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1 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
2 CIVIL NO. 01-3389

M.A., et al., :
3 Plaintiffs, :
-vs- :
4 :
NEWARK PUBLIC SCHOOLS, et al., :
5 :
: DECISION
6 Defendants :
7 ---------------------------------:
Newark, New Jersey
Febuary 6, 2002 11:30 a.m.
8 B E F O R E:

9 THE HONORABLE KATHARINE S. HAYDEN, U.S.D.J.
A p p e a r a n c e s:
10

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Pursuant to Section 753 Title 28 United States Code,
23 the following transcript is certified to be an accurate
record as taken stenographically in the above-entitled
24 proceedings.

25 Ralph F. Florio
Official Court Reporter

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1 THE COURT: Good morning. We are on the record in
2 the matter of M.A., et al versus Newark Public Schools, et
3 al.
4 Yesterday the attorneys were here representing the
5 parties, and I heard oral argument. It was spirited and it
6 was very helpful to the Court. The briefing was excellent on
7 both sides, and I am prepared to render my decision on the
8 record with respect to the motions filed by the State
9 defendants and by the Newark defendant.
10 Therefore before the Court are the motions brought
11 by the State of New Jersey, Department of Education, which
12 was filed to dismiss plaintiffs' complaint for failure to
13 state a claim upon which relief may be granted on grounds of
14 sovereign immunity, untimeliness and failure to exhaust
15 administrative remedies.
16 The other motion was brought by the Newark Public
17 Schools, otherwise called the State-Operated School District
18 of the City of Newark. I'll probably be referring to it as
19 Newark throughout.
20 On the following basis: To dismiss for failure to
21 state a claim because plaintiffs have not exhausted
22 administrative remedies, to dismiss for failure to state a
23 claim under section 1983 and lack of subject matter of
24 jurisdiction under section 1983, for failure to state a claim
25 based on New Jersey Constitution, and on grounds that the

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1 Entire Controversy Doctrine in New Jersey bars the claim.
2 The complaint we are talking about was filed in
3 July 2001. The plaintiffs represent children in Newark
4 Public School Direct who needs special education services.
5 They claim that Newark Public Schools or Newark has failed to
6 provide the "free appropriate public education" they are
7 required to provide to children with special needs.
8 Plaintiffs claim that Newark has failed to (1) identify
9 children within their jurisdiction that need services, (2)
10 they have failed to timely evaluate these children for
11 special education eligibility, (3) for those determined to
12 have a disability, plaintiffs claim that Newark has not
13 timely provided and implemented the IEPs that individualized
14 education programs that are necessary, and (4) for those who
15 have received an IEP, defendants have not remedied the delay
16 with compensatory education.
17 In a preliminary statement the complaint identifies
18 the lawsuit as "a class action on behalf of all children with
19 disabilities ages 3 through 21, who require special education
20 services from the Newark Public Schools but have not been
21 evaluated for or provided with such services." Paragraph 24.
22 Both Newark and the DOE, the State Commissioner of Education
23 and two administrators are alleged to have failed to
24 identify, locate, refer and evaluate the plaintiffs for
25 special education eligibility. Have failed to provide them

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1 with special education and related services and failed to
2 provide them with compensatory education.
3 Additionally, the State defendants are alleged to
4 have failed to monitor Newark's delivery of special education
5 services and failed to ensure the plaintiffs receive
6 appropriate relief in response to a complaint investigation
7 request filed under the IDEA.
8 Factually, the complaint alleges that the
9 particular circumstances of six representative plaintiffs and
10 narrates the history of IDEA complaint investigation and the
11 Department of Education's findings. On the later, it appears
12 beginning with paragraph 72 of the complaint, that on July
13 24, 1998, the Education Law Center, plaintiffs' attorneys in
14 this litigation, requested the DOE to conduct a complaint
15 investigation of Newark's failure to identify and evaluate
16 children with potential disabilities in both public and
17 private schools and in a timely manner conduct and complete
18 special education valuations.
19 Off the record for just a minute.
20 (Discussion held off the record).
21 THE COURT: Back on the record. On 12/24/98 the DOE
22 issued a Complaint Investigation Report signed by one of the
23 individual defendants Gantwerk and transmitted by the other
24 one of the other named defendants Zangrillo, which identified
25 Newark's failures to identify potential disable public school

