

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: I.K.  
ODR #00803/09-10 KE

Date of Birth:  
[redacted]

Dates of Hearing:  
May 27, 2011  
June 3, 2011  
June 23, 2011

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Representative:  
Sonja Kerr, Esquire  
PILCOP  
1709 Benjamin Franklin Parkway,  
Philadelphia, PA 19103

Haverford Township School District  
50 E. Eagle Road  
Havertown, PA 19083

Frances Ratner, Esquire  
BeattyLincke  
2000 Old Forge Road Suite 202  
Kennett Square, PA 19348

Date Record Closed:

July 6, 2011

Date of Decision:

July 8, 2011

Hearing Officer:

Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

On remand from the U.S. District Court for the Eastern District of Pennsylvania, this matter addresses the sole issue of whether or not a valid settlement agreement exists between the parties.

For the reasons presented below I find for the Parent<sup>1</sup>.

## Issue

Did the parties enter into a valid settlement agreement on July 28, 2009?<sup>2</sup>

## Findings of Fact

1. Student<sup>3</sup> is a teen-aged eligible Student residing in the Haverford Township School District. [NT 376]
2. The Parent through her former counsel filed a due process complaint on June 15, 2009. The matter was assigned to Hearing Officer Daniel Myers and scheduled for July 29, 2009. [NT 266, 379-380; P1, p 167-169]
3. The Parent did not receive or hear from her counsel about any settlement proposal from the District following the filing of the due process complaint. [NT 383]
4. On July 28, 2009 the parties and their respective attorneys held a resolution meeting for several hours. At times the parties and their counsel all met together, at other times the parties met individually with their attorney, and at times counsel met with each other. [NT 49-55, 101, 115-116, 119, 130-131, 136, 283-286, 291-298, 384]

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<sup>1</sup> Both parents attended the first two hearing sessions and both parents testified. As the mother was the principal actor, however, this decision references the mother as the "Parent".

<sup>2</sup> Although the parties represented to Hearing Officer Myers that they had reached an agreement in principle, they also indicated that they needed to refine the terms and engaged in this process over the next several months.

<sup>3</sup> Other than in the cover page, no further reference is made to the student's name, exact age or gender so that the family's privacy may be preserved.

5. Counsel for the District wrote down some basic settlement terms which had been discussed in the fashion described above. District counsel then read the terms discussed thus far, and Parent's counsel, who was the Parent's formal legal representative at the time, orally agreed to the terms. None of the participants signed the sheet of paper on which the terms were written. [NT 60-62, 107, 113, 121-122, 129, 139, 171, 287-291, 318-320, 395; P-3, P-4]
6. The handwritten notes reflecting some basic items of the proposed agreement do not reflect that there was specific and detailed discussion about elements that would be put into a written agreement, such as a release of civil rights claims, a confidentiality provision, and the necessity for the school board to ratify any agreement. Neither the Parent nor her former attorney recalled that conditions such as these were examined. [343-347, 400-401, 406, 411-412, 415-417; P-3, P-4]
7. Believing the parties had come to an agreement in principle, counsel for both the District and the Parent spoke to Hearing Officer Myers on the telephone, asking that the hearing session be canceled and requesting 30 days to finalize the agreement. Hearing Officer Myers canceled the session and agreed to continue the matter for 30 days after which time, if he had not heard from the attorneys, he would dismiss the case. He confirmed this by email. [NT 35-36, 44-45, 63, 141-142, 173, 288, 299-301, 308-309; S-2]
8. The Parent left the meeting not believing that there had been a settlement, and/or not being in complete agreement with the proposal. [NT 404]
9. The standard retainer agreement between a client and the Parent's former attorney's agency specifically gives the client responsibility concerning the acceptance or rejection of settlement of any claims.<sup>4</sup>
10. On September 4, 2009, when 38 days had elapsed, and having heard nothing further, Hearing Officer Myers notified counsel by email that he was dismissing the matter and considered it closed. [P-1, p 157; S-7]

