UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

NOBLE WOMAN CHIEF NIKA RAET BEY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 5:16-cv-02627
	:	
EAST PENN SCHOOL DISTRICT; WESCOSVILLE ELEMENTARY SCHOOL; TARA DESIDERIO; KRISTEN CAMPBELL; DR. MICHAEL SCHILDER,	:	
	:	
Defendants.	:	

O P I N I O N
Defendants' Motion to Dismiss, ECF No. 10 - Granted

Joseph F. Leeson, Jr. **July 20, 2017**
United States District Judge

In May 2016, Plaintiff Nika Raet Bey, the mother of two children formerly enrolled in the East Penn School District, proceeding pro se, initiated this civil rights action under the Individuals with Disabilities Education Act (IDEA) and 42 U.S.C. § 1983. Bey's claims arise out of a series of alleged incidents involving inadequate individual education programs (IEPs) for her children, threats made by other students against her children, and school officials' failure to appropriately investigate these threats. Defendants have collectively moved to dismiss Bey's Complaint. For the reasons set forth below, Defendants' Motion is granted and Bey's Complaint is dismissed without prejudice.

I. Background

Bey's Complaint alleges the following facts.

From March 2015 through December 2015, Bey's son and daughter, both of whom are autistic, were enrolled in Wescosville Elementary School, within the East Penn School District. Compl. ¶ III, C, ECF Nos. 1, 8. During this time, the School District failed to "provide [an] adequate I.E.P. under accurate evaluations" for Bey's two children. *Id.* In addition, Bey's children were subjected to threats from students "of a different race." *Id.* Tara Desiderio, the Principal of Wescosville Elementary School, "failed to conduct an appropriate . . . investigation" to determine the identities of the students who threatened Bey's children. *Id.* Bey "complained to the [p]rincipal, tried to meet with the children's teachers," and ultimately withdrew her children from the District. *Id.*[1] Thereafter, the School District and Principal Desiderio "press[ed] charges against [Bey]" for removing her children from the school. *Id.* Bey seeks an award of "$400,000.00 in damages" as well as an injunction "assuring homeless families and families with disabilities that fraud against them [and] false allegations against them will not be tolerated." *Id.* ¶ 5.

II. Standard of Review

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure permits the court to dismiss a complaint for lack of subject matter jurisdiction. A Rule 12(b)(1) challenge may either be made in the form of a facial challenge or a factual challenge. *Warren v. Matthey*, No. 15–1919, 2016 WL 215232, at *2 (E.D. Pa. Jan. 19, 2016). Where, as here, an attack is facial, the court must consider only "the allegations of the complaint and documents referenced

[1] According to Bey's Response to Defendants' Motion (titled "Motion to Proceed"), her children are currently attending school in the Allentown School District. Pl.'s Resp. Defs.' Mot. ¶ 8, ECF No. 16.

therein and attached thereto, in the light most favorable to the plaintiff." *Id.* (quoting *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000)).

B. Motion to Dismiss for Failure to State a Claim

The defendant bears the burden of demonstrating that a plaintiff has failed to state a claim upon which relief can be granted. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (citing *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)). This Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *See Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)) (internal quotation marks omitted).

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court recognized that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court subsequently laid out a two-part approach to reviewing a motion to dismiss under Rule 12(b)(6).

First, the Court observed, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* at 678. Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to survive the motion; "instead, 'a complaint must allege facts suggestive of [the proscribed] conduct.'" *Id.*; *Phillips*, 515 F.3d at 233 (quoting *Twombly*, 550 U.S. at 563 n.8). While Rule 8, which requires only "a short and plain statement of the claim showing that the

pleader is entitled to relief," was "a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, . . . it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79 ("Rule 8 . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." (citing *Twombly*, 550 U.S. at 555)); *see* Fed. R. Civ. P. 8(a)(2). For "without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice' but also the 'grounds' on which the claim rests." *Phillips*, 515 F.3d 224, 232 (citing *Twombly*, 550 U.S. at 555 n.3).

