

I. Motion to Dismiss

A motion to dismiss tests the legal sufficiency of the complaint, and thus does not require the Court to examine the evidence at issue. *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court accepts all well-pleaded facts as true, "indulging every reasonable inference helpful to the plaintiff's cause." *Garita Hotel Ltd. Partnership v. Ponce Federal Bank, F.S.B.*, 958 F.2d 15, 17 (1st Cir. 1992). The plaintiff must, however, "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988). The Court need not accept "bald assertions" or "unsubstantiated conclusions." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990). "[I]f the facts narrated by the plaintiff 'do not at least outline or adumbrate' a viable claim, [the] complaint cannot pass Rule 12(b)(6) muster." *Gooley*, 851 F.2d at 515 (quoting *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984)).

II. Background

Elizabeth McKay is a junior at Winthrop High School and has been a student in the Winthrop school system since her kindergarten year. Elizabeth has a chronic connective tissue disorder called Marfan's Syndrome that prevents her from walking and requires her to use a power wheelchair or scooter for her mobility in school facilities. She was determined eligible for special education services pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 - 1491(o) (1990 & Supp. 1997) (IDEA), during her kindergarten year. Defendant Winthrop Board of Education manages, operates, and repairs all buildings in the Winthrop school system. Defendant Town of Winthrop is responsible for approving and funding the budget for the Winthrop school

system. It receives federal financial assistance for the programs and activities of Winthrop Middle and High Schools.

Through her father, George McKay, Elizabeth filed a three-count complaint alleging that the defendants discriminated against her due to her disability in violation of Title II of the ADA (Count I); the Rehabilitation Act of 1973 (Count II); and the MHRA (Count III). She alleges that the physical inaccessibility of the school system's programs, facilities, and activities have caused her emotional distress, pain, suffering, humiliation, and embarrassment. In addition to actual, compensatory, and punitive damages, Elizabeth seeks a declaratory judgment stating that the defendants have violated her rights.

III. Discussion

The defendants first contend that the plaintiff is not entitled to any damages pursuant to her statutory claims. Second, the defendants maintain that the plaintiff's claims are barred because she failed to exhaust her remedies as required by the IDEA and the MHRA. Third, the defendants seek to dismiss those portions of the plaintiff's claims arising under section 504 of the Rehabilitation Act and under Title II of the ADA that fall outside of the relevant statutes of limitations. Finally, in view of their allegation that an injunction is the only proper method of relief, the defendants seek a correction to the scheduling order that reflects an order for a bench trial.

A. Whether the plaintiff's claims for damages pursuant to the Rehabilitation Act and the ADA must be dismissed

It now is generally well accepted that, as a result of the United States Supreme Court's holding in *Franklin v. Gwinnett County*, 503 U.S. 60 (1992), that damages may be awarded pursuant to Title VI of the Civil Rights Act, 42 U.S.C. § 2000d (1994), damages also are recoverable pursuant to section 504 of the Rehabilitation Act. *See, e.g., Rodgers v. Magnet Cove Public Schools*, 34 F.3d 642, 645 (8th Cir. 1994); *Hurry v. Jones*, 734 F.2d 879, 886 (1st Cir. 1984); *Ciampa v. Massachusetts Rehabilitation Comm'n*, 718 F.2d 1, 5 (1st Cir. 1983) (either finding or assuming, without deciding, that damages are recoverable under section 504). Indeed, in a recent opinion by Judge Brody of the United States District Court for the District of Maine, the Court decided that a private cause of action to enforce the provisions of section 504 exists by implication and that punitive damages are recoverable under section 504. *Kilroy v. Husson College*, 959 F. Supp. 22, 24-25 & n.4 (D. Me 1997). This Court also has little difficulty in finding that Title II of the ADA authorizes the recovery of damages. Because Title II adopts the rights and remedies of section 505 of the Rehabilitation Act -- the section that sets forth the rights and remedies of section 504 of the Act, *see* 42 U.S.C. § 12132 (1995) -- any remedies available pursuant to section 504 of the Rehabilitation Act also are available pursuant to Title II of the ADA. *Cf. W.B. v. Matula*, 67 F.3d 484, 494 (3rd Cir. 1995); *see also Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187 (1st Cir. 1994) (holding that the broad language of *Franklin*, 503 U.S. at 70-71, in which the Court referred to the "general rule . . . that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute[,] supported the availability of exemplary damages under section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1985), pursuant to which courts

are directed to "order all appropriate relief," even though exemplary damages are not specifically provided for in that statute).

The defendants concede in their response to the plaintiff's reply brief that damages may in certain instances be recovered pursuant to section 504 of the Rehabilitation Act. They maintain, however, that damages only can be awarded following proof of a particularized intent to discriminate. Even if the Court were to accept this proposition as true, the plaintiff's complaint would withstand the motion to dismiss. Without deciding the exact nature of the intent required to be proved in order to obtain compensatory damages, the Court is satisfied that the plaintiff sufficiently has alleged intentional discrimination in her complaint ("Defendants' actions and omissions have been and continue to be intentional, willful, wanton, in bad faith, and/or malicious."). The Court concludes that damages may be recovered pursuant to section 504 of the Rehabilitation Act and pursuant to Title II of the ADA, and that the plaintiff has alleged sufficient discriminatory intent on the part of the defendants to prevail at this stage of the proceedings. *Niece v. Fitzner*, 922 F. Supp. 1208, 1219 n.9 (E.D. Mich. 1996).

The Court denies the defendants' request to treat their motion to dismiss as a motion for a summary judgment. A number of extensions already have been granted the parties in this matter for purposes of filing all motions. To allow the defendants to convert their motion to dismiss into a motion for a summary judgment at this time would be inappropriate and contrary to the requirements of Federal Rule of Civil Procedure 56 and Maine District Court Local Rule 7(a).

Finally, in view of the Court's finding that an injunction is not the only available means of relief for the plaintiff, the defendants' motion to amend the scheduling order for a bench trial is denied.

B. Whether any of the plaintiff's claims must be dismissed because she has not exhausted her administrative remedies

The defendants contend that the plaintiff is subject to the provisions of the IDEA and, as such, is required to exhaust all of the remedies set forth in that statute before seeking redress in federal court. The defendants also contend that the plaintiff is required to exhaust her remedies set forth in the MHRA. The Court is persuaded, however, by the plaintiff's contention that she is not subject to the IDEA's requirements and that, even if she were, she is not required to exhaust her remedies thereunder in order to bring an action pursuant to section 504 or pursuant to Title II of the ADA. *See Randolph Union High Sch. Dist. No. 2 v. Byard*, 22 IDELR 617, 620 (D. Vt. 1995) (plaintiff seeking damages pursuant to the ADA and state negligence and human rights act theories not required to exhaust IDEA remedies in view of fact that damages unavailable thereunder).

In view of its finding that the plaintiff may seek damages pursuant to section 504 and Title II of the ADA, the Court concludes that the plaintiff need not exhaust her administrative remedies pursuant to the IDEA. The Court is persuaded by the plaintiff's arguments on this point, especially her emphases on the facts that her complaint does not raise any issue with respect to her coverage by the IDEA, and that the damages she seeks could not be awarded through the IDEA. *See also Tuck v. HCA Health Servs. of Tenn., Inc.*, 7 F.3d 465, 471 (6th Cir. 1993); *Hope v. Cortines*, 872 F. Supp. 14, 20 (E.D. N.Y. 1995), *aff'd*, 69 F.3d 687 (2d Cir. 1995).

The Court also is unpersuaded by the defendants' contention that the plaintiff's MHRA claims are barred because she failed to exhaust her administrative remedies under that statute. The Court concludes that Maine law does not require a complainant to exhaust her remedies under the MHRA so long as one of the other causes of actions alleged in the same action does not require the

exhaustion of administrative remedies. *See* 5 M.R.S.A. § 4622 (Pamph. 1996). In view of the above, the Court accordingly denies the defendants' motion as it relates to the MHRA, as well.

C. Whether any of the plaintiff's claims must be dismissed due to applicable statutes of limitation

The defendants also seek to bar any of the plaintiff's claims that fall outside the applicable statutes of limitations set forth in the Rehabilitation Act and in the ADA. The plaintiff concedes that the applicable statutes of limitations pursuant to the Rehabilitation Act and the ADA are six years, and that the applicable statute of limitation for the MHRA is two years. The plaintiff contends, however, that in view of the fact that none of her claims exceed such time limitations, none of them should be dismissed. The Court agrees, and therefore denies the defendants' motion on this point.

IV. Conclusion

For the foregoing reasons, the defendants' motion to dismiss the plaintiff's complaint is **DENIED.**

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated this 6th day of June, 1997.