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<sup>4</sup>HO-1

11. The school board has to review settlement agreements in executive session and the school board then must approve final settlement agreements at a public meeting. As of September 4, 2009 the school board had not approved an agreement regarding Student in a public session or signed a settlement agreement regarding Student. The school board has not ever signed a finalized revised copy of the settlement agreement. [NT 66, 85, 94, 155-156, 164, 357; S-11]
12. As of September 4, 2009 the Parent had not signed the settlement agreement. The Parent has not ever signed a finalized revised copy of the settlement agreement. [NT 163-164, 357; S-11]
13. The process of crafting the settlement agreement continued well into the fall of 2009, with counsel for the parties exchanging various correspondences via e-mail and voicemail through August, September and October in which they refined the terms of the settlement agreement in consultation with their clients and exchanged annotated drafts. [NT 81, 174-187, 200-206, 302-305, 310, 321-325, 336-337-341; S-3, S-4, S-5, S-6, S-8, S-9, S-10, S-11, S-12]
14. The Parent read various versions of the proposed settlement agreement and there were things in the documents that she thought she would like to have changed; these things were communicated to the District's attorney through emails and voicemails. [NT 421-422]
15. However, the Parent never agreed to sign any of the versions of the settlement agreement. [NT 406]
16. On November 2, 2009 counsel for the District inquired about the status of having the agreement signed by the Parent, and on that same date former counsel for the Parent replied that she had sent a copy of the agreement to the Parent for signature on October 15, 2009 and had not received a signed copy back yet. [NT 207, 330-333; S-13]
17. On November 16, 2009 counsel for the District again inquired about the status of the agreement. There is no reply in the record from Parent's former counsel. Parent's former counsel left her agency on November 16, 2009. [NT 312-313; S-14]

18. From July 28, 2009 to December 7, 2009 neither the Parent nor her former counsel made the District's attorney aware that the Parent did not agree with the terms of the settlement agreement. [NT 208, 311-312, 336, 426-427]
19. Meanwhile, counsel for the District believed that the Parent's claims had been settled. [NT 208-209]
20. On December 7, 2009 counsel for the District communicated with the director of PILCOP, the agency under whose auspices the Parent was represented, that she had learned that the Parent's former attorney had left the agency and asked that the newly assigned attorney contact her. The agency director responded that they were reviewing the file and that it would take several weeks to do so. [NT 210-211, 312-313, 321; S-15]
21. Counsel for the District and the new counsel for the Parent began communicating by telephone and email on December 8, 2009. Counsel engaged in reworking the settlement agreement as the Parent was objecting first to a clause relating to reversion of funds, and later to the amount of money Student would receive. [NT 213-226, 333-334; S-16, S-17, S-18, S-19, S-20, S-21, S-22, S-23, S-24]
22. After attempts to work out the problems were not successful, on March 9 or 10, 2010 Parent's counsel amended the original complaint and submitted a motion to re-open the original due process matter. The parties held several resolution sessions, and exchanged communication by email, none of which resulted in a resolution of the matter. [NT 228-239; P-1, 135-156, 167-169; P-1A p 170-182]
23. Believing that her child was discriminated against because of the child's disability, the Parent is unwilling to release the District from civil rights claims and this position primarily underlies her rejection of the proposed agreement. [NT 400-401, 411-412, 415-417, 424, 427]
24. On March 19, 2010 the District through counsel filed a motion to dismiss, asserting that an agreement had already been reached in principle in July 2009, that the present hearing officer had no authority to reinstitute a prior complaint, that even if she did have that authority it should not be exercised as a six month period to re-file a

- claim was “completely out-of-step with the emphasis on timeliness regarding these types of claims”, and that a claim for specific enforcement of a contract is a matter of state law over which the hearing officer lacks jurisdiction. [P-1 p 132-134]
25. The Parent through counsel filed a response in opposition to the motion. The District filed a reply to the response. The Parent filed a motion for reconsideration. [P-1, p 7-10, 16-67, 68-74]
26. In a ruling dated June 5, 2010 this hearing officer granted the District’s motion to dismiss because the same matter had been dismissed by the previous hearing officer, because the Parent had not taken a timely appeal of that hearing officer’s dismissal order and because insofar as the hearing would involve a determination of whether or not an agreement existed between the parties this hearing officer believed that she did not have the jurisdictional authority to decide a contract dispute. Further, on June 5<sup>th</sup> this hearing officer denied the Parent’s motion for reconsideration. . [P-1 p 13-15]
27. On or about October 5, 2010 the Parent timely appealed this hearing officer’s ruling to the United States District Court for the Eastern District of Pennsylvania. On March 21, 2011 The Honorable Stewart Dalzell issued a Memorandum and Order remanding the matter to this hearing officer on the single issue of whether a valid settlement agreement exists. [P-2]

## Legal Basis

### Resolution Meetings

The IDEIA’s implementing regulations provide direction regarding resolution meetings and settlement agreements that is relevant here:

- (d) Written settlement agreement. If a resolution to the dispute is reached at the meeting described in paragraphs (a)(1) and (2) of this section, the parties must execute a legally binding agreement that is –  
 (2) enforceable in any State court of competent jurisdiction or in a district court of the United States...
- (e) Agreement review period. If the parties execute an agreement pursuant to paragraph (d) of this section, a party may void the

agreement within 3 business days of the agreement's execution. 34  
C.F.R. §300.510(d)(e)