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1 pupils, see paragraphs 74 to 76. Further identified Newark
2 failure to provide timely evaluation because it had not
3 developed an efficient procedure to address the "inordinately
4 large number of incomplete, noncompliant initial cases."
5 Paragraph 77. Also, as reflected in paragraph 77, the DOE
6 found the Newark Central Office was unable to monitor
7 stamping patterns and needs, time productivity levels and
8 respond and concerns and complaints from parents and school
9 officials in an adequate manner.
10 Also, the DOE identified a pile up of cases carried
11 over from one school year to the next; that schools routinely
12 advised parents to obtain outside assessment to speed things
13 up; the child study team, sometimes referred to as CST in
14 caps, referrals were not being made due to poor past and
15 current procedure. And when referred, those referrals were
16 outside regulated time lines. Complaint paragraph 78 to 80.
17 In the next paragraph, the complaint reflects that
18 while the public sector had written policies and procedures,
19 the DOE found that none were commit submitted for
20 identification in the nonpublic sector.
21 According to paragraph 83: The DOE concluded in
22 its report that Newark was engaged in "systemic noncompliance
23 with requirements established in NJAC 6:28 and 6A:14
24 regarding the identification and evaluation of potentially
25 disabled pupils in City of Newark" and that "systemic

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1 corrective action is required."

2 Based on its findings, the DOE set forth in the
3 report a number of procedures Newark had to implement
4 regarding the referral process at the school level.
5 Paragraph 84 to 86. In September 1999, Gantwerk wrote to
6 Education Law Center and expressed the DOE's intention to
7 provide compensatory educational services to children named
8 in the complaint to the DOE paragraph 87.

9 The DOE conducted a visit to Newark district
10 between May 8 and May 15, 2000, to determine compliance with
11 the IDEA and state regulations. According to its reported
12 findings, dated September 2000, DOE found Newark failed to
13 meet timelines "throughout the special ed," process due in
14 part to lack of staff and ineffective deployment of staff.
15 DOE ordered Newark to develop an improvement plan that would
16 ensure IEPs are implemented as soon as possible after the IEP
17 meeting. Paragraph 88.

18 The complaint details these foregoing historic
19 facts, and then alleges present, "ongoing noncompliance in
20 Newark." It further alleges further alleges, that none of the
21 defendants have provided the children named in the 1998
22 complaint of compensatory educational services. The
23 complaint alleges the complaints of the named child
24 plaintiffs and parents representative of the class of
25 individuals who have similarly been denied such services.

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1 Then in over 100 paragraphs, the complaint sets forth the
2 circumstances of the named child plaintiffs who are pupils in
3 6 different Newark public schools.
4 At oral argument, counsel for or from the Education
5 Law Center emphasized that despite the facts alleged about
6 the 6 Newark pupils set forth in paragraphs 96 to 202, the
7 complaint that has been filed before me is not an about
8 individual problems. Rather the complaint is about systemic
9 problems or structural problems throughout the direct
10 affecting all ends of the "child find" duty, which is
11 particularly associated with the Rehabilitation Act of 1973
12 but which "child find" duty is laced through the IDEA. As to
13 that child find duty, in W.B. versus Matula, 67 F.3d 484 at
14 pages 500 and 501, (3d Cir. 1995) decision held that section
15 504 from the Rehabilitation Act imposes a "child find" duty,
16 or the duty to identify disabled child "within a reasonable
17 time after school officials are on notice of behavior that is
18 likely to indicate a disability."
19 We didn't go into yesterday a definition of a
20 "child find" duty. But I found important the
21 characterization of the problems raised in the complaint by
22 the drafters of the complaint as problems affecting all ends
23 of the "child find" duty, hence I searched out that
24 definition which I think does the job from the Matula case.
25 If counsel have any reason to disagree with that

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1 definition of the "child find" duty?

2 (No response).

3 THE COURT: Beginning with the paragraph 216, the

4 complaint seeks relief under 12 causes of action as follows:

5 The 1st through 8th causes of action alleges that

6 the defendants violated plaintiffs rights under the IDEA and

7 state education statutes due to failure to identify, locate

8 and refer potential eligible children for special educational

9 services due to failure to evaluate; due to failure to make

10 eligibility determinations; develop IEPs. Implement IEPs;

11 provide compensatory educational services; and due to the

12 DOE, the Commissioner of Education and the Administrators'

13 failure to monitor and enforce Newark's obligations and these

14 defendants' failures to remediate Newark's denial of

15 services. The 9th cause of action alleges defendants'

16 policies and practices that deprived plaintiffs of their

17 rights under IDE under color of state law, were a violation

18 of 42 USC section 1983, and 10th cause of action alleges 1983

19 violations against Gantwerk, Gagliardi and Zangrillo

20 individually. The 11th cause of action alleges a through and

21 efficient education violation under Article VIII of the New

22 Jersey Constitution, the Abbott versus Burke mandates, and

23 the IDEA, with the focus of those allegations being Newark

24 and the 12th cause of action alleges the same against the

25 Department of Education and Commissioner of Education,

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1 Gagliardi.