Second, the Court emphasized, "only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 678. Only if "the '[f]actual allegations . . . raise a right to relief above the speculative level'" has the plaintiff stated a plausible claim. *Phillips*, 515 F.3d at 234 (quoting *Twombly*, 550 U.S. at 555). This is because Rule 8(a)(2) "requires not merely a short and plain statement, but instead mandates a statement 'showing that the pleader is entitled to relief.'" *See id*., 515 F.3d at 234 (quoting Fed. R. Civ. P. 8(a)(2)). If "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). "Detailed factual allegations" are not required, *id*. at 678 (quoting *Twombly*, 550 U.S. at 555), but a claim must be "nudged . . . across the line from conceivable to plausible." *Id.* at 680 (quoting *Twombly*, 550 U.S. at 570).

"The plausibility standard is not akin to a 'probability requirement,'" but there must be "more than a sheer possibility that a defendant has acted unlawfully." *Id*. at 678 (quoting

Twombly, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id*. (quoting *Twombly*, 550 U.S. at 557)).

III. Bey's claims concerning the allegedly inadequate IEP are dismissed for lack of subject matter jurisdiction.

Defendants contend that Bey has failed to exhaust the administrative remedies provided by the IDEA and that the Court therefore lacks jurisdiction over her claims concerning the School District's alleged failure to provide adequate IEPs to her children.

The stated goal of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE")." 20 U.S.C. § 1400(d)(1)(A). "Under the IDEA, a state is eligible for federal funding if it complies with several requirements, all aimed at protecting the rights of students with disabilities and their parents." *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 271 (3d Cir. 2014). In particular, "States must comply with detailed procedures for identifying, evaluating, and making placements for students with disabilities, as well as procedures for developing [IEPs]." *Id.* at 271-72. The IEP is "the centerpiece" of the IDEA and is "the means by which special education and related services are 'tailored to the unique needs' of a particular child." *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 181 (1982)).

The IDEA provides a comprehensive list of procedural safeguards and administrative remedies to ensure that a FAPE is being provided. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 749 (2017) (summarizing IDEA procedures). "Following completion of the IDEA's administrative process, i.e., exhaustion, the IDEA 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." *Batchelor*, 759 F.3d at 272 (quoting 20 U.S.C. § 1415(i)(2)(A)). "In the normal case, exhausting the IDEA's administrative process is required in order for the statute to 'grant[ ] subject matter jurisdiction to the district court [ ].'" *Id.* (quoting *Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778 (3d Cir. 1994)). This exhaustion requirement applies only when a suit seeks relief for denial of a FAPE. *See Fry*, 137 S. Ct. at 752.

A plaintiff may be excused from meeting the IDEA's exhaustion requirement if the plaintiff demonstrates the applicability of one of four "narrow exceptions." *See Old Bridge Bd. of Educ. v. R.D. ex rel. D.D.*, No.15-3886, 2015 WL 4464152, at *3 (D.N.J. Jul. 21, 2015). First, "[p]arents may bypass the administrative process where exhaustion would be futile or inadequate." *Honig v. Doe*, 484 U.S. 305, 327 (1988). Second, "an exception exists where the issue presented is purely a legal question." *Komninos*, 13 F.3d at 778. Third, if the administrative agency is unable to give relief, the plaintiff may also be excused from the exhaustion requirement. *Id.* at 778. Finally, exhaustion is not necessary when an "emergency situation" exists. *Id.* at 778. This fourth exception must be "sparingly invoked" and, in order to invoke this exception, "plaintiffs must provide affidavits from competent professionals along with other hard evidence that the child faces irreversible damage if the relief is not granted." *Id.* at 779.

Here, although Bey alleges that she attempted to speak with school officials about her children, she does not allege that she exhausted administrative remedies prior to commencing this action. Nor has she alleged facts that would support any of the above-named exceptions.[2]

[2] Bey does assert that, as a result of the alleged incidents, her children have suffered "anxiety, panic attacks, and post-traumatic stress." Compl. ¶ III, C. But these allegations are insufficient to invoke the "emergency situation" exception to the exhaustion requirement, as Bey has failed to provide "affidavits from competent professionals along with other hard evidence" that her children face "irreversible damage if the relief is not granted."

Further, Bey does not address the issue of IDEA exhaustion in her Response to Defendants' Motion. Accordingly, because Bey does not allege that she exhausted administrative remedies prior to commencing this action and has not demonstrated that she is entitled to be excused from the IDEA's exhaustion requirement, her claims concerning the allegedly inadequate IEPs are dismissed for lack subject matter jurisdiction.