### Power of an Attorney to Bind a Client

Generally, the ordinary employment of an attorney to represent a client with respect to litigation does not of itself give the attorney implied or apparent authority to bind the client with settlement or compromise and, in absence of express authority, he or she cannot do so.<sup>5</sup> Though settlements are favored by the law, an attorney cannot, without special authority from his or her client, compromise the client's claim, release the client's cause of action or surrender any of the client's substantial rights.<sup>6</sup>

Although it is common practice for an attorney representing a parent to negotiate a settlement agreement on behalf of the parent in a special education due process case, the attorney does not have the power to bind the parent to an agreement. On point, the standard retainer agreement between a client and PILCOP, the Parent's former attorney's agency, specifically gives the client responsibility concerning the acceptance or rejection of settlement of any claims.

Likewise, although an attorney for a school district has the power to negotiate a settlement at a resolution meeting or in an informal manner, his/her authority is in fact limited to negotiating, but stops at binding the school district to an agreement. Pennsylvania School Law requires that the affirmative vote of a majority of all the members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on subjects including "Entering into contracts of any kind, including contracts for the purchase of fuel or any supplies, where the amount involved exceeds one hundred dollars (\$100)."<sup>7</sup> Courts have ruled that if one party is insulated from a binding agreement by placing a condition precedent upon the execution of the contract, then it is only fair that the other party have that same freedom.<sup>8</sup>

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<sup>5</sup> *School Dist. of Philadelphia v. Framlau Corp.*, 15 Pa.Cmwlth. 621, 328 A.2d 866 (1974)

<sup>6</sup> *Id.*

<sup>7</sup> 24 P.S. §5-508 Public\_School\_Code

<sup>8</sup> *Fahringer v. Strine's Estate*, 216 A.2d 82, 88 (Pa. 1966)

### Settlement Agreements and Contracts

The enforceability of settlement agreements is determined by general principles of contract law.<sup>9</sup> A contract is a legally binding agreement between parties creating obligations that are enforceable or otherwise recognizable at law.<sup>10</sup> In order for a party to be bound by an agreement there must be a mutual manifestation of intent to be bound, i.e., a “meeting of the minds”.<sup>11</sup> To be enforceable a settlement agreement must contain all the necessary elements of a contract.<sup>12</sup> In general and in Pennsylvania there are three essential elements to a contract that must all be present for a court to find a contract to be legally enforceable: (1) offer, (2) acceptance, and (3) consideration.<sup>13</sup>

An Offer may be either written or spoken, or implied by action.<sup>14</sup> An Offer is defined under the Restatement (Second) of Contracts as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.<sup>15</sup> Generally, an Offer must sufficiently establish the subject matter that the contract will be based upon, and properly describe the parties to be bound.<sup>16</sup> An Offer does not have to state every element of the contract, but it must set forth the essential terms of the contract sufficiently for a *reasonable person* to be able to understand what the Offer is intended to be.<sup>17</sup> An Offer cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.<sup>18</sup> A fundamental principle of contract law is that the party proposing the Offer cannot suppose, believe, suspect, imagine or hope that an Offer has been made.<sup>19</sup> An Offer must be communicated to the offeree in an intentional [and] definite manner.<sup>20</sup> In Pennsylvania, if the

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<sup>9</sup> See, e.g. *Cargill, Inc. v. LGX*, 2007 WL 527725, at \*2(E.D. Pa. Feb. 13, 2007); *Pulcinello v. Consolidated Rail Corp.*, 784 A.2d 122, 124 (Pa. Super. 2001); *Century Inn, Inc. v. Century Inn Realty, Inc.*, 516 A.2d 765, 767 (Pa. Super. 1986)

<sup>10</sup> *Black's Law Dictionary*, 8th Ed., (2004)

<sup>11</sup> E.g., *Courier Times, Inc. v. United Feature Syndicate, Inc.*, 445 A.2d 1288, 1295 (Pa. Super. Ct. 1982).