2 After the complaint was filed, the plaintiffs move
3 the court for emergent injunctive relief as to the first two
4 named pupils ES and GT. Before any action was taken in
5 court, the parties reached agreement on services for ES and
6 GT. And as I understand it, an IEP was developed for each
7 student that is presently being implemented. Newark argues
8 that the issue of injunction of that particular injunctive
9 relief now is moot. Plaintiffs argue that an order embodying
10 it and providing the relief in the context of the injunction
11 applied for is in fact required. On another procedural
12 matter the United States moved for certifications of Eleventh
13 Amendment sovereign immunity issue and the United States
14 filed a brief in support of the constitutionality of the
15 IDEA, which had been attacked by the State defendants.

16 And attorney's from the Department of Justice
17 yesterday presented oral argument on waiver and abrogation of
18 states' immunity under the federal statute.

19 Standard of review. Defendants have moved to
20 dismiss based on rules 12(b)(1) and 12(b)(6). In deciding a
21 motion to dismiss under 12(b)(6), the Court must accept
22 plaintiffs' allegation as true and must give a plaintiff the
23 benefit of all inferences fairly to be drawn from the
24 complaint. See for example Weston versus Pennsylvania 251
25 F.3d 420, 425 (3d Cir. 2001). A court can not dismiss a

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1 complaint unless it concludes that the plaintiffs cannot
2 prove any set of facts that entitle it to relief. See
3 Connelly v. Gibson 355 U.S. 41, 45-46, 1957. "The issue is
4 not whether the plaintiff will ultimately prevail, but
5 whether the claimant is entitled to offer evidence to support
6 the claims." That familiar quote is from Scheur versus
7 Rhodes, 416 U.S. 232 at 236 1974.
8 A 12(b)(1) motion requires that the court apply a
9 less stringent test than would apply to a 12(b)(6) motion
10 Gould Electronics versus United States 220 F.2d-- it must be
11 F.3d 169, 1976, (3d Cir. 2000). "The standard for surviving a
12 Rule 12(b)(1) motions is lower than that for a rule 12(b)(6)
13 motion. The Third Circuit has explained that a court must
14 determine whether it has jurisdiction over the case before
15 deciding the legal issues on the merits and therefore decide
16 12(b)(1) motion based on whether the claim is legally
17 sufficient. The court added in Kehr Packages, Inc. versus
18 Fidelcor, Inc. 926 F.2d 1406 and 1401 (3d Cir. 1990). "But
19 dismissal is proper only when the claim clearly appears to be
20 material and made solely for the purposes of obtaining
21 jurisdiction or is wholly insubstantial substantial and
22 frivolous."
23 Again, from Kehr and it's the same page, Third
24 Circuit states in reviewing a facial attack, "the court must
25 consider only the allegations is in the complaint and

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1 documents referenced therein and attached thereto, in the
2 light most favorable to the plaintiff."
3 There are two issues that, I guess for my purposes,
4 I call nonstarters. If I find in favor of the defendants on
5 these issues because they go to the heart of the defendants'
6 motions, then we don't have to consider the others, and these
7 are the requirements of exhaustion under the IDEA and whether
8 the State enjoys immunity from this lawsuit under the
9 Eleventh Amendment, particularly under recent Supreme Court
10 jurisprudence.
11 Addressing Exhaustion: To the point of exhaustion,
12 we addressed the issue of exhaustion at oral argument.
13 Boiled down to its essence, the plaintiffs' justification for
14 their admitted failure to exhaust the multistep
15 administrative process strenuously argued for by these
16 defendants is that the plaintiffs are alleging systemic
17 breakdown of the delivery system, rooted primarily in the
18 lack of timeliness and identification and response, and as
19 such, this particular group of plaintiffs has presented
20 issues that are by their nature excused from an exhaustion
21 requirement.
22 Plaintiffs bear the burden on that. The burden of
23 demonstrating that an exception to exhaustion applies.
24 Gardner versus School Board of Caddo Parish 958 F.2d 108, 112
25 (5th Cir. 1992). To determine if they have succeeded it is

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1 necessary to examine the reason behind the rule, why the
2 exhaustion requirement exist is at all. The IDEA requires
3 exhaustion because it defers technical questions regarding
4 educational services to administrative expertise and avoids
5 lengthy and expensive federal trials. Jose P. Versus Ambach
6 669 F.2d, 865, 870 (2d Cir. 1982). And our Circuit in
7 Komninos versus Upper Saddle River Board of Education 13 F.3d
8 775, 778 (3d Cir. 1994), directed that attention be paid to
9 "the vitality of the carefully conceived administrative
10 procedure, providing as it does active, intense participation
11 by parents, educational authorities and medical personnel,"
12 and Komninos demanded the district court preserve this
13 by"insistence upon proof of irreparable injury before
14 allowing a party to bypass the exhaustion requirement." See
15 Komninos 13 F.3d at 779. That case also observes that "the
16 advantages of awaiting completion of administrative hearings
17 are particularly weighty in Disabilities Education Act
18 cases. That process offers an opportunity for state and
19 local agencies to exercises discretion and expertise in
20 fields in which they have substantial experience. These
21 proceedings thus carry out congressional intent and provide a
22 means to develop a complete factual record." Quoting to Smith
23 versus Robinson 468 U.S. at 1011." On Komninos, and that
24 appears at page 779.
25 But Komninos serves as a reminder that there are

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1 exceptions. "Even though the policy of requiring exhaustion
2 of remedies in the Disabilities Education Act is a strong one
3 some exceptions have been recognized. In Honig versus Doe
4 484 U.S. 305, 327, 1988, a case brought under an earlier
5 version of the Act, I am still quoting from Komninos the, the
6 court stated, "parents may bypass the administrative process
7 where exhaustion would be futile or inadequate." In like
8 vein, an exception exists where the issue presented is purely
9 a legal question or where the administrative agency cannot
10 grant relief, that is, the hearing officer lacks the
11 authority to provide a remedy.
12 I am omitting the citations that the Komninos case
13 set for that proposition. Finally, Komninos recognized the
14 exception when exhaustion would work "severe or irreparable
15 harm," upon a litigant. At 779.
16 I have carefully parsed the complaint, as counsel
17 is aware, earlier in this decision. I find that plaintiffs
18 have in fact alleged a systematic or structural failure on
19 the part of the defendants in identification of eligible
20 pupils for evaluation, actual evaluation, development of
21 IEPs, implementation of IEPs, monitoring and compliance by
22 Newark with the failures set forth with the Doe's two reports
23 and about its finding about the delivery of special
24 educational services to pupils in the Newark schools.
25 I agree with counsel that this complaint is not

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1 about the individual problems of ES and GT and MM and AO and
2 ODJ and AJE. Or if it is about these children, it is about
3 them as representatives of many other pupils. I note that in
4 saying this I am echoing, in part, the findings of the DOE in
5 December 1998, that in Newark was engaged in "systemic
6 noncompliance with the requirements established in NJAC 6:28
7 and 6A:14 and regarding the identification and evaluation of
8 potentially disabled pupils residing in the City of Newark"
9 and that "systemic corrective action is required" and I am
10 echoing the DOE's subsequent report in September 2000 to the
11 effect that Newark failed to meet timelines "throughout the
12 special educational process," that later phrase being an
13 expression as well of a systematic situation.
14 In short, plaintiffs are saying in this court that
15 what has been identified as a systematic breakdown in 1998
16 and 2000 continues and they seek redress on that basis.
17 Plaintiffs rely on reported cases other than
18 Komninos for the proposition that the exhaustion requirement
19 does not apply to the systemic and structural problems they
20 are suing about. New Mexico Association for Retarded
21 Citizens versus State of New Mexico 678 F.2d (10th Cir. 1982)
22 determined the where gravamen of the plaintiff's lawsuit is
23 that the entire special education services system offered by
24 New Mexico is infirm, the available remedies on the
25 administrative level did not include appropriate relief.