IV. Bey's remaining allegations fail to state a claim.

In addition to Bey's allegations that her children did not receive adequate IEPs, Bey also alleges that her children were threatened by students "of a different race" and that Principal Desiderio failed to investigate these threats. These allegations fail to state a claim upon which relief may be granted.

A. Bey has failed to state a claim under Title VI.

Neither Bey's Complaint nor her Response to Defendants' Motion sets forth the legal basis for her claims. Nevertheless, as Bey has filed her complaint pro se, the Court must liberally construe her pleadings and "apply the applicable law, irrespective of whether a pro se litigant has mentioned it by name." *See Holley v. Dep't of Veteran Affairs*, 165 F.3d 244, 247–48 (3d Cir. 1999). Accordingly, as it appears Bey seeks to allege acts of racial discrimination within a school setting, the statute most applicable to her claim is Title VI of the Civil Rights Act, which prohibits intentional discrimination based on "race, color, or national origin" in any program that receives federal funding. *See* 42 U.S.C. § 2000d.

In order to recover compensatory relief, an individual bringing suit under Title VI must demonstrate that the defendant engaged in "intentional discrimination." *See Blunt v. Lower Merion School Dist.*, 767 F.3d 247, 272 (3d Cir. 2014). In the context of Title VI, a plaintiff may establish intentional discrimination through a showing that the defendant acted with "deliberate

indifference." *Id.* The Supreme Court has defined "deliberate indifference" to mean that the defendant had knowledge of the alleged misconduct, had the power to correct it, and yet failed to do so. *Id.* at 273. The "knowledge" required as an element of deliberate indifference is actual knowledge; constructive knowledge is insufficient. *See id.* In the education context in particular, "a plaintiff may sue a school [under Title VI] for money damages for its failure to address a racially hostile environment," *Whitfield v. Notre Dame Middle Sch.*, 412 F. App'x 517, 521 (3d Cir. 2011), and "[a] plaintiff may recover for alleged 'severe, pervasive, and objectively offensive' student-on-student harassment if the school 'acts with deliberate indifference to known acts of harassment,'" *id.* (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999)).[3]

Although Bey has alleged that her children were threatened by students "of a different race," she has not alleged that this harassment was based on race or that school officials had knowledge of this conduct.[4] Accordingly, Bey has failed to allege facts that would demonstrate that school officials acted with "deliberate indifference" to racially-based peer harassment, and her claims under Title VI are dismissed. Because it remains possible that Bey could allege additional facts to state a claim under Title VI, her claims are dismissed without prejudice.[5]

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[3] To the extent Bey seeks to allege Title VI claims against individual Defendants Desiderio, Campbell, and Schilder, those claims are dismissed with prejudice because individual persons cannot be held liable under Title VI. *See Shannon v. Lardizzone*, 334 F. App'x 506, 508 (3d Cir. 2009) ("[B]ecause Title VI forbids discrimination only by recipients of federal funding, individuals cannot be held liable under Title VI.").

[4] Bey vaguely alleges that she "complained to the [p]rincipal," but the substance of her alleged complaints to the [p]rincipal is not clear. *See* Compl. ¶ III, C

[5] In Bey's Response to Defendants' Motion, she alleges additional facts concerning the alleged harassment of her children. The Court is unable, however, to consider these allegations in its review of the present Complaint. *See Dade v. Gaudenzia DRC, Inc.*, Civ. A. No. 13–1381, 2013 WL 3380592, at *2 n.1 (E.D. Pa. July 8, 2013) (observing that district courts in the Third Circuit generally do not allow facts from a plaintiff's response to a motion to dismiss to be considered when analyzing whether a plaintiff has stated a claim).