<sup>12</sup> *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999)

<sup>13</sup> *Schreiber v. Olan Mills*, 627 A.2d 806, 808 (Pa. Super. Ct. 1993) (it is axiomatic that before a contract may be found, all of the essential elements of a contract must exist)

<sup>14</sup> *Northern Penna. Legal Servs., Inc. v. Lackawanna Cnty.*, 513 F. Supp. 678, 683 (M.D. Pa. 1981)

<sup>15</sup> RESTATEMENT (SECOND) CONTRACTS §24

<sup>16</sup> *Detwiler v. Capone*, 55 A.2d 380, 385 (Pa. 1947)

<sup>17</sup> RESTATEMENT (SECOND) CONTRACTS §33

<sup>18</sup> *Id.*

<sup>19</sup> *Morosetti v. Louisiana Land & Exploration Co.*, 564 A.2d 151, 152 (Pa. 1989)

<sup>20</sup> *Id.*



party seeking to prove the existence of a contract does not show that a distinct Offer was made, then there is no contract.<sup>21</sup>

Acceptance may be explicit or implicit. While not all terms need be expressed in an Offer or the Acceptance, the contract must be clear enough so that a reasonable person would understand what they were agreeing to, and such clarity is particularly important where an oral contract is alleged.<sup>22</sup>

Consideration is an act, forbearance, or return promise bargained for and given in exchange for the original promise. Consideration demands some form of quid pro quo given in response to the Offer.

If any of these elements is missing, a court in Pennsylvania will not enforce an agreement as a legal contract.<sup>23</sup> Moreover, where offers have been made but rejected, or believed agreements repudiated, then there is no contract to enforce.<sup>24</sup>

An oral contract must contain the same elements required for a written contract.<sup>25</sup> The existence and terms of an oral contract must be established by clear and precise evidence.<sup>26</sup> The primary method of proving the existence of an oral contract is by performance. Action taken by one or both parties will often indicate that a contract was formed. The burden of proving the existence of an oral contract lies with the party that seeks to enforce it.<sup>27</sup>

An oral agreement differs from a written agreement insofar as for a written contract, any discussions prior to the writing are considered as being merged into the written contract.<sup>28</sup> Unless there is ambiguity as to the terms of the contract, oral testimony is not admissible to further explain the contract.<sup>29</sup> However, when courts are called upon to resolve a dispute regarding an oral contract, they must view the surrounding circumstances within which the

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<sup>21</sup> *Reed v. Pittsburgh Bd. of Pub. Educ.*, 862 A.2d 131, 135 (Pa. Commw. Ct. 2004) (citing REST §33)

<sup>22</sup> *Pennsy Supply, Inc. v. Am. Ash Recycling Corp. of Pa.*, 895 A.2d 595, 600 (Pa. Super. 2006).

<sup>23</sup> *Schreiber v. Olan Mills*

<sup>24</sup> *Morris v. School District of Philadelphia*, 1988 U.S. Dist. LEXIS 8680 (E.D. Pa 1988)

<sup>25</sup> *See, e.g., York Excavating Co. v. Employers Ins.*, 834 F. Supp. 733, 740 (M.D. Pa. 1993).

<sup>26</sup> *Redick v. Kraft*, 745 F.Supp. 296, 300 (E.D. Pa. 1990).

<sup>27</sup> *Mackay v. Mackay*, 984 A.2d 529, 534 (Pa. Super. 2009)

<sup>28</sup> *E.g., Boyle v. Steiman*, 631 A.2d 1025, 1033 (Pa. Super. 1993).

<sup>29</sup> *Id.*

contract was formed and with regard to the expectations and objectives of the contracting parties.<sup>30</sup>

## Discussion

### Burden of Proof

Ruling on a special education matter brought under the IDEIA, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). However, Pennsylvania courts have held that the burden of proving that a contract exists falls on the party that claims its existence.<sup>31</sup> Therefore, in the instant matter, although the Parent asked for the hearing, the burden of proof for this remanded matter rests with the District which asserts that a contract exists between itself and the Parent.

### Credibility of Witnesses

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003).

This hearing officer holds with certainty that the former attorney for the District and the former attorney for the Parent were testifying truthfully, with precision, and insofar as their memories served them after nearly two years, with fidelity to their recollections of the events that unfolded. Likewise, the testimony of the PILCOP advocate and the director of special education was deemed to be credible and was relied upon. Although the father’s testimony was limited as was his involvement there was no basis to question his credibility.

The mother offered credible testimony that she does not now believe, nor has she ever believed, that a settlement agreement exists. She persuaded this

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<sup>31</sup> *Edmondson v. Zetusky*, 674 A.2d 760, 764 (Pa. Commw. Ct. 1996)

hearing officer that, at best, on the day of the resolution meeting and continuing thereafter she was deeply ambivalent about the considerations she was expected to extend under the proposed offer, particularly as they pertained to relinquishing her child's right to seek redress for perceived discrimination, balanced against the offer of a substantial sum of money that she could use for past and future educational expenditures for her child. Although logically it certainly would seem that a timely, firm, and clear rejection of the District's offer from the beginning would have been best and expected given the mother's concerns, it can only be surmised that ambivalence, and perhaps a sense of being overwhelmed, prevented the Parent from openly making her concerns known and resulted in her ultimately leaving the final proposed settlement draft unsigned.

In certain instances that did not materially undermine her credibility on the core issue in this hearing, the Parent's statements did not ring true, and these bear mentioning. The mother said that she first contacted her former counsel in July 2007, approximately two years prior to her current attorney's filing the due process complaint in June 2009, and that she was "very concerned" about the delay. Given the clear concern she demonstrated for her child through this proceeding, this hearing officer cannot find her credible on this point, especially as she had personal contact at IEP meetings over this period with the lay advocate from her former attorney's office. [NT 379-381, 413] Likewise, although the former attorney for the District, the former attorney for the Parent and the District's director of special education all testified credibly that the Parent was present in the room when the initial terms of a proposed agreement were reviewed, the Parent testified that she did not recall the group going through the items. [NT 399-400] Although she was upset during that portion of the resolution meeting, the existence of that degree of disengagement from the discussion of substantial financial considerations is very difficult to accept. [NT 402, 414-415]

### Analysis

After carefully examining the documentary evidence and reviewing the testimony in this matter, this hearing officer must reach the conclusion that a contract between the District and the Parent does not exist for three reasons.

First, a 'legally binding agreement' pursuant to the resolution meeting was not executed. The meeting of July 28<sup>th</sup> was in fact a Resolution Meeting as contemplated in the IDEIA, albeit one that was flawed by untimeliness and lack of proper descriptive notice to the Parent. The wording of the statute

seems open to interpretation as to whether a) a 'legally binding agreement' reached at a Resolution Meeting must be written and executed at the meeting itself after which there is a three-day rescission period, or b) whether the 'legally binding agreement' may be written at a later time, then executed, and after it is executed be subject to a three-day rescission period. In either case a written agreement was never executed, that is, signed by the parties and therefore no Resolution Meeting Agreement exists.

Second, none of the three essential elements necessary for there to be "a meeting of the minds" were present.

Although an 'Offer' does not have to state every element of the contract, it must set forth the *essential* terms of the contract sufficiently for a *reasonable person* to be able to understand what the Offer is intended to be. Clearly, at the Resolution Meeting the District proposed distinct amounts of money to reimburse the Parent for past educational expenses, to provide a year of home schooling, and to satisfy attorney fees, but other *essential* terms of the Offer such as waiver of past claims including civil rights claims and reversion of funds were not set forth distinctly such that the Parent could understand what the Offer intended. The mother's testimony reflects that at the time of the Resolution Meeting she understood enough about these other non-financial terms to be concerned and hesitant, but not enough to interject a definite rejection of the Offer.

'Acceptance' likewise presents difficulty in this case. Although the Parent's former attorney, believing she was acting in the Parent's name during the Resolution Meeting, voiced assent to the items forming the concrete financial offer, the Parent did not give her consent. The Parent was distraught and possibly distracted at the Resolution Meeting and voiced no Acceptance of her own according to the director of special education's testimony and her testimony. Moreover, the essential terms that the Parent now clearly rejects were not put forth at the level of detail required for the Parent to give informed consent until they were written into the various drafts of the proposed settlement. Once the essential terms were written, and the Parent read each successive draft, she withheld her signature clearly albeit passively refusing Acceptance.

'Consideration', the return promise the District believed it had bargained for, is the third necessary element for there to be a contract in this matter and like its companion elements it is also absent. The Parent at no time extended the

Considerations sought, particularly a waiver of her child's civil rights discrimination claims, in exchange for the District's original promise.

Third, neither party has legally executed through signature the final written version of the proposed settlement agreement. The Parent has never signed the proposed agreement and the school board has never signed the proposed agreement. Furthermore, as an oral contract must contain the same elements required for a written contract and there has been no mutual 'performance' that would indicate there is an oral contract, an oral contract does not exist.

Although frequently in special education disputes parents and school districts enter into settlement negotiations, with or without counsel, and these negotiations turn into settlement agreements that are formalized and executed for the benefit of the child and the preservation of the relationship between the parties, the process in this case irrevocably broke down. There is no legally enforceable settlement agreement between the parties.

#### Order

It is hereby ordered that:

No settlement agreement exists between the parties.

July 8, 2011

Date

*Linda M. Valentini, Psy.D., CHO*

Linda M. Valentini, Psy.D., CHO  
PA Special Education Hearing Officer  
NAHO Certified Hearing Official