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1 Further, at page 851, the court noted exigent time
2 factor "further underscore the inadequacy of the State's
3 individualized proceedings for purposes of curing alleged
4 system-wide defects. . . Six school years have already been
5 irretrievably lost while this litigation runs it course."
6 The Second Circuit in Jose P. Versus Ambach,
7 earlier cited, 669 F.2d at page 870 reviewed the policies
8 administrative remedies including the usefulness of
9 administrative expertise where questions were difficult and
10 technical and the desirability of avoiding a lengthy costly
11 federal case. But these were not relevant, "where the
12 questions at issue are not technical, but concern about the
13 number of children on waiting lists, the availability of
14 programs, and adequacy of physical facilities."
15 Interestingly, Jose P. addresses something that
16 Newark raised, which is the fact that substantial number of
17 pupils are in fact receiving services. Nonetheless, the Jose
18 P. Decision noted that there was a demonstrated lack of a
19 meaningful administrative enforcement mechanism, which I find
20 analogous to the finding in this case by the DOE that despite
21 its reported findings at the end of 1998, in mid 2000, Newark
22 was still failing to meet timelines throughout the special
23 education process.
24 I therefore find that combination of futility, see
25 Honig versus Doe 484 U.S. 305, 327 and Smith versus Robinson

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1 468 U.S. 992, 1014 note 17 (1984) Supreme Court decision.
2 Along with the under; it's a Supreme Court decision, along
3 with the unavailability of a meaningful remedy obtainable
4 through due process hearings because what the plaintiffs are
5 complaining about are not individual problems to be addressed
6 through individualized administrative hearings. See Jose P.,
7 as earlier cited, and exigencies related to timeliness,
8 further delay in addressing a failure to identify need and
9 deliver services in a timely manner as per se
10 contraindicated, see Matula, all constrain this Court to
11 reject the defendants' arguments that this lawsuit may not be
12 entertained because the plaintiffs failed to exhaust
13 administrative remedies.
14 I find, too, that on a practical factual level
15 there is some merit in plaintiffs' argument through Ms.
16 Lowenkron that in effect Educational Law Center did exhaust
17 on behalf of these claims by bringing the Investigative
18 Complaint which sought redress on a systemic point of view
19 and did employ an appropriate administrative process. As
20 plaintiffs point out, there is no required appeal process or
21 prescribed route under IDEA subsequent thereto. It is
22 evident to me that this lawsuit follows the administrative
23 route plaintiffs did take more logically than the
24 individualized due process hearings that the defendants are
25 arguing for.

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1 On Eleventh Amendment immunity. Plaintiffs and the
2 Department of Justice urge me to reject the State's argument
3 that it was immune from suit because it has accepted federal
4 fund under IDEA and thereby has waived its immunity. As Mr.
5 Weiner put it, this argument is a clean and clear basis for
6 rejecting sovereign immunity. The other prong that Congress
7 abrogated the State's Eleventh Amendment rights in the Act is
8 arguably less certain despite a clear articulation in this
9 Circuit that this is indeed the case, because of U.S. Supreme
10 Court jurisprudence in City of Berne and Seminole Tribes.
11 And I think somebody pronounced Berne, so I am going to do
12 that too.
13 I note that Chief Judge Bissell entertained the
14 11th immunity last year F.P. versus State of New Jersey et al
15 in an unreported decision that was made available to me, I
16 think by plaintiffs' attorneys in which I think everybody is
17 familiar with from having had it circulated among the
18 attorneys in this case.
19 Borrowing from the reasonable of Eight Circuit in
20 Jim C. versus United States of America 235 F.3d 1079 2001,
21 Judge Bissell determined that New Jersey DOE, and hence the
22 Commissioner have "waived sovereign immunity for suits under
23 Section 504 of the Rehabilitation Act by accepting federal
24 fund for education programs. The principles of limited,
25 selective waiver in advanced in Jim C. Are equally to IDEA."

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1 That's Judge Bissell's opinion page 16.

2 Judge Bissell does not address in his opinion the

3 coercion argument played by the State here, but I note later

4 last year, Third Circuit decided MCI Telecomm Corp versus

5 Bell Atlantic Pennsylvania 2001 Westlaw 1381590, November 2,

6 2001, an opinion which both rejects a "magic words" approach

7 in construing the statute in order to establish a State's

8 knowing and voluntary waiver, see pages 15 and 16, and an

9 argument based on coercion. As to the later, the language

10 from the MCI case as follows: "The disbursement of federal

11 monies--" I just love it when they make a mistake in

12 Westlaw. "-- are congressionally bestowed gifts or

13 gratuities, which Congress is under no obligation to make,

14 which is a State is not otherwise entitled to receive, and to

15 which Congress can attach whatever condition it chooses."

16 Opinion at 8. As plaintiffs in the Department of Justice

17 point out, they only found at risk are precisely the funds

18 given to the State for IDEA purposes, factual support for the

19 position that the State has not made a showing of coercion.

20 Moving to the abrogation argument, Judge Bissell

21 after an examination of the IDEA, Section 504 and the ADA,

22 which were the federal statutes before him in FP, determined

23 that all of these Acts were enacted by Congress to apply in

24 Education,"with full knowledge of the persuasive involvement

25 that state and local government have for administering public

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1 education." The Acts, he went on, and congressional findings
2 in them, "necessarily and significantly detected
3 discriminatory practices in the public sector," and targeted
4 public sector conduct as "a significant cause of an
5 irrational discrimination against the disabled." That appears
6 at pages 21 and 22 of Judge Bissell's opinion.
7 Judge Bissell concluded that Congress enacted the
8 IDEA and other Acts "with requisite congruence and
9 proportionality required Berne to constitute a valid
10 abrogation of Eleventh Amendment immunity." Opinion at 22 and
11 23.
12 I agree, and to Judge Bissell's conclusion I would
13 add Judge Sloviter's careful examination of Congress's
14 section 5 power in Beth versus Carroll, 87 F.3d 80, 88 (3d
15 Cir. 1996) strongly suggests to me exiting Third Circuit law
16 supports the congruence and proportionality factors required
17 by subsequent Supreme Court analysis in Berne and found by
18 Chief Judge Bissell.
19 I find therefore that the State's Eleventh
20 Amendment argument fails.
21 Section 1983 claims. Now moving beyond those show
22 stoppers, as it were.
23 The State argues that the despite the clear mandate
24 of H.B. versus Matula, injunctive relief money damages
25 unavailable under the Civil Rights statute, 42 USC 1983.

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1 Plaintiffs argue, and I agree that H.B. Versus Matula is
2 still perfectly good law and it is explicit that, and that
3 Matula is explicit as follows, "far from inferring a
4 congressional intent to prevent section 1983 actions
5 predicated on the IDEA, we conclude that conclude that
6 Congress explicitly approved," and that is approved
7 italicized, such actions. Accordingly, section 1983 supplies
8 a private right of action." Moreover, plaintiffs argue, and I
9 agree, that under the facts of this case, the suit against
10 the individual named defendants may go forward on the basis
11 of both the individual and official capacity.
12 I find this based upon the those allegations in the
13 complaint about the findings and explicit corrective measures
14 set forth by the DOE in the report dated December 1998 and
15 the subsequent report of September 2000, the letter from
16 Gantwerk, earlier in 1999, all of which support these
17 individual defendants' awareness of involvement in planned
18 correction and remediation for the systemic failures of
19 Newark that were found to exist in the DOE reports and are
20 alleged in the complaint.
21 I therefore deny the motion to dismiss the cause of
22 action against the State defendants based upon 42 USC section
23 1983.
24 Time Bar and Entire Controversy Bar: The State
25 raises the argument that the Educational Law Center has known

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1 about this case for a period of time that makes applicable to
2 them and to plaintiffs a statute of limitation is that bars
3 the lawsuit it has filed on behalf of these plaintiffs. For
4 its part, Newark argues that when the Education Law Center
5 brought its state lawsuit based on Abbott, it was required to
6 raise the claims here and its failure evokes the protections
7 of the entire controversy doctrine.
8 For the record, would somebody place on the record
9 the name of that state lawsuit again, that was particularly
10 focused on in the entire controversy doctrine argument. It
11 was the one about remedies and/or decisions.
12 MS. WEISER: The in re Decisions.
13 THE COURT: Do you remember what that was?
14 MR. LOMBARDI: In re Decisions and Nondecisions of
15 the Department of Education.
16 THE COURT: We'll use that. In re Decisions and
17 Nondecisions of the Department of Education.
18 On the later point, the entire controversy
19 doctrine, plaintiffs assert a variety of arguments.
20 Factually, the litigation cited by the defendant involved
21 suits against the State for its statewide failure to enforce
22 the Supreme Court's holding, that's the New Jersey Supreme
23 Court's holdings in Abbott v. Berg regarding school planning
24 and budgeting, not suits regarding funding in the specific
25 direct for the provision of special education for disabled

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1 children. Furthermore, plaintiffs argue and point out
2 accurately that Newark was not a party to the Abbott
3 litigation.
4 Plaintiffs further point out that they asserted
5 Abbott funding claims in this action against the defendants
6 for the assessment of plaintiffs' needs for special education
7 services, to determine the need for supplemental funding and
8 to request it if needed. Paragraph 239 of the complaint.
9 They are not, as they point out, asserting claims based upon
10 the same facts or transactions involved in Abbott, as would
11 be required to demonstrate that this case is barred by Entire
12 Controversy Doctrine.
13 Examining our Entire Controversy Doctrine in New
14 Jersey, that doctrine requires the resolution in one action
15 of issues that relate to a single dispute between the same
16 parties. Leisure Technology Northeast, Inc. versus Klingbeil
17 Holding Company 137 New Jersey Super 353, 357 (App. Div.
18 1975). As the Third Circuit has explained in Rycoline
19 Products, Inc. versus C & W Unlimited, 109 F.3d 883, 886 (3d
20 Cir. 1997), "The Entire Controversy Doctrine is essentially
21 New Jersey's specific, and idiosyncratic, application of
22 traditional res judicata principles." In Rycoline the Circuit
23 Court of the Third Circuit further explained that: "The
24 Entire Controversy Doctrine embodies the motion that the
25 adjudication of legal controversy should occur in one

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1 litigation in only one court; accordingly all parties
2 involved in a litigation should at the very least present in
3 that proceeding all of their claims and defenses that are
4 related today the underlying controversy." Id. 885, omitting
5 internal quotations.
6 As plaintiffs correctly point out, their complaint
7 here involves many factual allegations that are unique to
8 this case, distinguishing it from the Abbott litigation
9 defendant cites as bar to this lawsuit. This case did not
10 arise from related facts or the same transactions or
11 occurrences from which the Abbott cases arose, and thus the
12 claims for adequate funding that are part of plaintiffs' case
13 are legitimately brought here rather than joined in the
14 Abbott litigation.
15 Additionally, the Abbott litigation was a class
16 action. The issues addressed by the Abbott cases addressed
17 them on-- The Abbott cases addressed its issues on behalf of
18 all the plaintiffs in the class with the judgment binding as
19 to the class members on the issues actually litigated. Class
20 action is not appropriate as a preclusive device against a
21 subsequent case brought on a highly specific and unique set
22 of facts. See Garvey versus Township of Wall, 303 N.J. Super
23 93, 102 (App. Div. 1997) finding an individual class members
24 claim who's not barred because he did not have a fair and
25 reasonable opportunity to litigate the claim in the prior

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1 class action suit.

2 Precluding plaintiffs here from filing claims

3 against the State for violation in the delivery of the

4 special education services based on the Abbott Court's

5 remedial order would prevent any child in the Abbott district

6 from bringing suit for this system's failures in their

7 particular case because a class action was brought and an

8 Order was made. The Entire Controversy Doctrine would be

9 made broad enough under that theory to prevent any relief for

10 violation of State provisions of educational rights in what

11 these plaintiffs enumerate as 30 school districts.

12 Further, plaintiffs argue that the Entire

13 Controversy Doctrine is not a bar unless there has been a

14 final judgment in the prior proceedings relying on Rycoline,

15 at page 890. The Abbott litigation that defendant Newark

16 cites is currently pending, with the exception of one case

17 DeWitt versus State Operated School District of the City of

18 Newark in which the non-systemic issues were dismissed and

19 the remaining issues consolidated into another case called In

20 The Matter of Abbott Global Issues that is currently on

21 appeal to the New Jersey Supreme Court.

22 And finally. Plaintiffs raise, and they are

23 correct in this regard, that the Entire Controversy Doctrine

24 is an affirmative defense that cannot defeat this Court's

25 subject matter jurisdiction, which is what's before me today,

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1 and thus it is not properly raised in this motion by the
2 defendants. Relying on Livera versus First National State
3 Bank of New Jersey 879 F.2d 1186, 1190 (3d Cir. 1989). The
4 doctrine can be used to support a motion to dismiss under
5 12(b)(6), but only if it is apparent on the face of the
6 Complaint according to Rycoline at page 886. I find that it
7 is not at all clear on the face of the plaintiffs' Complaint,
8 that this case and should be barred by the Entire Controversy
9 Doctrine.
10 On the time bar issue, which I am not persuaded by,
11 the State defendants argue that when plaintiffs initiated the
12 Complaint Investigation July 24, 1998, they had notice of
13 their due process rights at least on December 28, 1998 when
14 the State issued the Complaint Investigation Report that they
15 did. Plaintiffs claim, however, that the discriminatory acts
16 they complain of continue to this day, see Complaint
17 paragraphs 93 and 95, 203 to 215, and thus they are not
18 barred. The continuing violation are the defendants' alleged
19 ongoing failure to identify, locate, refer and evaluate
20 hundreds of class plaintiffs for special education
21 eligibility; its failure ongoing to deliver the services and
22 failure to provide compensatory education to remedy the
23 denial of educational services and a failure by the State
24 defendants to monitor the delivery of special education
25 services.