Additionally, Title VI provides a private cause of action for retaliation. *Whitfield*, 412 F. App'x at 522. In order to establish a retaliation claim under Title VI, a plaintiff must demonstrate the following: "(1) she was engaging in a protected activity; (2) the funded entity subjected her to an adverse action after or contemporaneously with the protected activity; and (3) a causal link between the adverse action and the protected activity." *Id*. "Protected activity includes 'formal charges of discrimination as well as informal protests of discriminatory [educational] practices, including making complaints to management.'" *Ke v. Drexel Univ.*, No. CV 11-6708, 2015 WL 5316492, at *38 (E.D. Pa. Sept. 4, 2015) (quoting *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701–02 (3d Cir. 1995)). Bey does not mention "retaliation" in her Complaint, but even if she had, any such claim would fail as she has failed to allege that she engaged in a protected activity or that she suffered an adverse action as a result.[6]

B. Bey has failed to state an equal protection claim under § 1983.

Although Bey does not explicitly bring a claim under 42 U.S.C. § 1983, she claims that she was "deprived of rights under the color of law" and "deprived of equal protection." Comp. ¶ II, B. Because her Complaint's language mirrors that of § 1983, it is clear that Bey is attempting to bring action under this statute.

Section 1983 provides that any person who, under the color of law, causes another person to be deprived of "any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. "To bring a successful claim under 42 U.S.C. § 1983 for a denial

[6] Bey alleges that she complained to the principal, but does not clearly allege the substance of her complaints, and she alleges that school officials filed criminal charges against her, but does not clearly allege that these charges were filed as a result of any protected activity on her part. In her Response to Defendants' Motion, Bey alleges additional facts concerning the alleged retaliation against her but, as set forth above, the Court is unable to consider these allegations in its review of the present Complaint.

of equal protection, plaintiffs must prove the existence of purposeful discrimination." *Blunt*, 767 F.3d at 273. Additionally, individuals seeking relief under § 1983 must show they "receiv[ed] different treatment from that received by other individuals similarly situated." *Id.* The notion that individuals be "similarly situated" is an essential element to a claim under § 1983. *Id.* (citing *Startzell v. City of Phila.*, 533 F.3d 183, 203 (3d Cir. 2008)). "Persons are similarly situated under the Equal Protection Clause when they are alike 'in all relevant aspects.'" *Id.* (quoting *Startzell*, 533 F.3d at 203).

Bey's Complaint contains no allegations regarding disparate treatment between her children and similarly situated students. The absence of such allegations renders the Court unable to make a plausible inference that her children were discriminated against, and Bey's equal protection claims are dismissed without prejudice. *See Spring v. Allegany–Limestone Cent. Sch. Dist.*, 655 F. App'x 25, 28 (2d Cir. 2016) (affirming dismissal of equal protection claims asserted on behalf of student where the complaint contained "no allegations regarding disparate treatment between [the student] and similarly situated students").[7]

[7] In her Complaint, Bey vaguely refers to the McKinney-Vento Act, which "was enacted in 1987 'to provide urgently needed assistance to protect and improve the lives and safety of the homeless.'" *See Nat'l Law Ctr. on Homelessness & Poverty, R.I. v. N.Y.*, 224 F.R.D. 314, 318 (E.D.N.Y. 2004) (quoting Pub. L. No. 100–77, 101 Stat. 525 (codified at 42 U.S.C. § 11431 (1988))). The purpose of the Act, which was reauthorized in 2002, is to "ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youths." *Id.* (quoting 42 U.S.C. § 11431). Although the Act itself does not provide a mechanism for civil enforcement of the rights it provides, courts have held that a plaintiff may enforce those rights by invoking 42 U.S.C. § 1983. *See id.; Lampkin v. District of Columbia*, 27 F.3d 605, 612 (D.C. Cir. 1994). Here, however, Bey has not alleged any facts that would support a claim under the Act.

V. Conclusion

Bey has failed to allege that she exhausted the administrative remedies provided by the IDEA and has otherwise failed to state a claim. Her Complaint against all Defendants is dismissed without prejudice, and she will be granted leave to file an amended complaint. Should she choose to file an amended complaint, it must contain allegations that are "simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). Any amended complaint "must be complete in all respects," it "must be a new pleading that stands by itself as an adequate complaint" without reference to Bey's initial Complaint, and it must "make clear which claims are being asserted specifically against which defendants and the specific factual basis for each claim against each defendant, as well as the specific relief being sought and the grounds for that relief." *See Cohen v. Wagner*, No. 13-CV-674, 2014 WL 199909, at *10 (E.D. Pa. Jan. 16, 2014). A separate order follows.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge