliance with IDEA procedures is part of the test for
25 determining whether a state has provided a free appropriate public
26 education (FAPE), Bd. of Educ. of the Hendrick Hudson Central Sch.

1 Dist. v. Rowley, 458 U.S. 176, 206-07 (1982), so that a procedural
2 violation resulting in the loss of an educational opportunity,
3 seriously infringing the parents' opportunity to participate in the
4 IEP formulation process, or causing a deprivation of educational
5 benefits constitutes denial of a FAPE. Parental involvement is a
6 "fundamental component of the operation of the IDEA." Rueker v.
7 Sommer, 567 F. Supp.2d 1276, 1286 (D. Or. 2008); see also 20 U.S.C.
8 § 1415 (state educational agencies must establish and maintain
9 procedural safeguards to ensure the parent is provided the
10 opportunity to be fully involved in the educational services
11 provided to their child).

12 ODE asserts that Ms. Oman cannot bring her retaliation claims
13 to this court because she has failed to exhaust her administrative
14 remedies. Whether exhaustion of administrative remedies under the
15 IDEA is required is a question of law. Rueker, 567 F. Supp.2d at
16 1291.

17 In general, plaintiffs must exhaust administrative remedies
18 before filing a civil lawsuit if they seek relief for injuries that
19 could be redressed to any degree by the IDEA's administrative
20 procedures. Kutasi v. Las Virgenes Sch. Dist., 494 F.3d 1162, 1163
21 (9th Cir. 2007). Although parents do have individually enforceable
22 substantive rights under the IDEA, see Winkelman ex rel. Winkelman
23 v. Parma City Sch. Dist., 550 U.S. 516 (2007) and 20 U.S.C. §
24 1400(d)(1)(A)-(B) (IDEA's substantive and procedural protections
25 exist to ensure a FAPE to children with disabilities and to protect
26 the rights of the parents of such children in the process of
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1 ensuring the children's access to education), a parent bringing a
2 claim on her own behalf rather than her child's is not required to
3 exhaust administrative remedies because no administrative remedies
4 exist. Blanchard v. Morton Sch. Dist., 420 F.3d 918, 922 (9th Cir.
5 2005) (Blanchard I). See also Rueker, 567 F. Supp.2d at 1291 (IDEA's
6 administrative remedies cannot remedy injuries that are non-
7 educational, citing Blanchard I). The Ninth Circuit has also
8 recognized an exception to the exhaustion requirement where an
9 educational agency has failed to perform its statutory duty to
10 notify a parent of all available safeguards and avenues of review.
11 Doe v. Gonzales v. Maher, 793 F.2d 1470, 1490-91 (9th Cir. 1986),
12 *judgment aff'd as modified in* Honig v. Doe, 484 U.S. 305, 327
13 (1988).

14 Ms. Oman's retaliation claims are Claim Nine in CV 05-558 and
15 Claim Seventeen in CV 05-1715. Against PPS, these claims assert
16 that defendant Bull hindered Ms. Oman's ability to exercise her
17 procedural rights under the IDEA and that PPS failed to provide the
18 additional instruction to C.O. as ordered by the ODE hearings
19 officer. Against ODE, they assert that ODE failed to investigate
20 PPS's denial of reimbursement to Ms. Oman for the IEE; failed to
21 provide Ms. Oman adequate notice of the procedural requirements of
22 the IDEIA, effective in 2004; ratified PPS's failure to provide the
23 additional instruction to C.O., and initially refused to file the
24 administrative record of DP 04-110 in this court.

25 Ms. Oman's claim that PPS defendant Bull prevented Ms. Oman
26 from speaking to witnesses before the due process hearing is a
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1 claim for violation of Ms. Oman's own substantive rights as a
2 parent. Accordingly, the claim is not subject to administrative
3 exhaustion and can be redressed at this time through an award of
4 nominal damages.

5 It is apparent, however, that Ms. Oman's claim that PPS failed
6 to provide the 4000 minutes of supplemental instruction as ordered
7 by the ODE hearings officer is not a claim brought on her own
8 behalf. It is a claim that is educational, and therefore
9 redressable through a due process hearing. See Robb v. Bethel Sch.
10 Dist. # 403, 308 F.3d 1047, 1048 (9th Cir. 2002) (when injury can be
11 redressed to any degree by the IDEA's administrative procedures and
12 remedies, exhaustion of those remedies is required); 20 U.S.C. §
13 1415(b)(6) and (k) (administrative hearings relate to complaints
14 about matters relating to the provision of a FAPE). It was
15 exhausted. The issue now is the failure of PPS to schedule the
16 minutes and the failure of ODE to act on Ms. Oman's complaint in
17 that regard. However, C.O. is not a party to this case and any
18 remedy ordering the educational instruction at this time requires
19 his participation. The court has no way to determine whether C.O.
20 seeks the relief of an order requiring PPS to provide the
21 supplemental instruction to C.O., or if C.O. would participate in
22 such instruction if offered. I conclude, therefore, that the court
23 has no jurisdiction over this claim.

24 The retaliation claims asserted against ODE are for 1) failing
25 to investigate Ms. Oman's complaint about confidentiality
26 agreements being required as a condition of reimbursement for an
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1 IEE, 2) failing to provide Ms. Oman adequate notice of the due
2 process notification requirements under the 2004 amendments to the
3 IDEA, 3) ratifying PPS's failure to provide C.O. the supplemental
4 instruction ordered by the ALJ, and 4) refusing to file the
5 administrative record of DP 04-110 in this court.

6 The first, second and fourth of these claims are asserted on
7 behalf of Ms. Oman herself, and not her child. Under Blanchard I,
8 no administrative exhaustion is necessary.

9 Moreover, the first claim relates to a complaint resolution
10 procedure (CRP) rather than a due process hearing. In addition to,
11 and distinct from, IDEA's due process hearings, federal regulations
12 provide an administrative mechanism for ensuring state and local
13 compliance with IDEA. See Christopher S. v. Stanislaus County
14 Office of Education, 384 F.3d 1205, 1210 (9th Cir. 2004). The
15 regulations require states to adopt a CRP for claims that a state
16 or local agency is violating the IDEA. 34 C.F.R. §§ 300.660,
17 300.662.

18 In Lucht v. Molalla River Sch. Dist., 225 F.3d 1023, 1028-29
19 (9th Cir. 2000), the court held that the CRP and the due process
20 hearing procedures are alternative, or even serial, means of
21 addressing a complaint. ODE argues that Ms. Oman was required to
22 exhaust all the CRP remedies provided in OAR 581-015-2030,
23 including judicial review in state court of a final order by the
24 Superintendent of Public Instruction.¹ This argument is

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26 ¹The regulation provides, among other things, that upon
27 receipt of a complaint, the Superintendent is to obtain a
28 response to the allegations, initiate attempts to resolve the

1 unpersuasive. Ms. Oman has alleged that ODE refused to investigate
2 her complaint because she had not made a showing that
3 confidentiality agreements were required of anyone but herself. OAR
4 581-015-2030 makes no mention of such a requirement. ODE's refusal
5 to take any action on the complaint foreclosed Ms. Oman from
6 pursuing the post-complaint procedures provided in OAR 581-015-
7 2030, including judicial review in state court.

8 No administrative exhaustion is required under the facts
9 alleged for second claim pursuant to Doe, 793 F.2d at 1490-91,
10 which excused exhaustion when an agency has failed to perform its
11 statutory duties.

12 The fourth claim relates to conduct relating to, and occurring
13 after, the filing of this action in federal court. Such conduct is
14 non-educational, directed solely at Ms. Oman, within this court's
15 jurisdiction, and obviously not redressable through administrative
16 procedures conducted by an administrative law judge.

17 The first, second and fourth claims allege violations of Ms.
18 Oman's substantive rights under the IDEA, and are therefore
19 potentially redressable through nominal damages.

20 However, the third claim against ODE is, for the reasons
21 discussed above, not subject to redress through a nominal damages
22 award to Ms. Oman.

23 ODE has also asserted Eleventh Amendment and sovereign
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25 complaint, and issue a written decision that contains findings of
26 fact and conclusions, as well as reasons for the Superintendent's
27 decision within 60 days of receipt of the complaint. Parties are
then permitted to seek judicial review of the final order under
Or. Rev. Stat. § 183.484.

1 immunity defenses. The IDEA, which was passed pursuant to
2 Congress's authority under the Fourteenth Amendment, abrogates the
3 states' immunity under the Eleventh Amendment. 20 U.S.C. § 1403.

4 ODE's sovereign immunity argument, which was addressed in my
5 Opinion and Order of September 10, 2007 (doc. # 144) was that to
6 the extent Ms. Oman's claims were based on a "perceived failure" of
7 ODE to "follow state regulations that may have conflicted with the
8 IDEA 2004 amendments," the claims were based on state law and
9 required to be brought in state court. I disagreed with ODE's
10 characterization of the claim, interpreting it as one asserting
11 that ODE failed to provide Ms. Oman with adequate notice of the new
12 due process notification requirements of the IDEA 2004 amendments
13 before and after Ms. Oman's due process hearing requests were
14 rejected as insufficient under those amendments. The dismissal of
15 due process hearing requests occurred before the federal government
16 promulgated regulations under the IDEA 2004 amendments, in October
17 2006, and before the state promulgated regulations, in April 2007.
18 I concluded that Ms. Oman's claim had nothing to do with
19 preexisting state regulations that may have conflicted with the
20 2004 amendments to IDEA.

21 In its first motion in limine, ODE raises the Eleventh
22 Amendment immunity issue again, this time directed at Ms. Oman's
23 retaliation claim regarding failure of the ODE to address her CRP
24 complaint about PPS requiring confidentiality agreements before
25 reimbursing for IEEs. This will be addressed during trial.