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1 Taking these claims as true and in the light most
2 favorable to the plaintiff, and relying on the established
3 precedent in this Circuit, see Bethel versus Jendoco
4 Construction Corp. 570 F.2d 1168, 1174 (3d Cir. 1978) that
5 found that where the defendants' discriminatory acts continue
6 to the present, they cannot be dismissed on a 12(b)(6)
7 motion.
8 I find that the plaintiffs' claims are not time
9 barred. As to the argument that the plaintiff knew or should
10 of known of the complaint of violation in 1998 because the
11 Education Law Center was involved in this complaint
12 investigation on behalf of the two named plaintiffs at that
13 time, as well as the larger class. The plaintiffs explain
14 that the class did not include the same plaintiffs as the
15 current proposed class, as some of the plaintiffs were not
16 involved in students in 1998 and some were not affected by
17 the defendants's actions in that year. As for those who were
18 affected by defendants' actions in 1998, many were not aware
19 of their injuries then.
20 Plaintiffs stated further that even if they did
21 know of the December 1998 Complaint Investigation Report, the
22 IDEA statute of limitations would not have started running at
23 that time. That reports states that the State of New Jersey
24 would cause Newark to remedy the IDEA violation. See
25 complaint paragraphs 84 through 86. Based on the report,

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1 plaintiffs state, plaintiffs had reason to believe that the
2 defendants' violations would be cured and therefore they were
3 not on notice that they had cause to file suit.
4 The report did not address compensatory education
5 for plaintiffs AE and ODJ. Defendants' argument suggests
6 that those compensatory educational claims began to run in
7 1998, however plaintiffs point to Barbara Gantwerk's letter
8 of September 25, 1999 that states, "It has always been the
9 intent of the Department of Education in the district to
10 provide appropriate compensatory services to those students
11 identified in the letter of complaint and to those student
12 identified through the investigation process." Paragraph 87
13 in the complaint. The plaintiffs could not have known even
14 at the time of the letter writing that those services would
15 not be forthcoming as they here alleged. As this failure
16 compensate is ongoing, like the claims discussed above, on
17 this claim the statute of limitations has not run.
18 On the New Jersey Constitution:
19 We did not address it at oral argument, but it is
20 briefed by the State defendants that there is no liability to
21 the cause of action for relief based upon violation of
22 Article VIII of the New Jersey Constitution and related state
23 statutes, that secure for the plaintiffs a right to a free
24 appropriate public education. That theory or the theory of
25 the briefing is that the Court cannot exercise pendant

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1 jurisdiction over these claims after dismissal of the federal
2 claims. Having not dismissed the federal claims, the Court
3 is in the position to exercise pendant jurisdiction and the
4 11th and 12th causes of action against Newark and the State
5 defendants will not be dismissed.
6 For the forgoing reasons, I am denying the motions
7 of the defendants. That leaves unaddressed the issue of
8 anchoring, as it were, the relief provided to ES and GT?
9 MS. LOWENKRON: Yes, your Honor.
10 THE COURT: Now, I am a somewhat concrete thinker
11 when it comes to Order to Show Cause. I don't have before me
12 sitting here now a copy of the proposed Order to Show Cause,
13 and I don't know, frankly, if one has been drafted and
14 proposed that actually captures what went on, what was agreed
15 to, etc.
16 Has one in fact been formulated?
17 MS. LOWENKRON: Your Honor, there was a proposed
18 order, which unfortunately I don't have either of these I am
19 talking about. There was a proposed order submitted along
20 with the motion, and there was subsequently an attempt to
21 draft a stipulation settlement to be so ordered. Both of
22 those exist, but are not in front of me.
23 THE COURT: Okay. I am going to provide the relief
24 sought by the plaintiffs of entering an order. I do not know
25 what it is going to say. I would appreciate the separate

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1 submission of whatever has been proposed giving the
2 defendants a chance for some input into it. So that from
3 their point of view it is the lease bad alternative so that I
4 am able to look at it with some input from counsel from both
5 sides.
6 If defendants don't wish to participate, I am not
7 ordering them that they do. But I'd appreciate getting that
8 document within five days. Okay.
9 MS. LOWENKRON: Yes.
10 THE COURT: Anything else, counsel? Thank you very
11 much everybody.
12 MS. LOWENKRON: Thank you.
13 MR. LOMBARDI: Thank you, your Honor.
14 MS. WEISER: Thank you.
15 THE COURT: Thank you all.
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